

Evolving Europe: Voices of the Future

Loughborough, 8-9 July 2013

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The New Unitary Patent System for EU; Opportunities and Challenges

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Introduction

The long awaited project of the creation of a unitary patent system within the EU (EU patent) became one step closer to reality when the EU Ministers signed the International Agreement for Establishing a Unified Patent Court (UPC) in February 2013.² This agreement accompanied by Regulation on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection (Regulation on Unitary Patent Protection),³ and Regulation Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection with regard to the Applicable Translation Arrangements⁴ (Regulation on Translation Arrangements) constitutes the package for the EU patent. Once the UPC comes into force by ratification of 13 countries, the registration of an EU patent will be launched. The signing of the agreement on UPC has been described as a truly historic moment for innovation and economic growth in EU.⁵

This new legal framework would entail opportunities and challenges that need to be examined and analyzed. On one hand, the EU patent is a single patent which will be valid across the EU Member States. This would reduce the costs of patent registration and maintenance. Also, the UPC as a court with effect in EU Member States will facilitate the enforcement of patents, prevent contradictory court rulings on the same issues, and make patent litigation more affordable. The EU patent would further help the development of the single market with the objective of improving the competitiveness of the EU compared to the US and Japan.

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² Council of the European Union, 'Signing of the Unified Patent Court Agreement' <<http://register.consilium.europa.eu/pdf/en/13/st06/st06590.en13.pdf>> 19 February 2013

³ Regulation (EU) No 1257/2012 of The European Parliament and of the Council of 17 December 2012 Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, OJ L361/1

⁴ Council Regulation (EU) No 1260/2012 of 17 December 2012 Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection with regard to the Applicable Translation Arrangements, OJ L361/89

⁵ Mr Richard Bruton, Irish minister for Jobs, Enterprise and Innovation: Council of the European Union, 'Signing of the Unified Patent Court agreement' (6590/13 PRESSE 61, Brussels, 19 February 2013)

On the other hand, as the geographical coverage of a patent increases, the risks of more validity and infringement challenges could go up. This would potentially affect the participation of small and medium enterprises in the new system. Additionally, there are concerns about the implementation gaps in the new framework, and forum shopping especially when combined with the potential bifurcation of infringement and validity proceedings followed by the use of the UPC.

This paper aims to study the opportunities and challenges that the new unitary patent system would have in the EU. In doing so, the paper first defines the legal concept of patents and describes their major economic benefits for patentees. Comprehensive understanding the new unitary patent system is not feasible without having a clear perception about the existing patent regime in the Europe as well as the historical development of the new unitary patent system. Therefore the next two parts of this paper will deal with them. It will further study the new EU patent and its characteristics in detail. Finally, the paper focuses on weighing the opportunities and challenges ahead of implementation of the EU patent.

What Is a Patent?

A patent is generally defined as a document describing an invention which entails a set of exclusive rights granted by the State to an inventor, joints inventors or their successor(s) in title for a certain period of time, *quid pro quo* for the disclosure of the invention to the public.⁶ patents are ‘granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application’.⁷ The exclusive right to the patented invention provides the patent holder the opportunity to prevent others from ‘making, offering, putting on the market or using a product which is the subject-matter of the patent, or importing or stocking’⁸ the patented product/process for those purposes. Obtaining such a monopoly is a fundamental incentive for patent seekers, and affords several advantages to the patent holder(s).

⁶ See World Intellectual Property Organization (WIPO) ‘Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions’ (2 November 2012) WIPO/GRTKF/IC/23/INF/8, 29.

⁷ The EPC 2000, art 52(1)

⁸ Irish Patent Act 1992, art 40(a)

Inventing usually involves significant investment in, and efforts at research and innovation. A Patent on an invention can serve as a tool to guarantee that others, and in particular, competitors would not be legally able to copy or reverse engineer the patented invention, and would then appropriate those efforts for their own benefit. In addition to that, even though a competitor independently invents the same invention, a patent can be used to bar others to put their products into the market. Therefore, a patent supports its owner, and ensures that s/he has a competitive advantage over its competitors.

In this context, patents provide incentives for individual inventors as well as corporations to get involved in research and development (R&D) projects in different areas of industry and commerce including pharmaceuticals, agriculture, biotechnology, nanotechnology, electrical and mechanical engineering. This reflects a core objective of granting patent which is encouraging innovative activities for promoting technical progress. Here, patents generate interest and investment in novel and flourishing industry. This point would be especially important for companies which plan to establish themselves in business and industry. The lack of legal protection for securing rights for their research and investment would make it difficult for such companies to commercialize their innovation.

