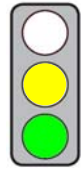


MAIN ISSUES

Objective of the Regulation: An EU patent providing patent protection for the entire EU and a European patent court system is to be established.

Affected Parties: Enterprises, research institutes, patent offices.



Pros: (1) The EU patent lowers the costs for the granting of patents by limiting translation requirements to a necessary minimum.

(2) A joint court for European patents and EU patents (EUPC) reduces law enforcement costs and increases legal certainty.

Cons: Aspects of the Draft Agreement on the European and Community patents court which are not in line with EU law must be corrected.

CONTENT

Title

Revised **Proposal COM(2000) 412** in the version of the General Approach of 4 December 2009 for a **Regulation** [of the European Parliament and] of the Council on the Community patent ("EU patent")

Proposal COM(2010) 350 of 30 June 2010 for a **Regulation** of the Council **on the translation arrangements for the European Union Patent**

Draft of the Council of 23 March 2009 of an **agreement on the European and Community patents court** (Council Document 7928/09)

Brief Summary

► Context and target

- Currently, patent protection can be granted through:
 - national patents issued by national patent offices to a Member State or
 - European patents granted within a centralised procedure to one or several contracting states by the European Patent Office (EPO) under the European Patent Convention (EPC).
- A "European patent" (formerly "Community patent") is a group of essentially independent nationally-enforceable patents, whose registration, examination and allocation is carried out centrally by the EPO. The European patent has the same effect in each contracting state where it is granted as the national patent – subject to possible national translation requirements (Art. 2 (2), Art. 65 EPC). 15 out of 37 EPC Contracting States – including Germany – consented as part of the "London Agreement" to forego translation requirements fully or partially.
- The "EU patent" is to be introduced as a third option, along with the national and the European patent, providing patent protection to the entire EU. At the same time, a European patents court system is to be established. The aim of the EU patent is to provide applicants with an easier and cheaper EU-wide patent protection. With a court for European patents and EU patents, the solving of legal disputes on patent granting and patent infringements is to be more consistent and calculable as it avoids parallel proceedings before national courts.
- As a legal basis for the introduction of EU patents and a European patents court system the following documents are intended alongside the EPC:
 - a Regulation on the EU patent [COM(2000) 412],
 - a Regulation on the translation arrangements for the European Union patent [COM(2010) 350] and
 - an agreement on the European and Community patents court [Draft of 23 March 2009 (Council Document 7928/09)].

► EU Patent: EU Patent Regulation

- The EU patent applies uniformly to the entire EU (Art. 2 (2) EU Patent CR). It is granted by the EPO under the provisions of the EPC as a "European patent designating the EU" (Art. 2 (1) EU Patent CR).
- The Regulation should "in particular establish the law applicable" to the EU patent which is relevant *after* it has been granted (Recital 3 EU Patent CR), for example for
 - the scope of the EU patent (Art. 7 et sqq. EU Patent CR),
 - the transfer (Art. 15 EU Patent CR) and licensing (Art. 19 et sqq. EU Patent CR) of the EU patent as an object of property,
 - the revocation (Art. 28 EU Patent CR) and
 - the lapse of the EU patent (Art. 27 EU Patent CR).
- In addition to the Regulation, the provisions of the EPC apply "to the extent that this Regulation does not provide for specific rules" (Art. 2 (4) EU Patent CR).

► **Translation requirements: Translation Regulation and European Patent Convention**

- The EU patent specification is to include the description, claims and any drawings (Art. 2 lit. b Translation CR). It is to be published in the language of the proceedings and, in addition, translated into one of the other two official EPO languages (Art. 3 (2) Translation CR in conjunction with Art. 14 (6) EPC).
- The wording of the EU patent in the language of the proceedings is deemed binding (Art. 3 (2) Translation CR).
- After the publication of the EU patent, Member States must not require any further translation as a prerequisite for its effectiveness (Art. 3 (1) Translation CR).
- Patent applications must be filed in one of the official languages of the EPO – German, English or French. Simultaneously, this choice determines the language of proceedings before the EPO (Art. 3 (2) Translation CR in conjunction with Art. 14 (3) EPC). If applications are filed in another language, the applicant must translate them into one of the EPO languages afterwards (Art. 14 (2) in conjunction with (1) EPC).
- Patent applicants having their residence or business seat in a Member State with an official language other than the official languages of the EPO are to obtain an additional reimbursement of the costs for the translation into the language of proceedings, beyond the currently already existing fee relief for such countries (Recital 5 Translation CR; cp. Rule 6 (3) of the 1st Chapter Implementing Regulations to the EPC on the reduction of fees). The Commission favours a full reimbursement of the costs by means of the patent fees collected by the EPO (p. 8 Translation CR).
- In the event of a legal dispute relating to an EU patent, the patent proprietor must provide a “full translation” at his or her own costs if requested by:
 - the competent court (Art. 4 (2) in conjunction with Recital 4 Translation CR) or
 - the “alleged infringer”, who can choose either the official language of the Member State in which the patent infringement took place or in which the infringer is domiciled (Art. 4 (1) Translation CR in conjunction with Recital 4 Translation CR).
- By the time the Regulation enters into force, a “system of machine translations” for EU patent specifications into all official EU languages should be in place. Machine translations should not have any legal effect but serve “information purposes only” (Recital 6 Translation CR).

