

# Unified European Front: The Road towards a European Unitary Patent

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*Photo: BNEGroup.org*

## ABSTRACT

For over forty years, European countries have held numerous conferences and signed multiple international agreements aimed at either creating a unitary patent which will be valid in all European countries upon issuance or establishing a specialized European court with jurisdiction over patents. This paper first outlines the need for a unitary patent in the European Union and then chronicles the measures taken to support and milestones toward the creation of a European-wide unitary patent system. The paper then discusses the few problems and pitfalls that have prevented European countries from coming to an agreement on such a patent system. Finally, the paper considers the closely related agreements of 'Unitary Patent Package', the challenges facing these agreements and examines if it would finally result in an EU Unitary patent system that benefits one and all.

*The views expressed in this working paper are those of the author and do not necessarily reflect the views of the European Union or the EU Centre in Singapore.*

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## UNIFIED EUROPEAN FRONT: THE ROAD TOWARDS A EUROPEAN UNITARY PATENT

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### INTRODUCTION

Obtaining, enforcing and maintaining patents in the EU are far from efficient or cost effective. An inventor that seeks patent protection in the European Union (EU) territory now has to either file for a national patent in each one of 28 national patent offices, or file for a European patent, granted by the European Patent Office (EPO), within the framework of the European Patent Convention (EPC)<sup>2</sup>. The European patent granted by the EPO, however, does not represent a unitary patent title for the EU. It represents a ‘bundle of nationally enforceable patents’ that requires validation in each and every designated Member States.

The likelihood of infringement and revocation proceedings in numerous individual national courts, the possibility of multiple interpretations by national courts and the cost of renewal fees in each European country where patent protection is desired make the system fraught with irregularities which can fall prey to disingenuous intentions of patent holders and seekers.<sup>3</sup> The absence of a unitary EU-wide patent means that patents in Europe remain territorially limited and enable strategic patent behavior amongst patent holders.<sup>4</sup>

It is clear that there is an urgent need for a unified European patent which is currently an important challenge within the Europe 2020 strategy.<sup>5</sup> The call for a unitary patent, long predates the Europe 2020 strategy, with efforts to create a unitary patent being made as early as the 1960’s. These attempts have been unsuccessful as European integration is complicated, with its big cast of actors (governments, technocrats, unionists, voters) that pursue a range of economic and political goals.<sup>6</sup>

### COMPARISON WITH MAJOR COMPETING PATENT SYSTEMS

To assess the performance of the current European patent system, it is valuable to examine the performance and structure of patent systems across other major economic powers.

The largest intellectual property offices in the world are that of China, Korea, Japan and USA. They all rely on a single patent office to grant patents and confer rights over the proprietor for the respective territory. These patent systems require patent applications to be filed in the region’s official language and are enforced under a single specialized patent system.

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<sup>2</sup> Convention on the Grant of European Patents (European Patent Convention or EPC) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000 html version available at <http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ma1.htm> accessed 1 January 2014.

<sup>3</sup> Commission, *The Proposal, Enhanced Cooperation Of Unitary Patent Protection*, COM (2010), 790 final

<sup>4</sup> World Intellectual Property Indicators [WIPO], *WIPO Economics & Statistics Series*, 2013 Edition, p. 5.

<sup>5</sup> Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth* COM (2010) 2020 final.

<sup>6</sup> Enrico Spolaore, *What Is European Integration Really About? A Political Guide for Economists*, (March 2013); available at [http://crem.univ-rennes1.fr/Documents/Docs\\_workshops\\_2013/2013-05-30\\_4\\_SpolaoreEuro-1.pdf](http://crem.univ-rennes1.fr/Documents/Docs_workshops_2013/2013-05-30_4_SpolaoreEuro-1.pdf) accessed 10 January 2014.

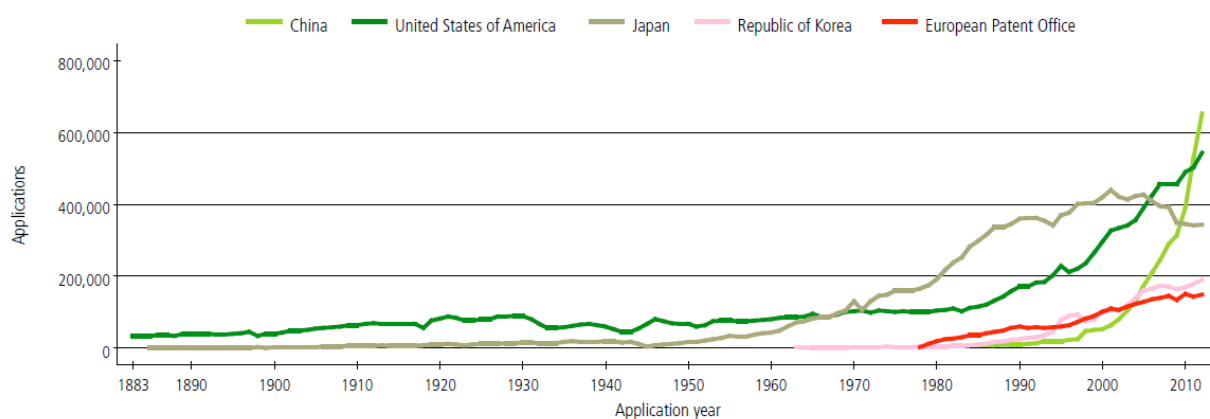
The lack of these features is precisely what causes the European patent system to be the most complex and costliest amongst the five largest Intellectual Property Offices (IPO)<sup>7</sup>. The EU patent system is highly fragmented in the post-grant phase, constituting the lion's share of costs, preventing businesses to draw full strength from the large market (of over 500 million consumers) that the EU represents.

#### *Patent application and grant trends in the top 5 offices*

Patent filings saw rapid growth during two time periods. The first occurred between 1983 and 1990 and the second happened between 1995 and 2008. The Japanese Patent office (JPO) saw the biggest filing growth during the first phase, followed by the United States Patent and Trademark Office (USPTO) and the EPO. During the second phase, applicants from State Intellectual Property Office (SIPO, China) contributed the most to overall growth, followed by the USPTO, and KIPO (Korean Intellectual Property Office, South Korea).<sup>8</sup>

The main difference between the first and the second phase was that the first surge was mainly due to new inventions, and the second phase was marked by an even split between new inventions and multiple filings equally accounting for the patent filling growth, driven by rapidly growing international commerce – or more colloquially “globalization”.<sup>9</sup>

**Figure 1: Patent applications trends in the top five offices**



Source: WIPO Statistics Database and UNESCO Institute for Statistics, October 2013<sup>10</sup>

During both these phases, EPO ended up contributing the lowest number of new patents filed due to two reasons - Firstly, the EU nations did not come up with many new inventions because of the decreased Research & Development (R&D) expenditure, discussed in detail further in the section. Secondly, the EPO was unable to attract foreign new application willing to file patents in fragmented Europe, as inventors preferred large homogeneous market with a single language and single regulatory framework to decrease ambiguity.

<sup>7</sup> IP5 Statistics Report 2012, Executive Summary; available at <http://www.fiveipoffices.org/stats/statisticalreports/2012edition/IP5statistics2012.pdf> accessed 10 March 2014.

<sup>8</sup> Trend in patent applications for the top five offices, *WIPO Economics & Statistics Series*, 2013 Edition.

<sup>9</sup> Carsten Fink, Mosahid Khan and Hao Zhou, WIPO, Economic Research Working Paper No. 12, Exploring the worldwide patent surge (2013), available at [http://www.wipo.int/export/sites/www/econ\\_stat/en/economics/pdf/wp12.pdf](http://www.wipo.int/export/sites/www/econ_stat/en/economics/pdf/wp12.pdf), accessed 10 January 2014.

<sup>10</sup> WIPO Economics & Statistics Series, 2013 Edition, available at [www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo\\_pub\\_941\\_2013.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo_pub_941_2013.pdf) accessed 10 January 2014.

The table below shows the change in volume of patents filed during these two time periods. The number of filings in 1990 is 29% higher than in 1983 for the first time frame and 92% when compared from that of 1995 to 2008.<sup>11</sup>

**Table 1: Changes in total filing volumes by patent offices during the two surge periods**

Office	Surge period: 1983-1990	Office	Surge period: 1995-2008
Total	29.0	Total	92.2
Japan	16.8	China	30.9
United States of America	8.1	United States of America	19.9
European Patent Office	4.5	Republic of Korea	14.9
Soviet Union	1.5	European Patent Office	9.1
Republic of Korea	1.0	Russian Federation	2.8
Canada	1.0	Japan	2.4
Others	-3.9	Germany	2.0
		Others	10.2

Source: WIPO Economic and Statistics Database<sup>12</sup>

### *Expenditure on R&D*

The variation in patent activity across economies reflects both the size and the level of development in the countries. Thus, Gross Domestic Expenditure on R&D (GERD) is one of the most widely used measures for innovation inputs. 'Patent activity intensity' (R&D expenditure as a percentage of GDP) is used as an indicator to check relative degree of investment in generating new knowledge. Several countries have adopted "targets" for this indicator to help focus policy decisions and public funding.<sup>13</sup>

Figure 2 (see page 5) shows the changes in R&D growth and expenditure across different geographies. The R&D intensity percentage of Japan, USA and the Republic of Korea in comparison to that of the European Union has consistently risen. China with R&D expenditure at 1.98% of GDP has managed to catch up with the EU (1.97%) in 2012. Countries with a higher R&D expenditure have managed to generate large numbers of resident patent (new invention) applications. Such investment in R&D is likely to encourage local businesses to not only produce and sell, but also increasingly develop goods and services in their home countries.

