



Is it time to rethink Unitary Patent Protection?

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The Unitary Patent, UP, has already established itself as a popular and valuable choice for EU patent protection and is well supported by the Unified Patent Court, UPC, which is providing a reliable venue for EU-wide enforcement. The 2024 uptake of Unitary Patent Protection is over 25%¹, meaning that one in four European Patents is being validated as a Unitary Patent enjoying unitary effect in key European jurisdictions. Patentees from Germany and the US are the most active beneficiaries of Unitary Patent Protection, closely followed by China and the remainder of the EU.

¹[Statistics & Trends Centre | epo.org](https://www.epo.org/statistics-and-trends-centre)

Certain users of the European Patent Office, EPO, remain cautious about Unitary Patent protection, perhaps being concerned about the threat of central revocation: a single negative validity decision leads to revocation of the entire Unitary Patent. This concern led many Patentees to “opt out” their existing European Patent portfolio from the jurisdiction of the UPC; many still continuing to use the traditional validation route followed by an opt out. Whilst maintaining the status quo for existing portfolios made good sense in 2023, the first 18 months of the Unified System have shown that it is time to start rethinking Unitary Patents and the UPC.

The Unified Patent Court, UPC, is proving to be an infringement venue:

Compare the ca. 240 pending infringement cases with the 55 standalone revocation actions¹, whilst considering the fact that there are well over 250,000 granted patents falling under the jurisdiction of the UPC, and it is immediately apparent that the UPC is only being used to attack European and Unitary Patents if there is a tangible and immediate threat. The statistics to date make clear that third parties have little appetite for launching standalone revocation actions in front of the Unified Patent Court.

CENTRAL REVOCATION: REAL OR “THEORETICAL” RISK?

Reluctance to use the UPC standalone revocation likely has several causes, the first of these being cost risk. Actions for revocation in front of the UPC

are complex, expensive and a cost risk is borne by all parties: the losing party is required to pay at least some of the winning parties' costs². Contrast this with the well-established, cheaper and cost-risk-free Opposition in front of the EPO³, and it becomes readily apparent why many third parties' first choice validity venue will be EPO Opposition for recently granted European patents.

Combining the statistics on UPC revocation actions to date with the continuing EPO Opposition: the savvy Patentee should not be swayed too far toward caution when considering the “risks” of the Unitary Patent! Central UPC revocation is proving to be more of a *theoretical risk*, wherein this “risk” should not be given too much weight when considering the benefits of Unitary Patent protection over traditional validation followed by opting out of UPC jurisdiction.

¹[Case load of the Court end November 2122024.pdf](#)

²[rop_en_25_july_2022_final_consolidated_published_on_website.pdf](#)

³[Oppositions | epo.org](#)

It is time to adapt validation strategies in Europe!

ECONOMIC CONSIDERATIONS

The majority of granted European patents are validated in only a few EU member states.¹ The first question must be why, when it is possible to obtain wide protection for a granted European patent, are so few EU countries validated? “Historical practice” is probably the main cause, however, the original decision was likely because these countries:

- were of greatest economic interest;
- had the highest likelihood of patent infringement; and
- were crucially the countries in which it was likely to be economically viable to actually enforce the granted part of the European patent.

¹[Data to download | epo.org](#)

It seems unlikely that, historically, infringers were only active in the few chosen EU member states: most probably the validation decision was based upon the economic balance between the costs of validating widely within the EU and the benefits of obtaining damages and injunctive relief in a second-tier market.

The entire EU validation landscape has now changed with the Unitary Patent requiring a serious rethink of existing policy!