Moreover, patents encourage and facilitate the disclosure of inventions, and in general useful ideas, into the public domain. The logic behind this point is that the inventors might tend not to disclose their inventions if their inventions was not legally protected. This could be so because they might fear that others could misappropriate their ideas and take unfair advantages of them. However, the grant of patents by guaranteeing the inventors' rights allows them to reveal their innovative developments which in a wider context may benefit the public.

The Existing Patent Regime in the Europe

The attempts to rebuilding European economy and industry after the Second World War captured attentions to the importance of patents as a major instrument in shaping industrial and commercial innovation policies. On this basis, France suggested to the Council of Europe the establishment of a European Patent Office in 1949. This idea in conjunction with the growing recognition of the need to have harmonized rules on the grant of patent, especially on patentability and validity, within Europe led to the signature of the Convention on the Grant of European Patents in Munich in 1973 (EPC 1973).

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The EPC 1973 entered into force in October 1977 for France, Switzerland, Germany, Luxembourg, Belgium, Netherlands and United Kingdom. Afterwards, other 31 countries have gradually joined the Convention.⁹ It is administered by European Patent Office (EPO). Examination and grant of patents are carried out by the EPO. The EPO is a stand-alone organ and does not bear any institutional connection with the EU. The Convention is open only to European countries.¹⁰ The EPO has its main seat in Munich (Germany) and a branch in The Hague (Netherlands), sub-offices in Berlin (Germany) and Vienna (Austria) and a 'liaison bureau' in Brussels (Belgium).

In November 2000, a diplomatic conference held in Munich revised the existing substantive and procedural law of the EPC 1973. The core objective for the revision of the EPC 1973 was to bring it into line with fundamental intellectual property changes worldwide, particularly after the establishment of World Trade Organization (WTO) and adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). It was believed that the revision was necessary to modernize the legal foundation of the European patent regime, and to adapt it to the future changes of science and technology.¹¹ The newly revised Convention on the Grant of European Patents (EPC 2000) entered into force on 13 December 2007. The EPC 2000 is the current legal framework for patent protection within the Europe.

The EPC 2000 establishes a centralized and single process for awarding patent in the Europe. Any inventor who seeks to protect his invention in more than one European country will be able to apply to the EPO and benefit from a single application and examination process. If the patent application is successful, a single patent is granted (the European patent) which consists of a bundle of national patents. The applicant will designate, according to his marketing needs, one, some or all the EPO Member States and validate the patent in his intended country or countries. According to the Article 2(2) of the EPC 2000, a European patent will, 'in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State', but in the meantime the common granting procedures set up under the EPC 2000 has not essentially affect national patent laws.

⁹ As of October 2010, there are 38 Member States. See <<http://www.epo.org/about-us/organisation/member-states.html>>

¹⁰ Non-EU Members are the Republic of Macedonia, San Marino, Albania, Serbia, Liechtenstein, Iceland, Switzerland, Monaco, Turkey and Norway.

¹¹ Notice from the President of the European Patent Office dated 24 March 2000 concerning revision of the European Patent Convention, cited in Stephen McGinness, 'The Patents Bill [HL] [Bill 90 of 2003-04]' (Research Paper 04/41, House of Commons Library's Science and Environment Section 2004) 19.

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It is, however, important to note that the grant of a European Patent does not lead to a directly enforceable patent in all 38 EPO Member States. The EPC regime allows patent applicants to avoid an expensive and time-consuming process of filing patent application in each Member of the EPO. Within this regime each EPO Member can sustain its own sovereignty over patent enforcement since the rights conferred through a patent is administered and enforced in the country for which the enforcement of the patent has been designated. Therefore, the patent which has been granted by the EPO and designated in a number of the Members is effectively independent in each Member State. Thus, the rules governing annual renewal fees for patent maintenance, infringement, enforcement and revocation remain at the discretion of national laws.