The overall R&D expenditure growth in the European Union has remained modest (+0.6% in real terms) in 2012 with the performance of member countries being highly heterogeneous. France and Germany experienced real growth in R&D expenditures - +0.6% and +1.6% respectively - while GERD in the United Kingdom decreased by 3.1% in 2012. Central and Eastern European countries continued to increase their R&D expenditures, while R&D in some other EU countries like Portugal and Spain is still below pre-crisis levels as they appear to have experienced higher budget cuts in 2012.<sup>14</sup> The Lisbon strategy set the EU

<sup>11</sup> WIPO Statistics Database and UNESCO Institute for Statistics, October 2013, available at <[http://www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo\\_pub\\_941\\_2013.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo_pub_941_2013.pdf)>

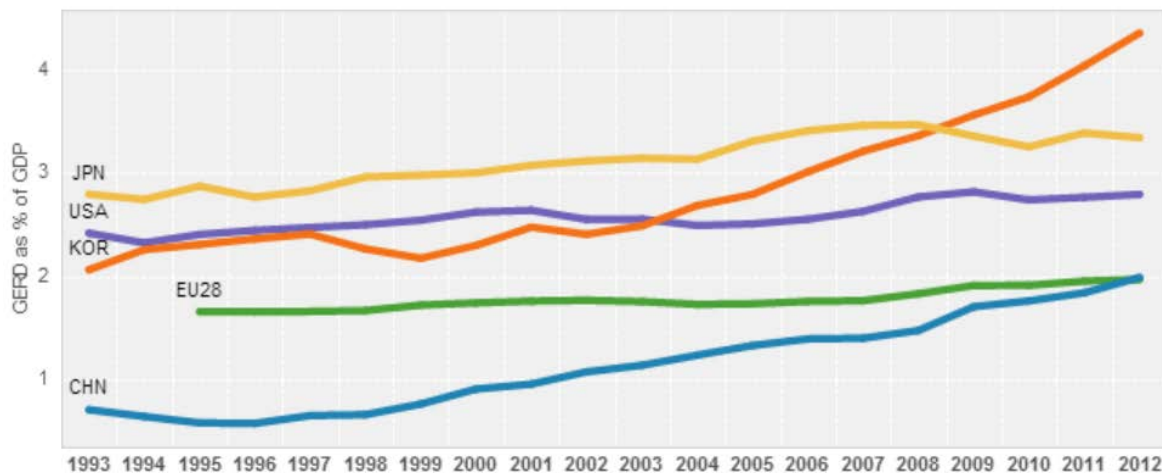
<sup>12</sup> WIPO Economics & Statistics Series, 2013 Edition, available at <[www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo\\_pub\\_941\\_2013.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo_pub_941_2013.pdf)> accessed 10 January 2014.

<sup>13</sup> Carsten Fink, Mosahid Khan and Hao Zhou, WIPO, Economic Research Working Paper No. 12, Exploring the worldwide patent surge (2013)

<sup>14</sup> The OECD R&D and GBAORD Sources and Methods Databases, relating to series presented in *Main Science and Technology Indicators* and *Research and Development Statistics* are available at <[http://webnet.oecd.org/rd\\_gbaord\\_metadata/default.aspx](http://webnet.oecd.org/rd_gbaord_metadata/default.aspx)> accessed 21 January 2014

R&D policy objectives of devoting 3% of GDP to R&D activities by 2010 and it is one of five key targets for the 'Europe 2020' strategy adopted in 2010.

**Figure 2: R&D intensity trends: Gross Domestic Expenditure on R&D (GERD) as a percentage of GDP, 1993-2012**



Source: OECD, Main Science and Technology Indicators, Database 2012/13<sup>15</sup>

The EU is currently far from its goal set out in 2020 strategy, but it shows enormous potential of attracting R&D expenditure from private sector. Establishing a unified patent system will reduce substantial costs for obtaining and maintaining patent protection in the EU, closing-up to the current costs of obtaining and maintaining patent protection in USA or Japan, and helping businesses reach a bigger market at similar costs.<sup>16</sup>

### Cost of patenting

European patents are expensive by international standards, in comparison, currently obtaining a European patent validated in only 13 Member States costs up to ten times more than acquiring a patent in the US.<sup>17</sup> The data below shows the current and the expected change in costs once unitary patent package kick-in.

National laws of most EU Member States require a full-length, verified and approved translation of the patent into their official languages. To apply for patent within different EU countries, one has to pay the costs for the translation, validation and publication fees to the local patent offices. Even though translation cost adds the most amount to the cost, other procedural red-tape and complexity contribute to the cost as well. All of these are upfront costs that had to be paid, which makes the existing European patent system costly, complex and overall unattractive.

<sup>15</sup> The OECD *R&D and GBAORD Sources and Methods Databases*, relating to series presented in *Main Science and Technology Indicators* and *Research and Development Statistics* are available

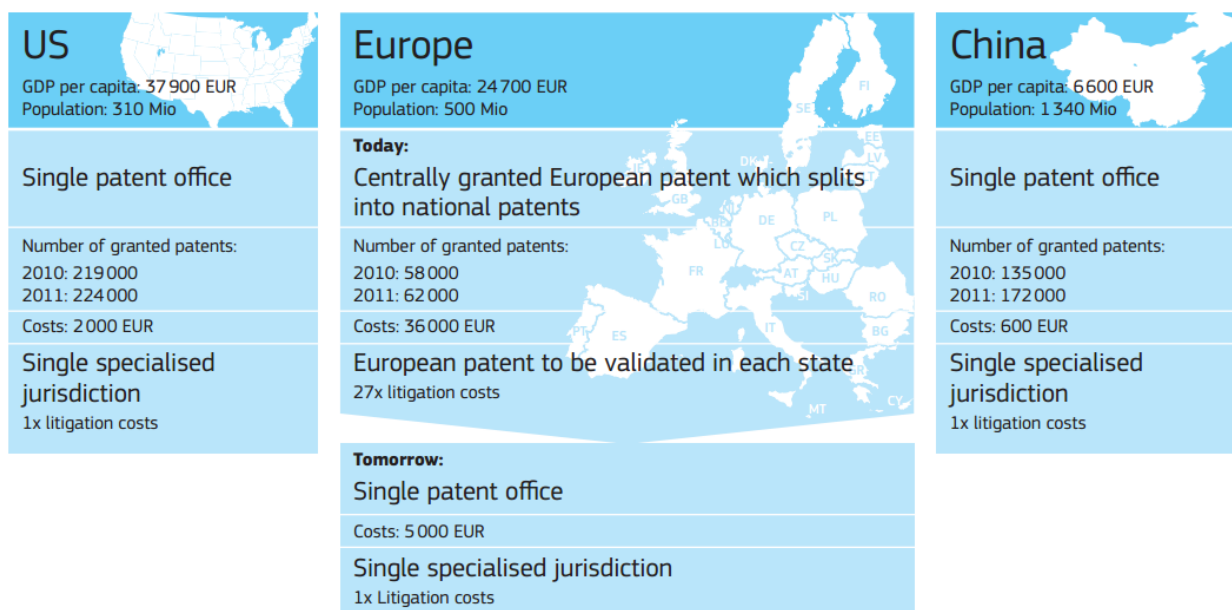
at <[http://webnet.oecd.org/rd\\_gbaord\\_metadata/default.aspx](http://webnet.oecd.org/rd_gbaord_metadata/default.aspx)> accessed 21 January 2014

<sup>16</sup> OECD Science, Technology and Industry Scoreboard 2011, available at <<http://www.oecd.org/sti/sci-tech/48712591.pdf>> accessed 10 August 2013.

<sup>17</sup> Commission, 'Proposal for a Regulation of the European parliament and the council implementing enhanced cooperation in the area of the creation of unitary patent protection' COM (2011) 215 final 2.

<sup>17</sup> Council Press conference, <<http://www.consilium.europa.eu/homepage/showfocus?lang=en&focusID=67824>> & <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/intm/119713.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/119713.pdf)> accessed 1 January 2014.