► **European patent court system: European and Community Patents Court Agreement (EUPCA)**

- The court for European and EU patents (EUPC) is to have sole responsibility in the case of civil law disputes on the validity and infringements of European and EU patents (Art. 15 EUPCA).
- It is to comprise a court of first instance, a court of appeal and a registry (Art. 4 (1) EUPCA). The court of first instance is to comprise:
 - a central division as well as
 - local and “regional” divisions to be set up at the request of contracting states (Art. 5 EUPCA). A “regional” division – i.e. cross-border – can be set up only at the request of two or more contracting states (Art. 5 (5) EUPCA).
- The panels are to be composed of both legal and “technically qualified” judges (Art. 10 EUPCA).
- The language of the proceedings
 - at the court of first instance
 - before any local or regional division is to be either one of the official languages of the contracting states hosting a division or sharing the regional division (Art. 29 (1) EUPCA);
 - before the central division is to be the official language of the EPO which granted the EU patent (Art. 29 (5) European and Community Patents Court Agreement);
 - before the court of appeal is to be the official language of proceedings used before the court of first instance (Art. 30 (1) EUPCA).
- The divisions of the EUPC may provide interpretation facilities at oral proceedings “to the extent deemed appropriate” (Art. 31 (2) EUPCA).
- If in the course of the proceedings a question arises related to the interpretation of EU law or the validity and interpretation of acts by EU institutions, the court of first instance may submit such questions to the ECJ for a preliminary decision (Art. 48 EUPCA).
- Decisions made by the EUPC on EU patents shall have a binding effect for the entire EU; in the case of the European patent, they are binding for the contracting states to which the patent was granted (Art. 16 EUPCA).

Changes Compared to the Status Quo

- To date, a European patent could only be granted to the European Patent Convention contracting states designated in the patent application, whereas the EU patent is valid per se for the entire EU.
- Unlike the European patent, the EU patent does not provide for Member States requesting any additional translation requirements for the patent’s validity.
- A European patent court system for disputes on European and EU patents is to stand alongside the national courts, which are then only responsible for national patents.

Statement on Subsidiarity by the Commission

An EU patent with a binding legal effect for the entire EU and uniform translation rules can be achieved at Union level only.

Policy Context

The Council's negotiations regarding the Commission's Proposal for an EU Patent Regulation from the year 2000 have been deadlocked mainly due to disagreements about translation requirements. At the beginning of 2009, Member States agreed on a draft agreement on the establishment of a European patent court system, and at the end of 2009 they agreed on a revised Proposal for the establishment of a uniform EU patent. In June 2010, the Commission submitted a Proposal on translation rules for the EU patent.

In July 2009, the Council submitted the draft version of the European and Community Patents Court Agreement to the ECJ in order to have its consistency with EU law assessed in a legal opinion. Within the Council itself there is not yet any consensus on the draft agreement: some Member States have "fundamental legal concerns" (nos. 6 and 9 of the Council's conclusions on improving the patent system in Europe of 7 December 2009). The ECJ's legal opinion has not been published yet. Since August 2010, the opinion by the Advocates General has been unofficially accessible ([Opinion 1/09](#)). They deem some of the proposed rules for an EU patent court system as inconsistent with EU law.

Legislative Procedure

EU Patent Regulation:

01 August 2000 Adoption by Commission
04 December 2009 General Approach in the Council

Regulation on Translation Arrangements:

30 June 2010 Adoption by Commission

Options for Influencing the Political Process

Leading Directorate General:	DG Internal Market
Committees of the European Parliament:	Legal Affairs (in charge), rapporteur (not yet known)
Committees of the German Bundestag:	Committee on the affairs of the European Union (in charge)
Decision mode in the Council:	- EU Patent Regulation: qualified majority - Regulation on Translation Arrangements: unanimity

Formalities

Legal competence:	- EU Patent Regulation: Art. 118 (1) TFEU - Regulation on Translation Arrangements: Art. 118 (2) TFEU
Legislative procedure:	- EU Patent Regulation: Ordinary legislative procedure (Art. 294 TFEU, ex-Art. 251 TEC) - Regulation on Translation Arrangements: Special legislative procedure (Art. 289 (2) TFEU)

ASSESSMENT

Ordoliberal Assessment

The completion of the internal European market also affects patent law. **The EU patent facilitates the free movement of goods, services and investments. The European and EU Patents Court Agreement contributes substantially** to legal consistency and thus **to legal certainty** throughout the EU.