Although the official languages of the EPO are English, French and German,¹² patent applications can be filed in any language of a Member State.¹³ Nevertheless, a translation in one of the official languages is required throughout the proceedings before the EPO because patent applications are prosecuted in the official languages.¹⁴ Translations may be also required after the grant of the patent in situations where the European patent is to be enforced in a Member State whose official language is different from those of the EPO.¹⁵

In relation to the translation, the optional Agreement on the Application of Article 65 of the Convention on the Grant of European Patents (London Agreement) was signed in 2000 in London which aims at decreasing the translation costs of the European patents.¹⁶ So far, 18 EPO Member States including Germany, France and the United Kingdom are Contracting Parties to the London Agreement. According to this Agreement, a Member whose official language is common with one of the EPO official languages dispenses entirely with the translation requirements. A Member whose official language(s) is/are different with that of the EPO dispenses with the translation requirements if the European patent is available in the official language of the EPO prescribed by that Member and supplied under the conditions provided for in Article 65(1) EPC. These Members may however require that a translation of the claims (as opposed to the entire documentation including the description) into one of their official languages must be supplied.

¹² The EPC 2000, art 14(1)

¹³ The Implementing Regulations to EPC 2000, art 14(2)

¹⁴ *ibid*

¹⁵ The EPC 2000, art 65(1)

¹⁶ The London Agreement entered into force in 2008.

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The existing status for translation requirement after the adoption of the London Agreement is as follows. Seven EPO Members do not require a translation (Germany, France, Luxemburg, Liechtenstein, Switzerland and Monaco). Three Members require only translation of the claims (Slovenia, Lithuania and Latvia). Eight Members require a translation of the claims if the patent is available in English (Denmark, Croatia, Hungary, Finland, the Former Yugoslav Republic of Macedonia, Sweden, Netherlands and Iceland) and a full translation is necessary in the remaining 20 EPO Members.

The current status of the translation requirement shows that despite the fact that the EPC 2000 with its centralized procedure for the patent application examination and grant results in a significant reduction of costs of obtaining a patent as compared to the national applications, the costs of translations in many Members and the maintenance fees remain to be an issue.

According to the Article 79 of the EPC 2000, ‘all the Contracting States party to this Convention at the time of filing of the European patent application shall be deemed to be designated in the request for grant of a European patent.’ Patent applicants can withdraw the designation of a Member at any time before the grant of the European patent.¹⁷ The designation of each EPO Member may be subject to a payment called ‘designation fee’.¹⁸ Patent applicants are also required to pay the filing, search and renewal fees for the European patent application.¹⁹

Within nine months of the publication of the grant of a European patent, any person may file an opposition with the EPO against a granted patent.²⁰ The outcome of the opposition will apply to all the EPO Member States in which that patent has effect.²¹ Such a central procedure is apparently advantageous to opponents as it will be easier and cheaper to attack a granted patent once with its effect in all designated countries than bringing opposition proceedings to each of them. The Opposition Divisions under the EPO are responsible for the examination of oppositions against any European patent.²²

‘If the Opposition Division is of the opinion that at least one ground for opposition prejudices the maintenance of the European patent, it shall revoke the patent. Otherwise, it shall reject the

¹⁷ The EPC 2000, art 79(3)

¹⁸ The EPC 2000, art 79(2)

¹⁹ The EPC 2000, art 78(2)

²⁰ The EPC 2000, art 99(1)

²¹ The EPC 2000, art 99(2)

²² The EPC 2000, art 19(1)

opposition.²³ Furthermore, grounds for opposition are limited into three categories: (a) ‘the subject-matter of the European patent is not patentable’ (b) ‘the European patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art’; (c) ‘the subject-matter of the European patent extends beyond the content of the application as filed’.²⁴ Decisions made by the Opposition Divisions can be appealed before Technical Boards of Appeal (TBA) within two months from the date of notification of such decisions.²⁵

Finally, in order to guarantee uniform application of the law or if an important point of law arises, referrals may be submitted to the Enlarged Board of Appeal (EBA), if a Board of Appeal considers that a decision is necessary.²⁶ Decisions by the EBA are binding on the referring board. In addition, the President of the EPO may also refer a point of law to the EBA if two boards of appeal have given different decisions on the issue.²⁷

As can be seen from the above discussion, the EPC 2000, to a significant extent, harmonizes the Member States’ national laws in regard to the grant of patents, and in particular, patentability criteria. Nevertheless, issues such as validity and infringement are left to the national laws and national courts. Also, there left two matters of particular concern. First, within the EPO regime, the cost of translation, whether the full patent, or merely claims, into the national languages of the EPO Members is still high. The second concern is the absence of a common European litigation framework to settle validity and infringement of European patents. Under the existing regime, it is not possible to appeal from a national patent court or office to the EPO. This situation may inevitably lead to different interpretation in Members’ jurisdictions about a single European patent.