**Figure 3: European Patent System, closing the competitive gap<sup>18</sup>**

Source: European Commission (2013)<sup>19</sup>

## ROAD TOWARDS SINGLE EU PATENT

Historically, the patent systems were designed to serve political and industrial developmental needs for individual economies. Although beneficial, nations have **not** found it essential to create international bodies for patent regulation as they fear that such regulatory bodies may lack the framework (political, legal and economical integrity) to maintain sovereignty of patents for each nation.<sup>20</sup>

### a. European Nation Wide Effort

For over forty years, the European countries have held numerous conferences and signed several international agreements aimed at either creating a unitary patent valid in all European countries upon issuance or establishment of specialized European court with jurisdiction over patents of all member states. Despite the consensus over the need for such an instrument, most nations treated them as turf wars, and these meetings ended as a zero-sum game. However, national substantive patent law has been partially harmonized throughout Europe quite early on. Annex 1 shows the multiple efforts (treaties and agreements) made towards a unitary European patent system in chronological detail.

#### *The Strasbourg Conventions - 1963*

In 1962, the 'Strasbourg Convention on the Unification of Certain Points of Substantive Patent Law' (Strasbourg Convention), negotiated under the auspices of the Council of Europe, was created with the objective of harmonizing substantive laws on patents, leading to more effective policies for all nations

<sup>18</sup> The costs for obtaining a European patent with unitary effect mentioned in this figure, are those that will apply once the transitional period of the language arrangements regulation has ended.

<sup>19</sup> Commission, 'Closing the competitiveness gap', available at

<[http://ec.europa.eu/internal\\_market/indprop/docs/patent/faqs/competitiveness\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/patent/faqs/competitiveness_en.pdf)> accessed 10 January 2014.

<sup>20</sup> Von, Holstein, *International cooperation in the Field of Patent Law with Special Reference to the activities of the Council of Europe*, 16 INT'L & Comp. L.Q. (1967), P. 191

involved. The treaty prescribed formalities for submitting a patent application and defined patentability of an invention under requirements of novelty, inventive step and industrial application. Inventions which did not comply with these conditions were not allowed to be patented.

Although it was opened for signature in 1963, it took until 1980 for the treaty to enter into force. The Strasbourg Convention was an important step from a European integration stand-point as it provided a blueprint for a substantive European patent law that is embodied in the 1973's EPC. Lastly, in anticipation of a Community Patent, most Community Member saw the Strasbourg Convention as a pre-cursor to lead into the formation of Community Patent Convention (CPC) of 1975, which never materialized.

### *The European Patent Convention (EPC) – 1973*

Based on Strasbourg Convention and the Patent Co-operation Treaty (PCT), countries acknowledged the benefits of cooperation in the field of patents, which simplified member state's application process, but did not centralize the granting stage. On recommendation of the Council of Europe, the convention on the Grant of European Patent Convention (EPC) took place in Munich, Germany in 1973 and became effective in 1977, creating a European Patent Office (EPO), which is a centralized executive body for filing and granting European patents.<sup>21</sup>

The task of the EPO is to grant 'European patents' - once EPO grants the patent, it turns into a bundle of national patents, separately validated in each designated country.<sup>22</sup>

### b. Parallel efforts under the auspices of the EPO

To properly understand the most recent development toward unified patent protection within the EU, it is necessary to also discuss efforts made outside the scope of the European Union. Within the framework of the EPO there have been significant, parallel attempts to tackle the problems faced by European Patent system.

### *The London Agreement – 2000*

In 1999, an initiative was undertaken to reduce the translation costs of European patents. The agreement on the application of Article 65 of the Convention of the Grant of European Patents (better known as the London Agreement) was concluded in London, on 17 October 2000, as an optional protocol to the EPC.<sup>23</sup>

Following the deposit of the instruments of ratification and accession by 13 EPC Contracting States, the London Agreement came into force in May 2008. The contracting parties to the London Agreement had accepted to waive all or part of the translations requirements which they were entitled to prescribe on the basis of Article 65 of the EPC and proposed a language scheme, which used English, German and French and excluded all other languages.

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<sup>21</sup> European Patent Office (EPO), Contracting Legal Foundation: European Patent organization, available at <<http://www.epo.org/about-us/organisation/foundation.html>> accessed 13 November 2013.

<sup>22</sup> Convention on the Grant of European Patents (European Patent Convention or EPC), available at <<http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ma1.html>> accessed 1 January 2014.

<sup>23</sup> EPO, London Agreement – Key Points, available at <<http://www.epo.org/law-practice/legal-texts/london-agreement/key-points.html>> accessed 1 January 2014.

Although the agreement was able to reduce translation requirements and associated costs, a majority of EPC Member States still ended up requiring most parts of the patents application to be translated into their official languages.<sup>24</sup> Also, Italian and Spanish was not included amongst the language regime and thus Italy and Spain never acceded to the London Agreement.<sup>25</sup>

### *The European Patent Litigation Agreement (EPLA) – 2003*

Within EPO's framework there have been significant, parallel attempts to tackle the problems of the European Patent system. Frustrated with the lack of progress, some member states of the EPO began to draft a separate patent judiciary system.

With the goal of improving the functioning and attractiveness of the EPC patent system, EPLA<sup>26</sup> was proposed in 2003, as an optional protocol for the signatories of the EPC. The patent judiciary system, which was proposed to be legally independent from all EU institutions, would have jurisdiction to deal with all infringement and revocation actions concerning European patents. The language used by the court will be the three official languages of the EPO.

Despite the numerous benefits and widespread support for the EPLA, the proposed draft encountered several constitutional<sup>27</sup> and institutional compatibility<sup>28</sup> concerns with the existing European Community treaties. Nonetheless it inspired the Unified Patent Court (UPC) with regard to Unified Patent Litigation System (UPLS) and accounted for substantial integration of EU jurisdiction.<sup>29</sup>

## **THE EU'S RECENT PROGRESS TOWARD A UNITARY PATENT SYSTEM**

Frustrated with decades of failed negotiations and proposals to establish an European patent system within a reasonable period of time, 12 member states decided to install a unitary patent under an 'enhanced cooperation' agreement to subvert the objections from Italy and Spain, with the consent of European Parliament (2011/167/EU).<sup>30</sup> Italy and Spain were the two major nations which were against creation of a patent system that did not include their national languages into the language regime of the proposed unitary patent system. This impasse is discussed in detail, later in this section.<sup>31</sup>

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<sup>24</sup> The London Agreement, explicitly, does not restrict the rights of the states to prescribe that, in the case of a dispute relating to a European patent, the patent proprietor shall supply a full translation into an official language of the state of the alleged infringer. The translation can be requested by an alleged infringer or by the competent court or quasi-judicial authority in the course of legal proceedings.

<sup>25</sup> Mahne Kevin P., *Unitary Patent and Unified Patent Court for the European Union: An Analysis of Europe's Long Standing Attempt to Create a Supranational Patent System*, J. Pat. Off. Society, 94 (2012), p. 183

<sup>26</sup> European Patent Office, *Draft Agreement on the Establishment of A European Patent Litigation System Art. 3(2)* (Feb. 16, 2004), available at

[http://documents.epo.org/projects/babylon/eponet.nsf/0/B3884BE403F0CD8FC125723D004ADD0A/\\$File/agreement\\_draft\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/B3884BE403F0CD8FC125723D004ADD0A/$File/agreement_draft_en.pdf) accessed on 21 January 2014

<sup>27</sup> Council Regulation (EC) 44/2001 of 22 December 2000; European Parliament legal Service, 'Member States- overlap between that agreement and the *acquis communautaire*' 1 February 2007 paras 40-6.

<sup>28</sup> Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights; 'Member States- overlap between that agreement and the *acquis communautaire*' 1 February 2007 paras 26-39.

<sup>29</sup> EU Unitary Patent (Historical breakthrough, European Council), Available at

<http://www.consilium.europa.eu/homepage/showfocus?lang=en&focusID=86891> accessed 13 January 2014.

<sup>30</sup> Council Decision 2011/167/EU of Mar. 10, 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection (OJ 2011 L 76, p. 53), available at

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dba0c95be1ac694ca2b34fa70d4ba3727f.e34Kaxilc3qMb40Rch0SaxuMahv0?text=&docid=136302&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=620827>

<sup>31</sup> Mahne Kevin P., *Unitary Patent and Unified Patent Court for the European Union: An Analysis of Europe's Long Standing*



A measure such as 'enhanced cooperation' had been taken once before, when in 2010, 14 Member States adopted a new rule for divorce.<sup>32</sup> However, enhanced cooperation in the field of European Intellectual Property right was contested to be an exclusive competence for the union and not permissible. Nevertheless, Member States saw this as an invaluable tool to achieve (or strive to achieve) their goal of a unitary patent and went ahead.<sup>33</sup>

An enhanced cooperation does not create a true EU patent<sup>34</sup> or an EPC patent<sup>35</sup>. All it creates is a unitary patent, which allows a group, possibly a subset of Member States of the European Union who chose to adhere to legal framework. Such an enhanced cooperation constitutes a powerful tool to overcome institutional impasse with the ultimate purpose of reinforcing integration within a group of Member States.