The Unitary Patent affords wide geographic protection² providing significant injunctive relief within the EU in combination with simplified, single court enforcement. Today, even before the Unitary Patent is fully valid across all participating EU member states, the injunctive relief of a Unitary Patent extends to 318 million people with a GDP of \$15.7 trillion. The economic reach of the Unitary Patent has completely changed the traditional norms when considering EU validation: every Patentee must newly consider whether obtaining patent protection in only two or three EU member states is a realistic economic decision. Does it make economic sense to only validate a European Patent in France and Germany, when the small extra costs for a Unitary Patent grants access to greatly increased injunctive relief and a wider potential market? Perhaps the better question is: *can we afford not to take a Unitary Patent?*

UNITARY PATENT VS BUNDLE PATENT RENEWAL FEES

The Unitary Patent yearly renewal fee coincides with the cost of the four most used jurisdictions within the Unitary Patent System.³ This comparison, however, is incomplete: paying four individual renewal fees also costs money, either administratively or via a third-party provider. The actual comparative cost for the Unitary Patent renewal fee vs. renewal fees for individual validations is much closer to *three*

² [UPC Member States | Unified Patent Court](#)

³ [Renewal fees | epo.org](#)

member states. Even if protection beyond two Unitary Patent states is only vaguely interesting, it is probably worth obtaining the Unitary Patent over the two individual validations.

LEGAL BENEFITS - MULTIPLE JURISDICTIONS

In addition to economic benefits, significant legal reasons exist for choosing Unitary Patent protection. The unitary nature of this patent right likely improves and streamlines patent enforcement for patents covering computer inventions. The ability to launch a single enforcement action across multiple jurisdictions has the potential to significantly simplify cases where several EU states need to be combined to infringe a claim, but only individual parts of the claim are infringed in separate EU states. One may imagine a claim covering a computer based method being infringed where cooperating servers are located in France and Germany and the final implementation occurs in Italy: a single Unitary Patent covers each of these jurisdictions allowing for simple enforcement of such a claim; such a simple legal process is rarely achieved via cross-border litigation in one or other of the jurisdictions.

COMPETITOR ACTIVITIES

Whilst a Patentee's activities are important when considering the geographic scope required, **it is also important to consider the activities of potential infringers.** One of the major advantages of being active within the EU is the free movement of goods between European member states. Competitors active in internet sales may continue operating in much of the EU even when facing infringement actions in individual EU member states, significantly blunting the effect of geographically limited patent protection. For high value goods: competitors may readily take significant second-tier market share in states where no patent protection is in force. Imagine, instead, the challenges facing competitors if protection and possible enforcement actions were

to cover the majority of the EU! Unitary Patent protection increases the economic viability of enforcing patent rights to a wider field of potential infringers – including those who are active across much of the EU and previously had the option of simply stopping or avoiding sales into the EU member states where patent protection was held.

Unitary Patent protection may even generate a whole new group of competitors for enforcement and licencing. Imagine a competitor selling only minimal numbers of infringing products in a large number of EU member states: it is economically

unviable to launch enforcement actions against such a competitor on a state-by-state basis, the competitor may simply stop sales altogether in such states or has such low sales that victory doesn't justify the costs. Such concerns are swept away with a Unitary Patent, allowing the Patentee to have a serious impact on the majority market of such potential infringers and making enforcement action a viable choice. Additionally, the Unitary Patent offers a route to new licencing revenue from secondary markets where enforcement is not critical, but in which competitors are active.

Summary

With the excellent uptake in Unitary Patent protection being accompanied by legal predictability at the Unified Patent Court, now is the time for Patentees to seriously consider Unitary Patent protection. Whether Unitary Patent protection is beneficial depends on a number of aspects, but a good place to start is to answer the following:

- Why do we only validate in certain EU countries?
- Is this still the correct decision in light of the reach of the Unitary Patent?
- Are we tolerating competitors because of their business model, and will the Unitary Patent provide the tool we need?

Only when these questions are properly answered can a real decision on the individual benefits of Unitary Patent protection be made.

We at Meissner Bolte believe that the Unitary Patent provides significant benefits across all technical fields and for most active Patentees within the European Union. Whilst the Unitary Patent may not be appropriate in every case, ignoring this option and holding on to an out-of-date validation policy is most unwise and could leave you lagging behind your patent-savvy competitors.

Please do not hesitate to contact us to discuss the above and how we could advise you further on whether the Unitary Patent is now the right decision for some, or even all, of the patents in your portfolio.