For, patentees, this is apparently not an ideal system because s/he must take advice and litigate in several jurisdictions, and may possibly face different rules of procedure and evidence. This would not only lead to high costs of the litigation and uncertain timing of outcomes. All in all the fragmentation between the grant of patents and the litigation mechanisms reflect an inefficient system which is far less attractive than the main EPO competitors, i.e. the United States Patent and Trademark Office (USPTO), and Japan Patent Office (JPO).

²³ The EPC 2000, art 101(2)

²⁴ The EPC 2000, art 100

²⁵ The EPC 2000, art 111(1)

²⁶ The EPC 2000, art 112(1)(a)

²⁷ The EPC 2000, art 112(1)(b)

Background and Initiatives for European unitary Patent

The first attempt at unifying the patent regime for Europe made in 1975. In doing so, ‘the Convention for the European Patent for the Common Market’ was signed in Luxembourg in that year. However this attempt was unsuccessful since the Convention was not ratified by enough countries, and, consequently, never entered into force. Fourteen years later in 1989, the next attempt, the Agreement relating to Community Patents, also failed for the same reason.

Taking into account the fact that the establishment of a patent system at the Community level might not be reached anytime soon, the EPO’ Members decided to focus on a common litigation system within the EPC framework to integrate judicial system for patent validity and infringement cases, including the rules of procedure and a common appeal court. In doing so, a Working Party on Litigation (WPL) was formed in 1999 which later submitted a draft text for an optional protocol to the EPC 2000 called European Patent Litigation Agreement (EPLA).

In parallel with this work, a new proposal for a Community Patent Regulation (CPR) was submitted in 2000 to the European Commission. The idea behind this proposal was to link the EPC to the Community patent. This was envisaged to achieve through granting and publishing a Community patent by the EPO only in one of its official languages with a translation of only the claims into the two other languages. As for the litigation arrangements, the proposal suggested a two-instance Community IP Court through use of provisions in the Treaty of Nice.

Due to the Competitiveness Council failure to agree on the details of CPR, proposal on translating the claims and the Community IP Court remained problematic issues throughout discussions and proved insoluble in the end. At the same time, the European Council and Commission clarified that a common Community patent judiciary cannot be created in Europe without a Community patent. The EPLA project, therefore, lapsed.

Towards a Unitary Patent

In order to break the deadlock in establishment of a unified patent regime, two sets of different, though related, approaches adopted toward a common litigation regime for patent disputes, and regulations on unitary patent protection and the applicable translation arrangements.

As for the regulations on unitary patent protection and the applicable translation arrangements, the European Commission proposed to continue the discussion based on the

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enhanced cooperation to advance towards a higher level of integration. Hence, after the European Parliament consent, in March 2011 a decision authorizing enhanced cooperation in the area of the creation of unitary patent protection was approved by the Council of the European Union.

Further, in April 2011 the European Commission re-introduced the two draft regulations on the unitary patent for Europe, the first Regulation on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection (Regulation on Unitary Patent Protection), and Regulation Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection with regard to the Applicable Translation Arrangements (Regulation on Translation Arrangements). Both regulations were endorsed by the Council of the European Union in June 2011, and was approved by the European Parliament in December 2012, and entered into force in January 2013.

With regard to a common litigation regime for patent disputes, in 2009, the Council of the European Union agreed to create an integrated and specialized jurisdiction by means of an international agreement for patent disputes which is called European and EU Patents Court Agreement. According to this Agreement, the court would have discretion to hear claims related to infringement and invalidity. It should consist of a court of first instance, including a central division and local divisions, and a court of appeal.

Due to some uncertainty about the legal construction of this Agreement, the Council of the European Union requested a legal opinion from the European Court of Justice (ECJ). In its opinion rendered in March 2011, the ECJ provided that the European and EU Patents Court Agreement was incompatible with the provisions of the EU Treaty and the Treaty on the Functioning of the European Union.²⁸ The main point of disapproval of the ECJ was the fact that the Patent Court to be set up would be an authority created by means of an international agreement which is composed of EU and non-EU Member States, and would therefore not be fully compatible to the EU legal structures.

