

# UNITARY PATENTS AND UNIFIED PATENT COURT

After over 40 years of false starts we now have a new legal framework providing for the possibility of obtaining a Unitary Patent with potentially Europe wide effect which can be litigated across its entire geographic scope in one central court. Business Secretary Vince Cable is quoted as claiming that the “*unified patent regime is a good result as it will mean defending a patent across Europe will now be much simpler...We estimate benefits to the UK of around £200m a year*”.

Although no definite date has been fixed for its introduction it is likely that the new court system will come into effect in 2015. It is important that all organisations which already have European patent protection in place and/or are considering applying for new or additional patent protection are aware of the development and consider the potential impact of it upon them and their patenting strategy.

## New patent regime

At present in Europe, an applicant can either choose to apply for national country based patents (such as a UK patent) or apply for a European patent validated in specific European countries where protection is required. National and European patents are enforced and their validity assessed on a country by country basis. For example in the United Kingdom if infringement of a UK or European (UK) patent is taking place in Scotland or the damage is being suffered in Scotland, an action for infringement can be raised in the Court of Session in Scotland.

The existing system has been criticised as too expensive and time consuming as patents have to be enforced on a country by country basis, with different national courts often reaching different decisions based on essentially the same patented invention.

The new Unitary Patent regime will fundamentally alter the scope of patent protection in Europe as well as the enforcement of new Unitary Patents and existing European Patents. Once the new regime is in place an applicant can choose to seek a Unitary Patent which could have effect potentially in 25 European Member States (currently Spain and Italy have opted out of the scope of the unitary regime but may opt in at a later date). The precise geographical scope of the new Unitary Patent will depend on which European countries ratify the necessary agreements, but it will likely offer a hugely expanded scope of protection via one application.

## New unified patent court

The new Unitary Patent and existing European Patents (subject to a 7 or potentially 14 year opt out transition period) will be dealt with under a new Unified Patent Court Regime via a European Court with jurisdiction to cover the entire geographical scope of such patents, rather than on a country by country basis by national courts.

The precise structure and location of the various courts making up the overall Unified Patent Court is yet to be fully determined. The Court of First Instance will comprise a Central Division as well as local and regional divisions. The Central Division is divided between London (dealing with pharmaceutical and life sciences patents), Munich (dealing with mechanical patents) and Paris (dealing with all other types of patented inventions). Depending upon the number of patent disputes being dealt with in a particular member country, countries can have up to four local divisions. In addition countries can group together to establish regional divisions. There will also be a Court of Appeal to be located in Luxembourg.

It is clear that there can be potentially a wide source of courts in which for example to raise actions for infringement of existing European Patents or the new Unitary Patent. In short the action must be brought at the local division (or potentially regional division if there is no such local division) either where the alleged infringement has occurred/will occur or where the defender resides/carries on business. In cases where there is neither a local nor regional division the action must be brought at the appropriate branch of the Central Division. It is possible for parties to agree where the action should be dealt with and/or for one or either of them to seek to have the action transferred from a local or regional division to the Central Division. Absent infringement proceedings being in play already at a local or regional division and/or the agreement of the parties, any declarations of non-infringement or revocation must be made at the Central Division.

For some larger industries with large portfolios of patents, the new Unitary Patent system could offer a significant advantage. However for the vast majority of patent owners in the UK, who may only require protection in a few additional European countries, whether the new system does bring the promised advantages is yet to be seen. The irony may be that seeking national protection for patented inventions increases at least until there has been a sufficient bedding-in period for the Unitary Patent and in particular an assessment made as to whether the Unified Patent Court does offer real time and cost savings.

## Practical impact for Scottish patent owners/businesses

Whilst the precise enforcement and operation of the new system remains to be seen, there is a risk that SMEs and particularly those based in Scotland where no local or regional division is pencilled in at present, could either be forced to have to litigate their Unitary and/or European patents outside Scotland and possibly in distant jurisdictions and/or face being sued for infringement in a variety of foreign locations and considerably far away from their own operating base.

Therefore whilst the possibility of a central enforcement system is attractive on paper, the risks of uncertainty as to where any litigation will take place, the effectiveness of an untested court system and the risk of an entire European/Unitary Patent being revoked by one central European court need to be considered.

**Be aware of the new system.** All businesses with an interest in the fields of patents should keep a close eye on the progress of the new Unitary Patent system and decisions of the various new courts to factor that in to their decisions on any patent prosecution and forum shopping for litigation within Europe.

**Consider where to apply for patents and to exercise opt out rights?** Once the new system is in place applicants will essentially have a choice of whether to (1) seek to apply for National Patent protection as the only long-term way to guarantee enforcement options in national courts and/or (2) continue to apply for a European Patent and then decide

whether to use the 7 and potentially up to 14 year opt out transition period, during which time national courts can still be used for enforcement. Opting out may for example remove the possibility of a central revocation attack.

If you would like to discuss the potential impact of the new Unitary Patent System please do contact us.

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