Today, Europe is the closest it has been since the mid 1970's in establishing an EU-wide supranational patent system. The European Commission is aggressively pursuing the two regulations and an agreement that will take forward the 'unitary patent package'. The first two regulations implemented under enhanced cooperation procedures are - EU regulation on unitary patent protection (*Unitary Patent Regulation*)<sup>36</sup> and the translation arrangements applicable to the unitary patent (*Translation Regulation*).<sup>37</sup> The third is an international agreement regarding the setting up of a unified patent jurisdiction (*Unified Patent Court Agreement*).<sup>38</sup>

### The EU Unitary Patent Regulation

Under the EU Unitary Patent regulation, an inventor will be able to obtain patent protection in all EU countries by submitting a single patent application to the EPO. The EPO will follow the same procedure, criteria and rules for examination currently followed for the European patents issued by the EPC. The difference would be the post-grant phase, where the patent will be given unitary protection throughout the territory of EU Member States participating in the unitary patent scheme.<sup>39</sup> As a consequence, the European patent with unitary effect '*will only be limited, transferred or revoked, or lapse, in respect of all the participating Member States*'.<sup>40</sup>

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Attempt to Create a Supranational Patent System, J. Pat. Off. Society, 94 (2012), p.164

<sup>32</sup> Council Decision, Enhanced Cooperation of the Law Applicable to Divorce and Legal Separation, (2010/405/EU), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:189:0012:0013:en:PDF>> &

<sup>32</sup> Council Regulation, Enhanced Cooperation of the Law Applicable to Divorce and Legal Separation, (EU) No 1259/2010, available at <<http://register.consilium.europa.eu/pdf/en/09/st16/st16113-ad01.en09.pdf>> accessed 1 December 2013.

<sup>33</sup> EU Unitary Patent (Historical breakthrough, European Council), available at

<sup>33</sup> <<http://www.consilium.europa.eu/homepage/showfocus?lang=en&focusID=86891>> accessed 12 December 2013

<sup>34</sup> 28 EU Member States.

<sup>35</sup> 38 Member States, including all 28 EU Member States.

<sup>36</sup> Council of the European Union, Regulation (EU) No 1257/2012 of The European Parliament And Of The Council (Dec. 17, 2012) Implementing Enhanced Cooperation In The Area Of The Creation Of Unitary Patent Protection

<sup>37</sup> Council of the European Union, Regulation (EU) No 1260/2012 of The European Parliament And Of The Council (Dec. 17, 2012) Implementing Enhanced Cooperation In The Area Of The Creation Of Unitary Patent Protection regard to the applicable translation arrangements.

<sup>38</sup> Regulation (EU) No 1257/2012, Preamble at 9, 11, 12, 25 & Art. 17-18

<sup>39</sup> Radcliffe J, *European Patent Litigation Strategy*, (Bloomberg BNA, Aug. 2013), available at

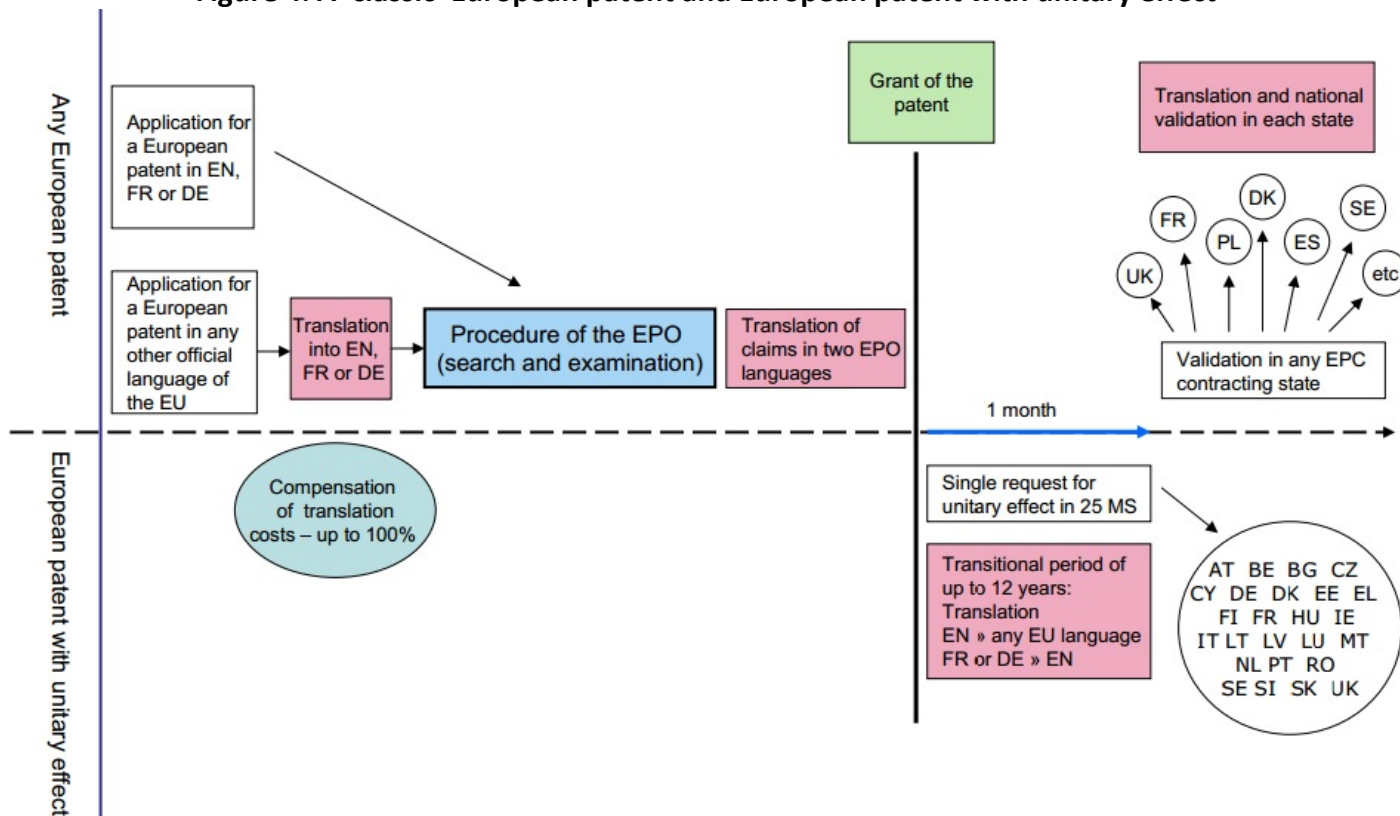
<[http://www.bna.com/uploadedFiles/Content/Web\\_Forms/Real\\_Magnet\\_Form/European\\_Patent\\_Litigation/WIPR0813\\_white\\_paper\\_eu-patent-lit.pdf](http://www.bna.com/uploadedFiles/Content/Web_Forms/Real_Magnet_Form/European_Patent_Litigation/WIPR0813_white_paper_eu-patent-lit.pdf)> accessed 21 December 2013.

<sup>40</sup> Article 10 para 4 Unitary Patent Protection Proposal, (Reg. 1260/2012)

Once the agreement and the regulations come into force, it will be possible to obtain a European patent with unitary effect, which will be a legal title ensuring uniform protection for an invention across 25 Member States, providing huge cost savings and reducing administrative burdens.<sup>41</sup>

The European patent with unitary effect thus exists alongside ‘classic’ European and national patents of the respective Member States. Up to the grant phase, applicants can choose between (i) a national patent granted nationally (ii) a European patent having unitary character, (iii) a European patent without unitary effect.