As a result of this ruling, the Council of European Union revised the earlier version and called the new Agreement for the common EU litigation mechanism for patent disputes the 'Unified Patent Court' (UPC). The revised version clarified that the UPC Agreement as an international court is open only to the EU Member States, and is common to the participating EU Member

²⁸ 150 Opinion 1/09 of the Court (Full Court), [2011] ECJ I-00000

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States. Furthermore, the UPC must cooperate in the same way as national courts with the ECJ. This would mean that in order to guarantee the ECJ supremacy about EU laws, the Court of First Instance of the UPC and the Court of Appeal of the UPC may, if they consider this necessary to enable them to make a decision on a case, request the ECJ to give an obligatory decision on a question as to the interpretation of the EC treaties or the validity and interpretation of acts of EU institutions. The decisions made by the ECJ will be binding on the Court of First Instance of the UPC and the Court of Appeal of the UPC.

The text of the UPC Agreement was signed 24 EU member states on 19 February 2013 in Brussels. Bulgaria became the 25th EU Member State by signing the Agreement on 5 March 2013. Although Italy has signed the Agreement, this country as well as Spain had decided not to take part in the unitary patent system valid across the EU as a result of the proposed language scheme, which uses English, German and French at the exclusion of other languages. Poland was the third EU Member refusing to join the new EU patent regime, but expressed that it could do so later if it wishes.

Following the signing of the UPC agreement, the ratification process by national parliaments has started. In order to enter into force, at least 13 Member States including, France, Germany and the United Kingdom will have to ratify the UPC Agreement. The Central Division of the Court of First Instance will be located in Paris (France) with specialized sections in London (with the focus on the classification C of International Patent Classification: chemistry cases such as pharmaceuticals, and the classification A: human necessities) and Munich (with the focus on the classification F: mechanical engineering). Participating countries may establish a single division or –in the case where the conditions regarding minimum case load are met– multiple local divisions of the court. Countries may also set up a regional division, serving as the local division of the group. Luxembourg would host the court of Appeal and would also serve as the registry.

All the necessary decisions (designation of committees, budget, appointment of judges and president, recruitment of staff, facilities, etc.) should be adopted in a timely manner so as to enable the first registration of a European patent title with unitary effect in spring 2014. The UPC will be a court common to the contracting Member States, and, therefore, subject to the same obligations under the Union law similar to any national court.

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The UPC would have competence to hear cases regarding the EU patents for which unitary effect is registered with the EPO, and also for other European patents registered with participating countries in the UPC regime. In the latter case, cases might also be brought before national courts and patents holders would be able to choose not to use the UPC during a 7-year transition period. Accordingly, even though a patent holder choose not to obtain the EU Patent option, it will likely that, after the expire of the 7-year transitional period, s/he finds herself /himself using the UPC for disputes. The UPC decisions are valid for the full territory of the EU participating Member State where the patent is valid. Cases to the UPC can concern infringement, declarations of non-infringement, revocation and damages. The proceedings embrace a counterclaim from the opposed party. The UPC competence also covers supplementary protection certificates.

The UPC is the third element of the unitary patent system within the EU (EU patent). As mentioned before, the two regulations (Regulation on Unitary Patent Protection and Regulation on Translation Arrangements) adopted on 17 December 2012. The two regulations are in force from 20 January 2013. They would apply from 1 January 2014, or from the date of the entry into force of the Agreement on a Unified Patent Court, whichever is later.

After that happens, the European patents granted by the EPO in respect of all participating Members would acquire, upon request of the patent proprietor, unitary effect in participating EU Member States, provided that an entry to that effect is made in a special register kept by the EPO. The EU patent would exist at the same time with classical European patents and national ones. Patent holders can choose between various combinations of EU patents and classical European patents. That is to say, an EU patent for the 24 EU Member States which participate in the EU patent scheme together with a classical European patent with the effect in one or more EPC Members.

After grant of the European patent, there would be no requirement to translate the EU patents when the transitional period of up to 12 years has expired. Nevertheless, the patent holder must provide a full translation into the relevant language in case of dispute at the request of a court or an alleged infringer. Constructively, a compensation plan is arranged to decrease the costs for non-profit organizations, small and medium enterprises, universities, natural persons and public research organizations having principle place of business or their residence within a Member State of the EU. According to this plan, in situations where such applicants file applications in an

official language of the EU other than English, French or German, the costs of the application translation will be reimbursed up to a ceiling.

