

Unitary Patent System

Overview and Considerations

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Brief Overview

Important changes are coming to the European patent system. On June 1, 2023, the Unitary Patent will launch throughout the European Union. The Unitary Patent system will create a single patent authority for all participating member countries. Under the current European patent system, a patent holder or applicant must apply to have a patent individually “validated” by specific European countries in order to receive patent protection within the validating country. The Unitary Patent system seeks to streamline this process and will provide protection across all participating countries with a single patent. Beginning on March 1, 2023, entities that hold issued European patents or pending applications will have the opportunity to “opt out” of the Unitary Patent system. If no action is taken, all patents which issue after June 1, 2023 will be subject to Unitary Patent jurisdiction.

Unitary Patent System Considerations

According to the European Patent Office, the Unitary Patent system will create a single patent market with a value comparable to that of the United States or China. However, some European countries will not participate in the Unitary Patent system, and patent holders will be required to continue to individually validate patents within non-participating countries in order to receive protection. There will be benefits and risks to participating in the Unitary Patent system, and opting out may be prudent, especially during the initial transition period, as much of the Unitary Patent system remains unknown and untested in the courts. Therefore, European patent holders and applicants should give careful consideration to their European patent strategy under this new system moving forward.

Participating Countries

Initially, the Unitary Patent system will encompass seventeen countries: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovenia, Sweden, and the Netherlands. An additional eight countries have indicated they will join the Unitary Patent system in the future: Cyprus, Czech Republic, Greece, Hungary, Ireland, Poland, Romania, and Slovakia. The United Kingdom and Spain have indicated they will not participate in the Unitary Patent system. Even if unitary effect is requested, patent holders will still be required to individually validate their patents in non-participating countries in order to receive protection.

Benefits of the Unitary Patent System

After June 1, 2023, a patent holder may request that an issued European patent be given unitary effect. Unitary effect provides cross-border protection in all participating countries. If infringement occurs within multiple participating countries, unitary effect will allow a single enforcement action, saving time and resources. Additionally, the maintenance fees for a unitary patent will be equal to the sum total of renewal fees currently paid for the four most commonly validated European countries,¹ making a Unitary Patent a simple and cost-effective strategy to receive broad patent protection throughout much of the European Union.

Disadvantages of the Unitary Patent System

The Unitary Patent system provides “all or nothing” protection across all contracting member states. This means a patent owner has less flexibility to strategically select where to enforce its patents in Europe. This also exposes a unitary patent to centralized

¹ Germany, France, the Netherlands, and the United Kingdom.

attacks. If a unitary patent is invalidated in one member country, the patent will be invalidated throughout the Unitary Patent system, resulting in a significant loss of patent rights within the European Union. Finally, a newly formed Unitary Patent Court will have jurisdiction over all unitary patents. Much remains unknown about the Unitary Patent Court, specifically, whether patents will be more easily invalidated under the new system, and if there will be changes to patentability rules.

Next Steps for European Patent Owners - Opt Out, Request Unitary Effect, or Submit to Unitary Patent Jurisdiction

Beginning on March 1, 2023, European patent owners will be entitled to “opt out” of Unitary Patent jurisdiction, and maintain the status quo under the current validation system. After June 1, 2023, patent owners will have one month to opt out of the Unitary Patent system after a patent issues. It may be strategic to opt out of the Unitary Patent system during the initial transition phase, as much remains unknown about the Unitary Patent Court. A patent holder may opt back in to the Unitary Patent system² one time after opting out, so long as there are no pending actions related to the patent in any validated countries.

During the first seven years of the Unitary Patent system, a patent will only be given unitary effect following a post-grant request from the patent holder. If a patent holder does nothing and continues to individually validate without opting out of the Unitary Patent system, any issued European patent may become subject to jurisdiction under the Unitary Patent Court if an action is instituted against that patent within a participating member country.

Conclusion

The Unitary Patent system and Unitary Patent Court represent the most significant change to European patent policy in 50 years. This change requires all European patent owners to make a choice: either opt out of the Unitary Patent system prior to June 1, 2023 or become subject to the jurisdiction of the Unitary Patent Court (either by affirmatively requesting unitary effect, or by doing nothing).

There are several benefits and potentially substantial cost-saving advantages to the Unitary Patent system, but also significant risks and uncertainties to opting in or allowing a patent to become subject to the jurisdiction of the Unitary Patent Court. European patent holders should give careful consideration to whether participation in the Unitary Patent system aligns with their European patent portfolio strategy and goals.

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² Technically referred to as a “withdrawal” of the patent holder’s opt-out election.