Figure 4: A ‘classic’ European patent and European patent with unitary effect

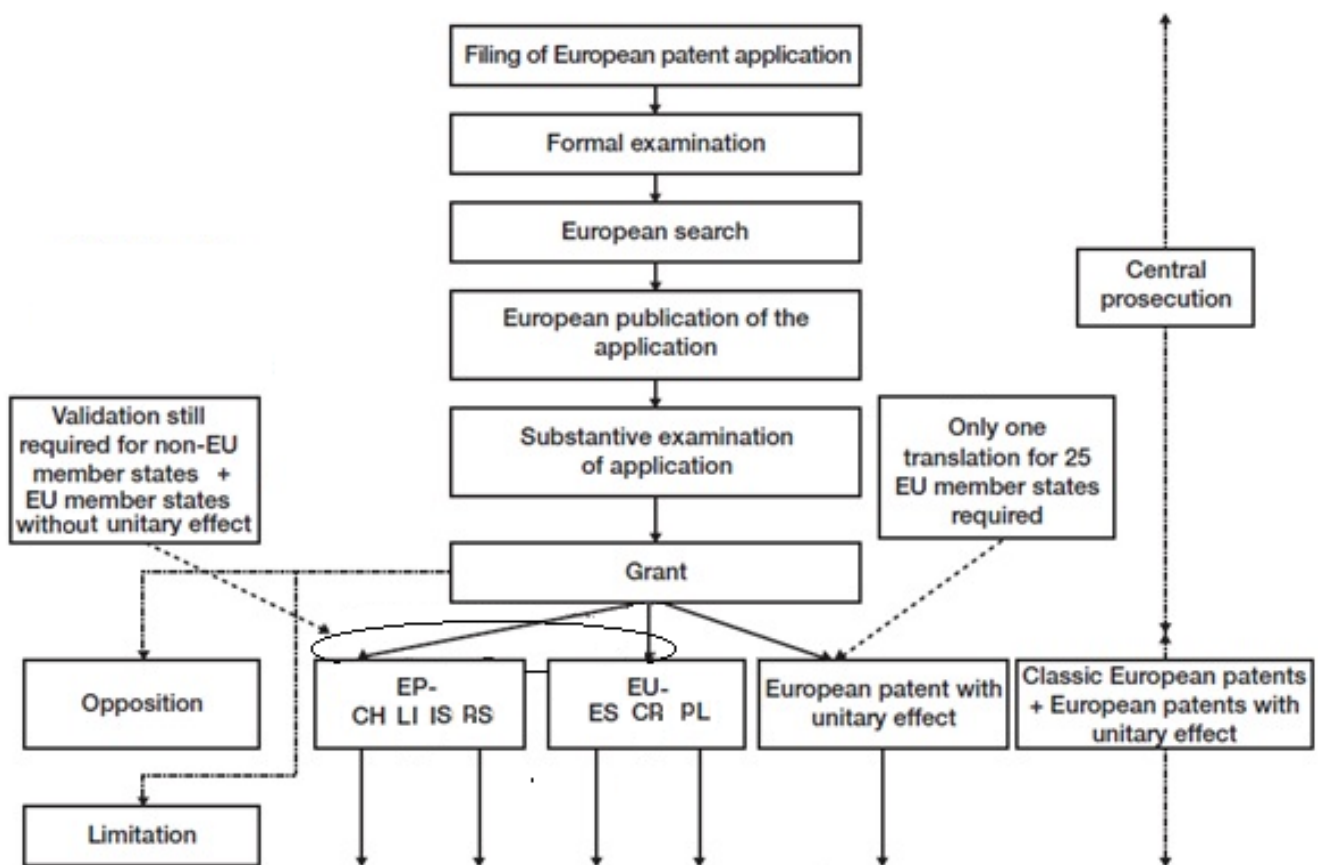


Source: European Commission (2013)<sup>42</sup>

<sup>41</sup> Commission proposes unitary patent protection in 25 Member States – Frequently Asked Questions, (MEMO/11/240), Brussels, Apr. 13, 2011 Available at <[http://europa.eu/rapid/press-release\\_MEMO-11-240\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-240_en.htm)> accessed 13 November 2013.

<sup>42</sup> Commission, ‘A ‘classic’ European patent and European patent with unitary effect’, available at <[http://ec.europa.eu/internal\\_market/indprop/docs/patent/faqs/how-does-it-work\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/patent/faqs/how-does-it-work_en.pdf)> accessed 10 January 2014.

Figure 5: A European patent with unitary effect



Source: Author's own creation

### The Translation Regulation

*"For a community with twenty three official languages, this has historically been a quagmire fraught with administrative and political controversy".<sup>43</sup>*

Probably the greatest source of frustration in ratifying the unitary patent is the problem of translation. Although there is consensus regarding the substantive provisions of the EU Unitary Patent regulation, the translation regime is not part of the EU Unitary Patent regulation. Therefore, a second regulation to govern the translation regime was adopted.<sup>44</sup> The proposal adopted by the European Commission for the translation regime was on the same lines as the translation regime of the Community Patent Regulation (2008).

While filing for a Unitary patent the application can be drawn in any of the official languages of EU (twenty four languages), but will also require the applicant to file for a translation in either English, French, or German (the three official languages of the EPO), if not already done so.<sup>45</sup> Once the Unitary patent is granted, the applicant will have to translate the patent in the remaining two official languages for publication.

<sup>43</sup> Soo Philip P., Enforcing a Unitary Patent in Europe: What the U.S. Federal Courts and Community Design Courts Teach Us, *Loyola of Los Angeles International and Comparative Law Review*, 35(55) (2012), p. 70, available at

<sup>43</sup> <<http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1688&context=ilr>> accessed 10 January 2014.

<sup>44</sup> Translation Arrangements under Regulation 1216/2012.

<sup>45</sup> Regulation (EU) No 1260/2012.

### *Italy and Spain's Impasse*

The languages used for the unitary patent have always been a difficult political sticking point. Due to the stronghold of the three nations (France, Germany and United Kingdom) and the widespread use of their national languages, it is inevitable that English, German and French were chosen to be the official languages for the translation agreement.

In May 2011, Italy and Spain initiated actions against the Council decision for *authorizing* enhanced cooperation based on two fundamental reasons - firstly, under Article 118 of Treaty on the Functioning of the European Union (TFEU), European intellectual property rights fall out of the scope of enhanced cooperation.<sup>46</sup> Secondly, they claim that the trilingual system violates the principle of non-discrimination as freedom from discrimination is a core value of the European Union, Article 21-22 of Charter of Fundamental Rights (CFREU).<sup>47</sup>

Regardless of the pending annulment actions by Spain and Italy against the Council decision *authorizing* enhanced cooperation, on 17 December 2012 the Council adopted two regulations implementing the enhanced cooperation. On 22 March 2013, Spain lodged complaints against the Council regulations *implementing* enhanced cooperation.<sup>48</sup>

Recently on 16th April 2013, the Court of Justice of the European Union (CJEU) dismissed the first set of actions brought by Spain and Italy for *authorizing* enhanced cooperation.<sup>49</sup>

### *Cost effectiveness*

The provisions under Regulation 1260/12 for the European patent, the unitary patent was created with the aim of balancing the economic and public interests. In terms of proceeding cost, the translation arrangements outlined in the regulation, aimed to achieve legal certainty and benefit for all organizations. In particular, small and medium-sized enterprises (SME) would benefit the most from the ease in processing and cost effectiveness of the program.

Once the regulation comes into force and the transitional period begins (up to twelve years), the cost to obtain a European patent will decrease from the currently average of EUR 32,119 to substantially viable EUR 6,425. Once, complete transition has been done, the cost would further reduce to EUR 4,725 due to further reduction in administrative cost compared to the current system.

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<sup>46</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47. Article 118.

<sup>47</sup> Charter of Fundamental Rights (2007/C 303/01); Art. 21 'Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

<sup>48</sup> Case C-146/13 *Kingdom of Spain v European Parliament and Council of the European Union* [2013] OJ C 171/15 (application for annulment, case in progress), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=137928&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=197732>;

<sup>48</sup> Case C-147/13 *Kingdom of Spain v Council of the European Union* [2013] OJ C 171/16 (application for annulment, case in progress)

<sup>48</sup> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=137924&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=197708> accessed on 10 January 2014.

<sup>49</sup> Joined Cases C-274/11 and C-295/11, *Kingdom of Spain v Council of the European Union and Italian Republic v Council of the European Union* (Grand Chamber 16 April 2013) not yet published, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136302&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6337038> accessed 10 August 2013.

**Figure 6: Costs comparison: 'Classic' European Patent versus new Unitary Patent**

	European "bundle" patent (25 MS)	European patent with unitary effect (25 MS) - during transitional period	European patent with unitary effect (25 MS) - after transitional period
<b>Procedural fees</b> (filing, search, examination and grant)	4 045 € (not concerned by the reform)	4 045 € (not concerned by the reform)	4 045 € (not concerned by the reform)
<b>Validation costs:</b>			
Translation	20 145 €	2 380 €	680 €
Local patent agents	5 250 €	0	0
Official local patent offices fees	2 679 €	0	0
<b>Validation costs total</b>	<b>28 074 €</b>	<b>2 380 €</b>	<b>680 €</b>
<b>TOTAL COSTS</b>	<b>32 119 €</b>	<b>6 425 €</b>	<b>4 725 €</b>

Source: European Commission (2013)<sup>50</sup>

### The Unified Patent Court (UPC) Agreement

The UPC Agreement is an international agreement which establishes a specialized patent court with exclusive jurisdiction for litigation relating to European patents and European unitary patents.<sup>51</sup> It aims to address the problems involved with litigation of European bundle patents currently done on a national basis, by creating a patent protection network applicable throughout EU. The UPC will have jurisdiction over litigation involving current and future European patents and future EU unitary patents.<sup>52</sup>

#### *UPC structure*

The proposed patent court will consist of a Court of First Instance, a Court of Appeal, and a Registry.<sup>53</sup> The Court of First Instance will include setting up Local Divisions in contracting Member State, with a maximum of four local divisions per contracting state. If two or more contracting states prefer to set up a Regional Division, they can do so - for example, the Scandinavian contracting states or the Baltic States, have expressed interest in creating Regional Division.<sup>54</sup> There are a few states (Malta and Luxembourg, as of now) which do not want to establish local or regional division, leaving its jurisdiction with the Central Division.

<sup>50</sup> Commission, 'Costs comparison: "Classic" European Patent versus new Unitary patent', available at [http://ec.europa.eu/internal\\_market/indprop/docs/patent/faqs/cost-comparison\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/patent/faqs/cost-comparison_en.pdf) accessed 10 January 2014

<sup>51</sup> Forum shopping is also inevitable, as parties seek to take advantage of differences in:

<sup>51</sup> a) national courts' interpretation of harmonized European patent law; b) procedural laws; c) length of proceedings; and d) levels of damages awarded.

