



The Rise of the Unified Patent Court: A New Era

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The Unified Patent Court (UPC) (hereinafter also “the Court”) will finally start its operations in June 2023 after much anticipation, providing for the first time in Europe a common legal framework for patent litigation across the 17 participating EU Member States. The creation of the system has raised many expectations, as it is expected to streamline validity and infringement proceedings in Europe and reduce litigation complexity and costs for businesses seeking effective patent protection across European borders.

The prehistory of the UPC began more than half a century ago, with various discussions between experts from different European countries in the late 1950s and 1960s.¹ These ultimately led to the signing of the European Patent Convention (EPC) in Munich in October 1973 and thereby the creation of an autonomous legal system for the granting of European patents. All efforts to unify the invalidation and infringement proceedings in Europe, however, failed to materialise for several decades. Countless attempts were made (e.g. with the Luxembourg conferences or the European Patent Litigation Agreement), but until very recently, all turned out to be fruitless for one reason or another.

Although the new system entered the finishing straight with the launch of the unitary patent package in 2012, the following decade continued to be anything but smooth. Among the many legal and political hurdles, some Member States refused to sign the UPC Agreement while there were constitutional challenges in Germany, which, together with Brexit, led to delays, renegotiations and enormous uncertainties as to whether the system would even become a reality at one point.

¹ Cf. the meeting of the working group “patents” on 11 April 1962 discussing issues of infringement proceedings in a common European patent system (Doc. 3073/IV/62 – D).

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For many reasons, the system as it stands today might not be the perfect solution. Nevertheless, it is the result of a myriad of efforts invested by generations of lawyers dedicating substantial parts of their careers to the unification of Europe's patent systems. Many compromises had to be made and changing realities also had to be taken into account. This mere legacy imposes a great responsibility on all parties, judges and the administration to use the system fairly and wisely.

The UPC, once it opens its doors, will need to establish immediately a strong reputation for quality, consistency and efficiency in order to build public trust and credibility among users. Setting up an unprecedented court system for private parties based on EU and international law clearly entails more complications than, for instance, the opening of a national court. Some events in the last few months, including technical problems linked to the Case Management System (CMS) and discussions about the professional conduct of part-time judges working in private practice while serving at the Court, have not helped the reputation of the UPC in the opening stages. Nevertheless, these initial difficulties will be quickly forgotten if the new system manages to prove its effectiveness over time and builds the expected reputation.

The new Court will need to meet the highest standards in managing court proceedings, interpreting and applying the law, and adjudicating disputes. The Administrative Committee and the Advisory Committee were able to select the best candidates from a group of outstanding legally and technically qualified judges across all participating Member States, whose experience and expertise will lay the foundation for the high quality decision-making required.

A system exuding expert patent litigation is not only important for the UPC itself but it may also affect national practices. The history of the EPC has proven that such a project can have a particular impact on national systems. National patent jurisdictions as well as the EU will closely monitor the UPC to assess whether certain features of the system are also a good fit for national laws or even worthy of EU harmonisation. On a more general level, the UPC will reflect upon the ability of the EU to set up such a litigation forum for private parties, which might serve as a pilot for similar projects in other legal realms in the future. Hence, the quality of the new Court system might also have an impact beyond the world of patents.

Consistency will be the key to success for the new system. Despite Brexit, the UPC Agreement is still influenced by the common law tradition, thus conferring a great deal of discretion to the judges. This legislative framework, in conjunction with the diverse experiences of judges and the different legal cultures, will naturally require a process of discovery over the coming months. Nevertheless, in the long run, a unified Court needs to apply a unified practice to limit the risk of forum shopping. In other words, inconsistencies between the different Divisions will undermine the central idea of *one* Court of First Instance spread across the participating EU Member States (Art. 7(1) UPC Agreement) and the credibility of the system as a whole.

The UPC will establish a cooperative partnership with the Court of Justice of the European Union (CJEU) as its interpretation and application of the UPC Agreement must be consistent with EU law. The Divisions of the Court of First Instance should be encouraged to refer a case to the CJEU when there is a question of interpreting

EU law that requires clarification. Waiting for the Court of Appeal to take action on the appellate level will only serve to slow down the process of aligning the practice with EU law and ensuring consistency between the different Divisions.

Most importantly, the UPC will need to establish a reputation for efficiency. It is intended to offer an attractive litigation forum, to provide timely decisions and to reduce litigation costs for patentees seeking patent enforcement in multiple EU Member States. At the same time, the UPC's practice will de facto form part of the European innovation policy in a broader sense. Therefore, the Court should make use of the conferred judicial discretion and apply the principle of proportionality also in a legal-economic sense taking into account not only the need for effective IP enforcement but also the effects of a Court measure on the infringer.

The rise of the UPC marks nothing other than the start of a new era for European patent enforcement, and needless to say it will be interesting to see how the new system develops. Indeed, exciting times lie ahead!

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