Impact on Efficiency and Individual Freedom of Choice

The societal aim of a patent is to set incentives by granting exclusive marketing rights to patent proprietors for a limited period of time. In return, the patent proprietor is obliged to publish his or her inventions, which in turn promotes the dissemination of new ideas. How well a patent fulfils this task depends especially on the relationship between patent costs and expected profits. A European patent validated in one of the 13 largest EPA contracting states is, in relation to the number of citizens, more than five times more expensive than a US-American patent and almost two times more expensive than a Japanese patent. This difference is mainly due to national translation requirements when granting a European patent.

The proposed restriction on translation requirements will make the EU patent significantly cheaper than the European patent. The planned system of machine translations enables researchers to obtain quick information on prior art. This promotes the fast dissemination of knowledge.

Compared to US-American patents, proprietors of European patents can incur relatively high costs, even after a patent has been granted, as until now national courts have been responsible in the case of a dispute. This has frequently meant parallel court proceedings in several states, thus leading to high law enforcement costs. **The proposed European and EU Patents Court reduces significantly law enforcement costs for both the European and the EU patent, since actions in several states become superfluous.**

Moreover, **the European and EU Patents Court contributes substantially to legal consistency in the EU and thus to legal certainty.** For until now the competence of national courts has always led to different and contradicting decisions. Besides, a consistent case law facilitates out of court settlements, as judgements become more predictable. In providing one single binding language version of an EU patent only, the existence of different legal interpretations due to translations is avoided. That the European and EU Patents Court should be composed of not only legally but also technically qualified judges strengthens the court's judgement in often very technical patent law issues.

Impact on Growth and Employment

The EU patent also enables small and medium-sized enterprises (SMEs) to obtain an EU-wide patent protection; to date, this was often too expensive due to high costs and low legal certainty of the European patent. The new provision increases SME's willingness to invest, research and develop, and thus promotes growth and employment.

Legal Assessment

Legislative Competence

The legal basis for the creation of an EU patent is Art. 118 (1) TFEU (European legal title for the protection of intellectual property rights); translation arrangements of EU patents are based on Art. 118 (2) TFEU.

Subsidiarity

An EU patent with legal effect for the entire EU and the relating translation arrangements can be established at European level only.

Compatibility with EU Law

In its legal opinion on the Draft Agreement for setting up a European and EU Patents Court, **the Advocates General of the ECJ consider several provisions** – though not the construct of the European and EU Patents Court per se – **as being not in line with EU law** (cp. No. 123 of the [Opinion 1/09](#)). First, the application of EU law to patent granting through the EPO and its judicial control is allegedly not ensured. Particular reference is made to the appeal's procedure, for which independent boards of appeal are responsible (Art. 106 EPC). After an appeal's procedure has been carried out, there are no other options for a court examination. However, this is an aspect which would affect the revision of the EPC and therefore is not part of the question of whether or not the EUPCA is in line with EU law.

Second: the full application of EU law through the European and EU Patents Court is allegedly not ensured, since the Draft Agreement does not refer to it sufficiently. This would affect first and foremost primary law, but also general principles of law. Although a general suggestion in the Draft Agreement does already exist that the court "shall respect" EU law (Art. 14a EUPCA).

Third: **The rights of defence at the European and EU Patents Court are not sufficiently ensured since only the official EPO languages German, English and French are languages of proceedings** before the central division of the first instance. The issue at hand, however, is rather that the interpretation and translation during a procedure is at the discretion of the court and cannot be requested by the parties (in contrast to Art. 30 §1 Rules of Procedure of the ECJ).

Fourth: besides, legal **protection is insufficient where the European and EU Patents Court infringes EU law** and, in particular, fails to comply with the obligation to submit cases for preliminary decision to the ECJ (Art. 48 (1) EUPCA), because **no legal remedy is provided.**

If the ECJ follows the non-binding legal opinion of the Advocates General – which is likely – then there is considerable need for revision of the Draft Agreement. **The aspects rightly mentioned by the Advocates General** – such as rights of defence and legal remedy – **could, however, be easily modified** in the EUPCA.

Alternative Action

As an alternative to the introduction of the EU patent and the European and EU Patents Court, the less far-reaching further development of the European Patent Litigation Agreement (EPLA) ([Draft](#) of 2005) could be taken into account. It provides for the establishment of a European Patent Court which would be competent in the case of complaints regarding infringements and the validity of European patents.

Conclusion

The EU patent facilitates the free movement of goods, services and investments. The limitation of translation requirements for EU patents leads to cost savings as the EU patent becomes much cheaper than the European patent. The European and EU Patents Court contributes considerably to legal certainty. Moreover, it lowers the law enforcement costs for both the European and the EU patent significantly. Legally critical aspects of the Draft Agreement on a European and Community Patents Court can be corrected selectively in order to ensure the Agreement's consistency with EU law.