Evaluation of the New EU Patent System: Is It a Good Idea Anyway?

The long awaited project of the creation of a unitary patent system within the EU would, if the UPC Agreement is officially ratified, be achieved sometimes in 2014. This would end the 40 years of hops and deadlocks in negotiations in the Europe to have a central patent regime. Under the newly designed system, there would be no longer the need to validate the patent granted by the EPO in each EU Member. A single patent would be valid in 24 EU Members. Apart from considerable economic advantages arising out of the exclusive rights that the new regime would have for the patent holder(s), with the EU patent, obtaining a patent could be cheaper, could take less time, and its enforcement could be more effective and easier.

With the new regime, patents may costs less. Since the patent holder does not need to validate his patent in each Member States and face payment of national fees and formalities. Also, there is no such a requirement to translate the EU patent in each Member States, except in case of dispute. The annual renewal of the EU patent would merely require the payment of a single renewal fee providing further cost savings and simpler administration. It would further decrease the costs of patent litigation since there will be a central patent litigation system. This would reduce the local attorney charges incurred in attending to the patent actions. Points made above could significantly contribute to the reduction of time spent to obtain a patent.

As for the judicial framework, Under Article 64(3) EPC, 'any infringement of a European patent shall be dealt with by national law'. This means that the EPO has no competence to deal with and to decide on patent infringements and validity cases for patents enforced in the EPO Members. The enforcement of EPO's patents may be consequently characterized as a fragmented system with 'variegated national approaches towards patent-related litigations and the possibility of having opposite decisions (and hence outcome) in case of parallel litigations'.²⁹ Within this framework, if the patent holder needs to stop others from infringing his patent in different EPO's Member States, he would be required then to conduct simultaneous litigation in the courts of several different countries, while incurring extremely high cost. On the other hand, in the event

²⁹ Malwina Mejer and Bruno Potterie, 'Economic incongruities in the European patent system' (CEPR Discussion Paper, no 7142, 2009) 1.

that the patent validity is contested in national court, the outcome applies then again only in that country. Hence, it is possible for a patent to be simultaneously litigated in several jurisdictions within Europe, while outcomes may vary in each national country. So, the patent may be found infringed and valid in one country, whereas in another one it may be found not infringed and invalid.

However, with the EU patent, the enforcement of a European patent would be dealt at a supranational level. The UPC will avoid the occurrence of multiple court cases concerning the infringement and validity of the same patent in different EU Member States. It will also impede contradictory court rulings regarding the same issues. It therefore ends the current situation in which the same European Patent can be the subject of litigation in several EU Member States with the potential for duplication of efforts and costs.

Despite of the advantages that one could envisage for the EU patent package, it has faced some criticisms as well. In particular, it has been argued that the current Patent system under the EPC 2000 allows patent applicants to limit their patent protection to those countries for which they think a monopoly and exclusive protection will be necessary. Under strategic and economic aspects, it is often not necessary to obtain patent protection in all EU Member States.³⁰ Instead, a monopoly needs to be obtained only in countries in which the patented invention can be produced, and there is a promising market for selling the relevant products.³¹ Furthermore, even though a sufficient market for the concerned patented invention, it may be appropriate in some cases not to extend the patent protection to certain countries because of cultural, social or economic considerations.

By choosing only some designated states, patent applicants are able to implement flexible patenting strategies. Small and medium enterprises, even if the EU patent achieves its objective of framing a relatively inexpensive approach to obtaining patent protection in the EU, may be still reluctant to obtain a Europe-wide patent since they run the risk of being their patents revoked by an inexperienced judge. Thus, obtaining patent protection for the major EU Member States such as the UK, France, Germany and perhaps Italy or Spain, may be sufficient to secure de facto EU-wide protection.³² In this situation, the establishment of a unitary patent protection

³⁰ Annette Kur, Max Planck and Thomas Dreier, 'European Intellectual Property Law: Text, Cases and Materials' (Edward Elgar Publishing, 2013) 88.

³¹ *ibid*

³² *ibid*

could be questioned by industry whether such a new regime is actually necessary or even desirable.