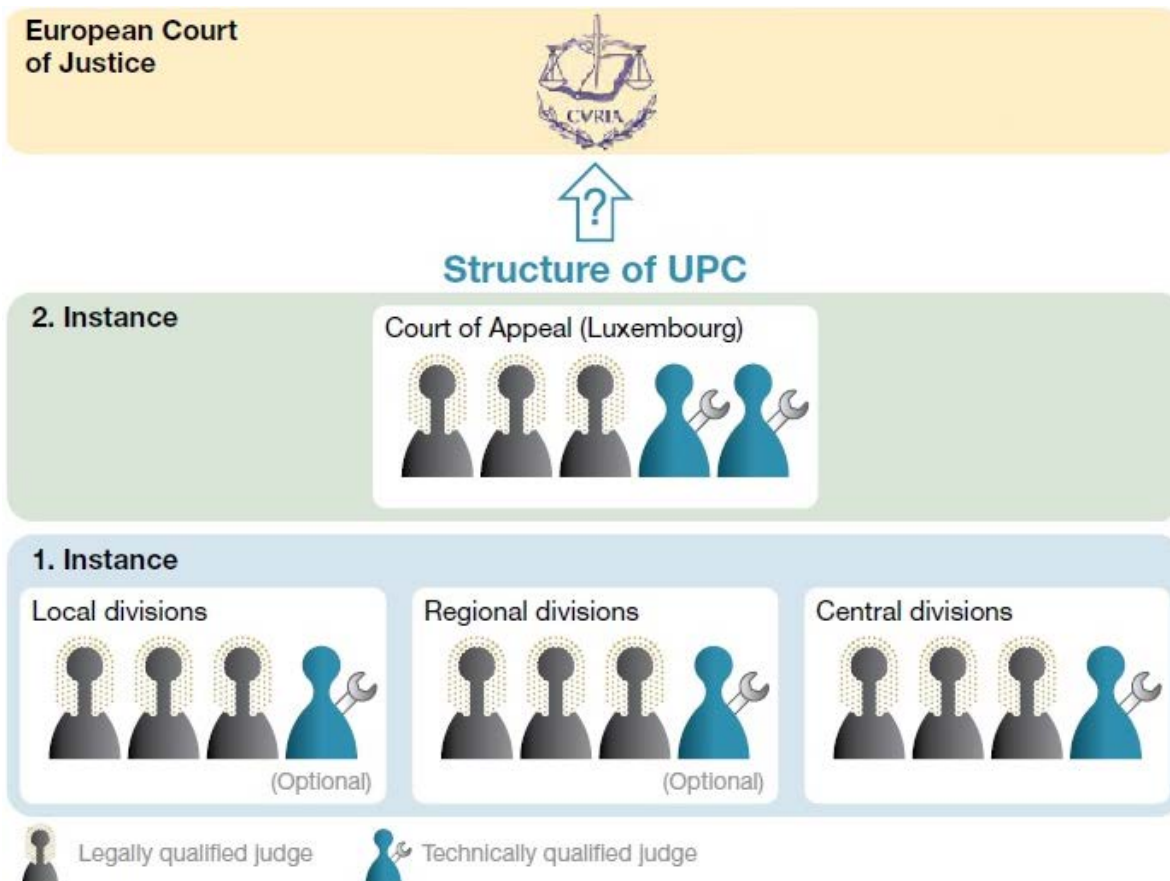
<sup>52</sup> EPO, Agreement on a Unified Patent Court and Statute (document 16351/12) of Jan. 11, 2013, available at [http://documents.epo.org/projects/babylon/eponet.nsf/0/A1080B83447CB9DDC1257B36005AAAB8/\\$File/upc\\_agreement\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/A1080B83447CB9DDC1257B36005AAAB8/$File/upc_agreement_en.pdf) accessed 13 November 2013.

<sup>53</sup> Agreement on a Unified Patent Court and Statute (document 16351/12), *Supra* Note 72, Art. 4

<sup>54</sup> Scandinavian contracting states: Sweden, Finland and Denmark; Baltic States: Estonia, Latvia and Lithuania; and Bulgaria, Rumania, Greece, Cyprus, Slovenia are planning a Regional Division.



Figure 7: New court structure and panel composition



Source: Intellectual Asset Management, Patents in Europe 2013/2014<sup>55</sup>

The Central Division will have general jurisdiction over revocation actions. It will also have jurisdiction over infringement cases involving defendants having their residence outside the territory of the UPC Member States and in certain other situations.

In 2012, the 'big three' France, Germany and United Kingdom reached an impasse when it came to seats for the Central Division Court.<sup>56</sup> As a part of an overall compromise for the Court of Central Division, it was proposed to create specialized cluster in each region, Paris, Munich and London.<sup>57</sup> The Central Division headquarters in Paris will handle cases on technology,<sup>58</sup> while the London branch will handle cases relating to medical device, pharmaceuticals, and the life sciences,<sup>59</sup> and the Munich branch will handle cases relating to mechanical engineering.<sup>60</sup> The Court of Appeal will be in Luxembourg.

<sup>55</sup> Rainer K Kuhnen, Unitary patent and Unified Patent Court: the proposed framework, *Patents in Europe 2013/2014* Intellectual Asset Management, available at <<http://www.iam-magazine.com/issues/Article.ashx?g=bf7522ce-5388-4aab-a607-e2bc5504050f>> accessed 10 January 2014.

<sup>56</sup> Agreement on a Unified Patent Court and Statute (document 16351/12), *Supra* Note 72, Art. 5(1a), 7(4)

<sup>57</sup> Agreement on the application of Art. 65 EPC (Oct. 17, 2000), London Agreement available at <[http://documents.epo.org/projects/babylon/eponet.nsf/0/7FD20618D28E9FBFC125743900678657/\\$File/London\\_Agreement.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/7FD20618D28E9FBFC125743900678657/$File/London_Agreement.pdf)> accessed 20 January 2014.

<sup>58</sup> International Patent Classification (IPC), classes B/D/E/G/H (All cases that do not fall under classes A,C & F)

<sup>59</sup> International Patent Classification (IPC), classes A & C (chemistry, including pharmaceutical and human life sciences)

<sup>60</sup> International Patent Classification (IPC), class F (mechanical engineering)

The Court of First Instance and the Court of Appeal may refer questions to the Court of Justice of the European Union (CJEU), on patent infringement or interpretation of EU law<sup>61</sup>. However, the role is still to be completely defined.

### *Panel Composition*

Local/Regional Division: The panel for the local/regional divisions will consist of three legally qualified judges of multiple nations. In addition, a technically qualified judge may be allocated to this pool of judges, either on request of the parties (litigating parties) or on the panel's own discretion.

Central Division: The central division panel will comprise of three legally qualified judges from different contracting Member States. They can request for an additional technically qualified judge as required.

### *Transitional period (Opt-out, opt-in)*

During the transitional period (lasting seven years from date of commencement), outlined under Article 83 of the Agreement, nations can choose to bring actions for infringements or revocation concerning 'classic' European patents before national courts, or go to the Unified Patent Court. Unless otherwise specifically mentioned all contracting nations are opted in to the Unified Patent Court system. This will provide the proprietor with an opportunity to opt-out of the exclusive competence of the court before the expiration of the transitional period (or unless an action has already been brought before it).

After the transitional period is over, the Unitary Patent Court will have exclusive competence for all European 'classic' patents with or without unitary effect.

Till date, agreement has been signed by 25 EU Member States. The agreement will need to be ratified by at least 13 Member States, including France, Germany and the United Kingdom to enter into force.<sup>62</sup>

## **REASONS FOR CONCERN**

At all the meetings that have taken place to come up with a Unitary Patent system, there are a few challenges which always ended up marginalizing the efforts of all the parties involved. These concerns can be categorized into four major buckets - complexity of the patent regime, legal uncertainty, linguistic challenges, and ratification risks. Further in the paper we will look at each risk individually and seek through a solution to admonish fears of all nations.

