

# EU PATENT: ENHANCED CO-OPERATION WITHOUT ITALY AND SPAIN?

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The current European patent system is a fragmented system because patent protection is limited to the member states in which the patent is validated and patents have to be enforced in the national courts. Despite the translation cost reductions brought by the London Protocol in 2008, a European patent owner is still faced with substantial translation costs during validation. Litigating European patents in national courts also brings legal uncertainty, because decisions are not unified. The result is that European patents are validated in just five countries on average.

To overcome these issues, an EU patent and an EU patent court are envisaged. It is believed that a unified European patent system would make it easier and cheaper to obtain patent protection in Europe as a whole and that protection would be grounded in legal certainty.

## EU patent

EU patents would exist in parallel with European patents and national patents. An EU patent would be granted by the European Patent Office (EPO) in the same way as a European patent, but it could only be transferred or revoked, for example, in all states as a whole. Practical advantages of an EU patent include central payment of renewal fees and an end to the current use of local agents.

Over the last 10 years, different proposals have been rejected as the member states were unable to agree on what an EU patent should look like. On December 10, 2010, it was confirmed at the Competitiveness Council that no common agreement on the troublesome translation issue would be possible within the foreseeable future.

As a result, 25 of the 27 EU member states have been authorised by the European Council to use 'enhanced co-operation', as a last resort, to create an EU patent. The countries that opted out, Italy and Spain, may choose to join later on.

The fact that some European countries (Norway and Turkey, for example) are not EU members further complicates the introduction of the EU patent. However, as Norway, Turkey and other non-EU countries are contracting states of the current European Patent Convention (EPC), it is proposed that the patent owner will be able to choose between: an EU patent valid in the co-operating countries; an EU patent valid in the co-operating countries but also designating any EPC contracting states; and a European patent as it is currently known.

The proposed solution to the translation issue is that an EU patent would be published in the same way as a European patent and machine translations would translate the patent into all other EU languages. However,

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transitional arrangements would exist until machine translations are of a sufficiently high standard. A full mandatory translation obligation applies to the proprietor in case of a dispute.

## EU patent court

On March 8, 2011, the Court of Justice of the EU (CJEU) concluded that the draft agreement to create a European and EU Patent Court (EEUPC) is not possible under provisions of EU law.

The EEUPC would be outside the institutional and judicial framework of the EU and comprise a court of first instance (with central and national divisions), a court of appeal and a joint registry.

Firstly, the EEUPC would be given the exclusive right to handle a number of proceedings (infringement actions, for example) that are currently heard by the national courts. Secondly, the right to ask for a preliminary ruling would be removed from the national courts and reserved for the EEUPC.

The CJEU concluded that both limitations are incompatible with the very nature of EU law.

## Moving ahead

As the creation of an EU patent system under enhanced co-operation is a legally distinct procedure, it can go ahead despite the CJEU's conclusion on the EEUPC.

Even if the proposed solution to the translation issue is adopted, there are still unresolved issues that can get in the way. These issues include the level of renewal fees and their national allocation, and the CJEU's involvement in cases where the European Commission has suggested strict obligations for judges and sanctions in case of violations of EU law, which could delay proceedings.

In conclusion, there are still many unsolved hurdles and it will most likely take several years before enhanced co-operation is put into effect, and without Italy and Spain. ■

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