The EU patent might not cover the full territory of the EU Market. It is limited to the EU Member States in enhanced cooperation. And, since only thirteen ratifications are required for the new regime to be in force, it would become operable only for those Member States which ratify the UPC Agreement. Accordingly, not all 24 States which have signed the UPC Agreement need to ratify it, and it is unlikely that all of them will do so in the foreseeable future. From the EU perspective, this fragments in the Internal Market runs counter to the cohesion objective.

In addition to that, there is a fragmentation in the rules applicable to the unitary patent. Here, some commentators argue that according to the new patent regime

*'to a given unitary patent only one national law would apply throughout the territories of enhanced cooperation. Yet it also means that different national laws would apply to different unitary patents. Therefore, instead of creating uniformity, a multiplicity of national laws would apply. While some reference to national law is inevitable as a matter of implementing the property rules of patents, the UP Regulation misses an opportunity to provide for a minimum of uniformity and transparency for market actors.'*³³

Obtaining patents and the use of the UPC are intended to be affordable. However, there are no reliable estimations of the costs. There is also no reliable estimation for fees related to the patent applications with the unitary effect, and their renewal fees. It is true that the costs of obtaining patents in twenty-five separate national patents through the EU patent would be cheaper than through the EPO route. However, it is not clear whether patent applicants, particularly individuals and small and medium-sized enterprises, necessarily needs protection in 24 EU countries. Generally it seems that individuals and small and medium-sized enterprises are not advised to file in, or designate all countries of the EU.

This is also true with relation to patent litigation. Essentially, litigation before the UPC would be heard by a panel of three to four judges, which could be more expensive than a single judge. Here although the use of the UPC would replace litigation in several countries, it should be surveyed that how common such multiple litigation is. Possibly, multiple litigation may be

³³ Reto M. Hilty and others, 'The Unitary Patent Package: Twelve Reasons for Concern' (Max Planck Institute for Intellectual Property and Competition Law 2012) 2.

conducted by transnational companies. But, those corporations have the necessary financial resources. Therefore, the envisaged benefits here are at best unclear.

Furthermore, it has been also argued that the establishment of the EU patent could negatively affect the EPO's success. Specifically, the EPO regime of granting patents has been a remarkable success. In the event that the new patent system does not work as well as the EPO, the EPO's success and achievement could be undermined and severely damaged. For example, the possibility of a centralized attack, not only on unitary EU patents but also on European patents designated in one of the participating EU member States could discourage patent applicants from applying for patents through the EPO route, and, instead, push them towards greater use of national patent offices.

Finally, the new UPC could entail forum shopping where it gives a multitude of options for the choice of the court in the patent disputes. 'Forum shopping entails choosing the court which is most likely to be favourable to the plaintiff's claim from among all those which potentially have jurisdiction to decide the case'.³⁴ Under the new UPC, actions for patent infringement and validity may be brought before the Local or Regional Division in the country/region where it is more likely to win the trial. It could take some time until the loopholes are closed and a reliable case law is established.

Conclusion

In February 2013, the long awaited project of the creation of a unitary patent system became significantly closer to the reality by signing the UPC Agreement. This new legal framework would entail opportunities and challenges for inventors seeking for patent protection. On one hand, the EU patent is a single patent which will be valid across the EU States. This would reduce the costs of patent registration and maintenance. Also, the UPC as a court with effect in EU States will facilitate the enforcement of patents, prevent contradictory court rulings on the same issues, and make patent litigation more affordable. The EU patent would further help the development of the single market with the objective of improving the competitiveness of the EU compared to the US and Japan.

³⁴ Alan Boyle, 'Forum Shopping for UNCLOS Disputes Relating to Marine Scientific Research' in Myron H. Nordquist, Ronán J. Long and Tomas H. Heidar (eds) *Law, Science and Ocean Management* (Volume 11, BRILL, 2007) 520.

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On the other hand, as the geographical coverage of a patent increases, the risks of more validity and infringement challenges could go up. This would potentially affect the participation of small and medium enterprises in the new system. Additionally, there are concerns about the implementation gaps in the new framework, forum shopping especially when combined with the potential bifurcation of infringement and validity proceedings followed by the use of the UPC.

In view of individuals and companies seeking for patent protection, it is still too early to decide, based on the advantages and disadvantages already discussed, how well to use the new system. The new system could enter in force from as early as January 2014. Nevertheless, every inventor needs to envisage the potential benefits and costs about using the new regime and take strategic decisions that befit its innovation and economic policies.