### *Complexity of the Patent Regime*

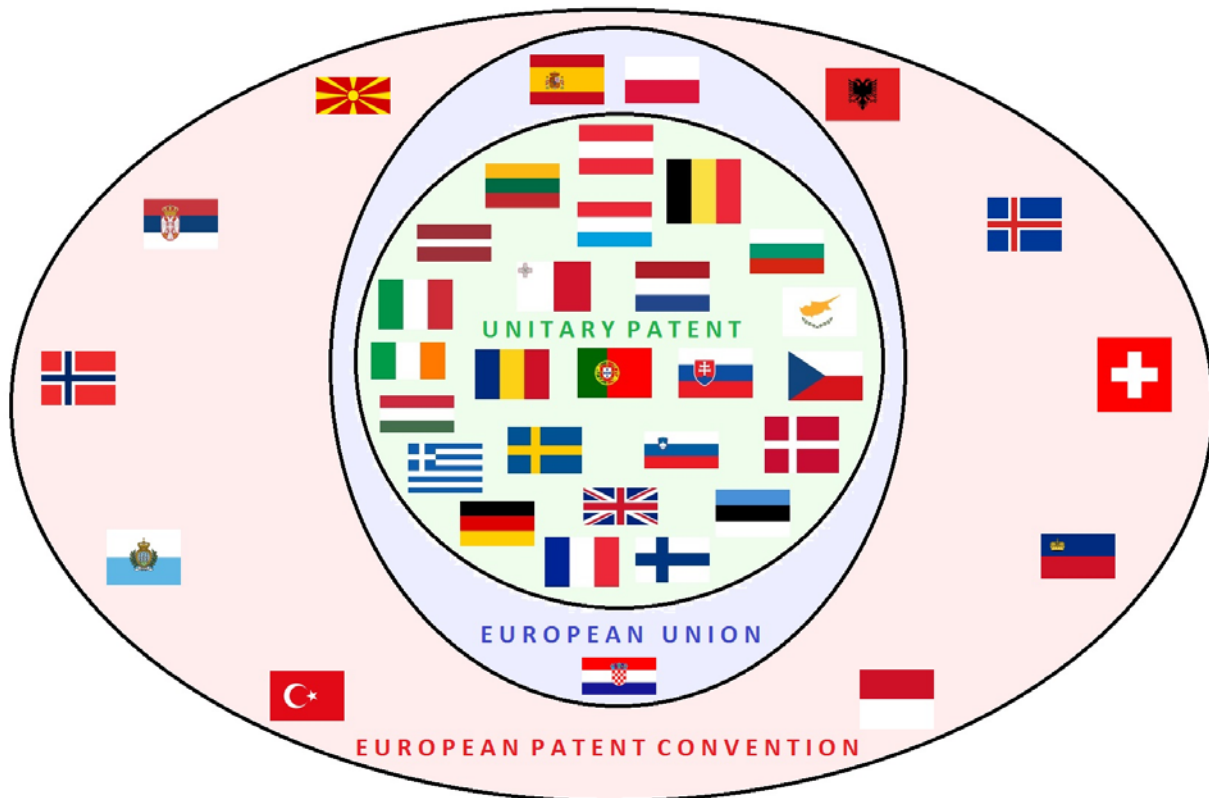
Instead of consolidating European nations under a single patent law in Europe, the Unitary Patent Package seems to be adding to the fragmentation on both the territorial and substantive levels.

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<sup>61</sup> Rainer K Kuhnen, Unitary patent and Unified Patent Court: the proposed framework, *Patents in Europe 2013/2014* Intellectual Asset Management <iam-magazine, available at <<http://www.iam-magazine.com/issues/Article.ashx?g=bf7522ce-5388-4aab-a607-e2bc5504050f>> accessed 10 January 2014.

<sup>62</sup> Status of Ratification- Agreement on a Unified Patent Court, available at <[http://ec.europa.eu/internal\\_market/indprop/patent/ratification/index\\_en.html](http://ec.europa.eu/internal_market/indprop/patent/ratification/index_en.html)>, accessed 10 November 2013.

Figure 8: Complexity of current system



Source: Author's own creation

*Territorial fragmentation:* The unitary patent will not cover all nations within the EU, and will be restricted to only those EU Member States which participate in the enhanced cooperation. In addition, it will become operational only for the Member States that ratify the UPC Agreement. From EU perspective the further fragmentation of the Internal Market, due to the unitary patent, works against the objective to make the EU a cohesive block for IP. From a patent holder's perspective, the lack of patent protection in major European markets jeopardizes their innovation in these Member States, which would eventually lead to the need for a national patent to flank the unitary patent.<sup>63</sup>

*Substantive fragmentation:* The Unitary Patent Package will create four overlapping levels of patent protection in Europe:

- I. National patents granted nationally
- II. National patents granted by the EPO, within the system of the UPC Agreement
- III. National patents granted by the EPO, without subjection to the UPC (due to transitional opt-out, non-ratification by Member States, or for non-EU States)
- IV. European patents with unitary effect.

According to the principle of optionality, all systems will coexist alongside each other.

<sup>63</sup> Hilty R M, Jaeger T, Lamping M, Ullrich H, 'The Unitary Patent Package: Twelve Reasons for Concern' (2012) Max Planck Institute for Intellectual Property & Competition Law research Paper No. 12-12, 12; available at [http://www.ip.mpg.de/files/pdf2/MPI-IP\\_Twelve-Reasons\\_2012-10-17\\_final3.pdf](http://www.ip.mpg.de/files/pdf2/MPI-IP_Twelve-Reasons_2012-10-17_final3.pdf) accessed 10 January 2014.

### *Legal Uncertainty*

The shift from an autonomous 'classic' European Patent to a hybrid 'European patent with unitary effect' casts doubts on the legal quality and legal nature of the patent - is it EU-law, international law, or a different *sui generis* type of law?

Articles 6 to 8 of the Unitary Patent Regulation provide a broad, albeit not complete set of rules of infringement and on its exceptions, basic rules, as contained in all previous proposals (transfer of right, rights *in rem*, treatment in execution and insolvency, *erga omnes* effect of restrictive contractual licensing, date of third-party effects of patent transactions), are missing.<sup>64</sup>

Also, the validity of the unitary patent itself is in question with respect to TFEU, challenging the competence to creating regulations with respect to European intellectual property rights, which falls outside the scope of enhanced cooperation.

### *Linguistic Challenges*

The major thorn while discussing the Unified Patent system amongst Member States has been the selection of official languages. All EU Member States, apart from Germany, France and United Kingdom, feel they are not being treated as equals. Under the pretext of linguistic nationalism, Member States identify the confinement of languages as a competitive disadvantage because it limits the ability of the nation to conduct business in their language and reduces the earning of the state that translation work brings in.

The cost of translation and patent validation represents a major source of income for patent agents in several Member States. It is possible that some governments have argued against several proposals, not out of true concern for linguistic diversity or competitive disadvantages for their businesses, but to defend the interests of these national patent agents.

Spain and Italy have always pleaded that the language arrangements for the European patent with unitary effect should include Italian and Spanish alongside German, English and French. Alternatively, Spain and Italy were willing to conduct negotiations on the proposal to make English the only language for the EU patent. When all else failed they contested that enhanced cooperation was illegal on grounds of lack of competence, misuse of powers, and infringement of the treaties and thus enhanced cooperation cannot be established in this area.<sup>65</sup>

### *Ratification risk and duration*

Another element of uncertainty surrounding the Unitary Patent Package is the ratification of the UPC Agreement. This is because national ratification processes are often misused for political interests. For UPC to come into effect they need a minimum of 13 Member States to ratify the agreement. Also, France, United Kingdom, and Germany have to compulsorily ratify the agreement. The risk of non-ratification is particularly high in a few EU nations.

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<sup>64</sup> Unitary-patent.eu (For a Democratic Innovation Policy in Europe), Only Gandalf can protect Europe from the Unitary Patent, available at <<https://www.unitary-patent.eu/content/only-gandalf-can-protect-europe-unitary-patent>>, accessed on 10 January 2014.

<sup>65</sup> Article 118 TFEU gives the specific power to the Union to introduce European intellectual property rights. It does not concern the power to harmonize national legislation, but a specific power to introduce European intellectual property rights.

In the upcoming UK general election (in 2015), an anti-EU mood prevails amongst politicians and they are requesting a public vote against the ratification of the UPC Agreement. If the United Kingdom rejects the agreement, the whole package will collapse, even if the agreement is ultimately ratified (and that's assuming that 12 other states have already ratified by this point).

In Germany, the government has warned that an examination of UPC's impact with German constitution has to be done.<sup>66</sup> This has raised eye brows in many Member States on the impact of the UPC in their nations. The Polish government, which initially supported the UPC are now seen to be backing out after viewing the results of a study conducted by Deloitte on UPC, which showed that the unitary patent will increase the cost for a Polish company to get a patent.<sup>67</sup> The Polish government now seems to be following a 'wait and see' approach.

Also, historical trends show that ratification has led to the downfall of many treaties and agreements. Last minute back out and bad faith may lead to a similar story for UPC.<sup>68</sup>

### *Other Concerns - Does one size fit all?*

As mentioned earlier, once UPC comes into force the cost to obtain a pan-EU patent will decrease by 80%. This assumes that the patent applicant always wants a pan-EU patent. In countries, where the cost is lower to obtain a national patent, this may prove a detrimental and an enforced measure. The UPC seems more attractive for SMEs than larger enterprises, as it provides SMEs with a much needed stimulus to innovate, at the same time giving nightmare to the larger enterprises which may face centralized validity challenges (they risk losing EU wide protection in a single stroke). Organizations with high value patents, particularly in the fields of pharmaceutical, technology and other businesses, are likely to shy away from this system, as it presents organizations with the perceived risk of putting all eggs in one basket.<sup>69</sup>

## **CONCLUSION**

The EU is an economic and political partnership with a single currency and a single market where goods, services and people travel freely across borders. Regrettably, the European patent system, which is a critical component for the European economy, has not yet benefited from European unification. For the most part, each European country continues to operate its own national patent system to grant, validate and manage post grant issues.

To encourage much needed innovation, growth, and increase market competitiveness, European political leaders must establish a patent system which provides patent applicants an efficient and cost effective way to obtain patents throughout Europe. The present fragmented patent system is prohibitively expensive for European businesses and results in legal uncertainties as different national courts conclude differently on substantive patent issues.

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<sup>66</sup> McDermott Will & Emery, Final form Unified Patent Court Agreement published, available at <<http://www.lexology.com/library/detail.aspx?g=ed601991-ddcc-4a95-8436-d6d5b2a8adeb>> accessed on 10 November 2013.

<sup>67</sup> Dimitris Xenos, 4.2.2 The Deloitte report for the Polish Economy, The European Unified Patent Court: Assessment And Implications of the Federalisation of the Patent System In Europe, 10:2 *SCRIPTed*, (2013), available at <<http://script-ed.org/wp-content/uploads/2013/08/xenos.pdf>> accessed 10 January 2014.

<sup>68</sup> The Community Patent Conventions of 1975 and 1989, due to constitutional problems in some Member States.

<sup>69</sup> Unitary-patent.eu (For a Democratic Innovation Policy in Europe), Only Gandalf can protect Europe from the Unitary Patent, available at <<https://www.unitary-patent.eu/content/only-gandalf-can-protect-europe-unitary-patent>>, accessed on 10 January 2014.



European countries have made several attempts, starting in mid-1970's, to create an EU unitary patent and establish a European patent court. Progress has been made in areas of the pre-grant phase, where businesses and inventors are reaping the benefits of the large market of EU. However, in the post-grant phase, businesses still have to deal with different national systems with all its complexities and exorbitant costs.

The missing piece of the European patent system has been a Unitary Patent Package. The gamut of legal instruments, comprising two EU regulations and an international agreement can drive the required effect. The Unitary Patent Package is not being enforced with the intent to replace the existing European patent system, but merely to add another layer to the existing system. As a system, Unitary Patent Package will help cut costs of patenting in Europe, empower nations to become inventive and protect their rights pan-EU.

**Annex 1: Major agreements and treaties towards Unitary Patent in Chronological Order**

<b>Year</b>	<b>Substantive Law Proposal</b>	<b>Effort Towards Unitary Patent</b>
<b>1883</b>	<b>The Paris Convention</b> (in force since 7 July, 1884) An international IPR convention introduced the principle; - right of national treatment - right of priority	Cornerstone of later attempts to harmonize intellectual property law globally.
<b>1963</b>	<b>Strasbourg Treaty</b> (Convention on the Unification of Certain Points of Substantive Law on Patents for Invention) (in force since 1 August, 1980) The objective of the Strasbourg Treaty was to harmonize substantive laws on patents.	The Strasbourg Treaty was the first significant effort by European countries to harmonize substantive patent law. It also provided blueprint for the substantive European patent law that is embodied in the 1973 (EPC).
<b>1970</b>	<b>Patent Cooperation Treaty</b> (in force since 24 January, 1978) - Patent procedural streamlining for multiple jurisdiction application - No interference with regards to individual country granting patents or post patent grant validity, infringement, damages, and enforceability	PCT was an important step in world-wide cooperation towards an 'international patent'.
<b>1973</b>	<b>European Patent Convention</b> (Convention on the Grant of European Patents (EPC)) (in force since 7 October, 1977) - pre-grant and administrative procedures - only selective harmonization of post-grant national patent law	The EPC created the first European multinational organization with authority over certain aspects of patents.
<b>1975</b>	<b>1st Community Patent Convention</b> (Convention for the European Patent for the Common Market, 15 December, 1975 (1976 OJ L 17, 1)) (not in force) - EPO special unit administration - unitary and autonomous Community patent granted by the EPO	The CPC, like the Strasbourg Agreement, was a move toward creating a single European-wide patent system, however, suffered the same fate as Member States did not ratify it.
<b>1985</b>	<b>2nd Community Patent Convention</b> (Agreement relating to Community patents, 1989 OJ L 401, 1) (not in force) - largely restatement of 1st Community Patent Convention - new language regime	Member States were unable to resolve the main issues that were necessary to bring it into force.

1994	<p><b>TRIPS Agreement</b> (The Agreement on Trade-Related Aspects of Intellectual Property Rights) (into force since 1 January, 1995)</p> <ul style="list-style-type: none"> <li>- delineates basic standards for patentability (new, inventive step, and industrial application)</li> <li>- established a minimum twenty year patent term from time of filing</li> <li>- national Treatment principle</li> <li>- most-favored Nation Principle</li> </ul>	<p>The TRIPS required Member States to modify national law to give effect to the provisions of Agreement, unlike the EPC. This led to further harmonization of European substantive patent law.</p>
2000	<p><b>Community Patent Regulation</b> (Proposal for a Council Regulation on the Community patent - 2000 OJ C 337E , 278) (not in force)</p> <ul style="list-style-type: none"> <li>- EPO administration</li> <li>- unitary and autonomous Community patent granted by the EPO</li> <li>- comprehensive set of rules on substantive patent law</li> </ul>	<p>The Community Patent Regulation would give inventors the option of obtaining a single patent legally valid throughout the EU.</p> <ul style="list-style-type: none"> <li>- community Intellectual Property Court</li> <li>- exclusive jurisdiction over infringement and revocation jurisdiction, no EPO appeals, no ECJ or national court preliminary references</li> </ul>
2000	<p><b>London Agreement</b> (Agreement on the application of Article 65 EPC, 17 October, 2000) (in force since 2008)</p> <ul style="list-style-type: none"> <li>- no translation of European patents for States which have an official language in common with the EPO languages</li> <li>- other states may require translation of claims into their official language</li> </ul>	<p>The agreement was a major step toward reducing the cost of validating European patent in multiple European countries and this translation regime was heavily capitalized by the EU during the future EU unitary patent negotiations.</p>
2003 - 2005	<p><b>EPLA</b> (Draft Agreement on the establishment of a European patent litigation system) (not in force)</p> <ul style="list-style-type: none"> <li>- EPO / EPO Member State initiative</li> <li>- exclusive jurisdiction over European Patent instead of national courts</li> <li>- two instance court, full infringement and revocation jurisdiction, no EPO appeals, limited ECJ preliminary references</li> </ul>	<p>After nearly ten years of negotiations, EU Member States finalized the terms for the UPC agreement, based on character and structure of the present draft. EPLA is the backbone of present UPC system.</p>
2009	<p><b>Community Patent Regulation – General Approach</b> (Council Doc. 16113/09) (not in force)</p> <ul style="list-style-type: none"> <li>- political breakthrough</li> <li>- largely restatement of earlier (2000-2004) proposal</li> </ul>	<p>Initial political agreement on the establishment of a patent system for the EU was reached. An ‘Enhanced Patent System for Europe’ (Council Doc. 17229/09)</p> <ul style="list-style-type: none"> <li>- agreement excludes translation arrangements</li> <li>- patent judiciary still in the drafting stage</li> </ul>

<b>2010</b>	<p><b>Regulation on Translation Arrangements</b>  (Proposal for a Council Regulation on the translation arrangements for the European Union patent, COM(2010) 350 final) (not in force)</p> <ul style="list-style-type: none"> <li>- patent published in one EPO official language plus translations of the claims into the other two EPO official languages</li> <li>- further translations only in the case of court proceedings</li> </ul>	<p>Failure of negotiations over language arrangements</p> <ul style="list-style-type: none"> <li>- persisting opposition by Spain and Italy</li> <li>- recourse to enhanced cooperation, under <i>Article 20(2)</i> TEU</li> </ul>
<b>2011</b>	<p><b>Unitary Patent Regulation</b> (Council Decision authorizing enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU);</p> <ul style="list-style-type: none"> <li>- Proposal for a Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection (COM(2011) 215 final</li> <li>- Proposal for Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (COM(2011) 216 final))</li> </ul>	<p>European patents with an identical scope of protection for the participating EU states transformed into European patent with unitary effect post grant.</p> <ul style="list-style-type: none"> <li>- two instance court, full infringement and revocation jurisdiction, no EPO appeals, limited ECJ preliminary references</li> <li>- exclusive jurisdiction instead of national courts</li> <li>- only 25 participating EU states (Spain and Poland did not join)</li> </ul>
<b>2012</b>	<p><b>Unitary Patent Package</b></p> <p>The two Regulations and the Agreement were endorsed by the Competitiveness Council on 10 December, 2012 and adopted by the European Parliament on 11 December, 2012 and by the Council on 17 December, 2012. ((not in force)</p> <p>Unitary Patent Regulations enter into force from 1 January, 2014 or the date of entry into force of the UPC Agreement, whichever is the later.</p>	<p>The unitary patent package is composed of Regulations and Agreement. The parts of the package are: (i) the Regulation creating the Unitary Patent (<i>Regulation 1257/2012</i>), (ii) the Regulation on translation requirements (<i>Regulation 1216/2012</i>) (iii) the Unified Patent Court (UPC) Agreement (<i>2013/C 175/01</i>)</p>



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