

# Unitary Patent

This fall, you will vote on the regulation regarding the unitary patent and the unified patent jurisdiction. It could become a great opportunity to have a real UE regulation on patents, spurring innovation and knowledge society, if it were to tackle some crucial issues the patent system currently faces.

## The current patent system and the envisioned reform

There currently is a common patent system at the European level, which is regulated by the European Patent Convention of 1973 and organizes the European Patent Office (EPO). It is often seen as unsatisfying however, mostly because of its complexity and lack of democratic overview. Consequently, the EU has been envisioning since 2011 a new project of a unitary patent, which would be based on enhanced cooperation between 25 Member States.

In more concrete terms, this project would modify three parts of patent law:

- it would create a unitary patent title for all participating states. Currently, the patent titles granted by the EPO need to be also filed with national patent offices as well.
- a new unified jurisdiction would be the judge in first and last resort on all issues regarding the new patent title. This court would be constituted of specialized judges, and some plans without any recourse in front of an independent court.
- the linguistic issue: patents will be only translated in French, English, and German – leaving all other languages to automatic translation and its limitation.

The first two points are the most concerning, and were the reason for the postponement of the vote in Parliament last July: although the trilogue had reached an agreement and the JURI committee did not amend it to respect the compromise, the Council broke it by demanding that key points of the regulation should be deleted. Such a deletion would actually render the text illegal<sup>1</sup> and would actually threaten innovation. But this temporary drawback can also be seen as a new opportunity, as it gives you the chance to improve it.

## Revisions needed: legal uncertainties threatening innovation

The main concerns of companies and innovators are about the legal certainty and applicability of the proposed regulation, enhanced by the project's history. Indeed, a first version of the project was deemed incompatible with the Treaties by the European Court of Justice, which pointed out that it would deprive Member States and European

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<sup>1</sup> See for instance the opinion of the Legal Services of the EP, quoted during July JURI Committee meeting.

institutions of its powers, and questioning the very nature of EU law<sup>2</sup>. Moreover, the agreement on the unified jurisdiction was only minimally amended, although the regulation on the patent title was rewritten: some concerns remain, especially regarding the viability of the legal basis of the current regulation, which might not be in accordance with the Treaties<sup>3</sup>.

For businesses and innovation, however, it makes a unitary pointless: they are unlikely to file for a patent title that might get canceled in a few months by the ECJ. It is hence crucial, both for innovation and the respect of due process, that the text be amended in favor of a clearer regulation of the patent system, at least with some democratic overview.

## The European patent system needs an overhaul

Many actors have been calling for a complete overhaul of the European system and of the EPO governance, including the enlarged Board of Appeal of the European Patent office itself in 2010 *"when judiciary-driven legal development meets its limits, it is time for the legislator to take over"*<sup>4</sup>. No action has been taken though, and the EPO is still granting many controversial patents, including software patents, in disregard with the European Patent Convention and the repeated affirmations by the European Parliament of the illegality of such practices<sup>5</sup>.

Even worse, whatever little control on patentability that's left would be given away, as the unified jurisdiction would be comprised of *"specialized"* judges only, without any possibility to appeal to an independent court. Such a system does not exist in Europe for any kind of law, no matter how specialized. It would entail that a small group of specialists who might know each other and work in the same offices would be able to decide everything regarding the patent system. Checks and balances need to be put into place by ensuring a democratic overview, which the European Parliament would be best qualified to do and would be in accordance to the Lisbon Treaty<sup>6</sup>.

## Solutions for innovation, legal certainty and due process

Simple solutions could ensure such an overview, and April offers its expertises and suggestions. Among those, an inclusion within the regulation that patentability is ultimately the legislator's competence. As recent trials have shown, patentability is a hotly debated topic and the EU should avoid falling into the current US situation – where litigation seems to be the norm rather than the exception. It is hence crucial that MEPs, as elected representatives, keep an overview in order to prevent such drift.

**For more information and suggested amendments, all our documentation is available on <https://www.unitary-patent.eu/>**

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2 *"the envisaged agreement [...] would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law."* <http://www.april.org/en/analysis-opinion-european-court-justice-unified-patent-court>

3 For more information, see for instance <https://www.unitary-patent.eu/content/legal-basis-unitary-patent-do-not-play-fire>

4 OPINION of the Enlarged Board of Appeal of 12 May 2010 in relation to a point of law referred by the President of the European Patent Office pursuant to Article 112(1)(b) EPC , available on [http://documents.epo.org/projects/babylon/eponet.nsf/0/DC6171F182D8B65AC125772100426656/\\$File/G3\\_08\\_opinion\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/DC6171F182D8B65AC125772100426656/$File/G3_08_opinion_en.pdf)

5 For more criticism of the EPO practices, see for instance <https://www.unitary-patent.eu/content/criticisms-governance-european-patent-office>

6 Article 118 (1) of the Treaty (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008e118:en:HTML>)

## About April

Pioneer of free software in France, April is since 1996 a major player in the democratisation and the spread of Free Software and open standards to the general public, professionals and institutions in the French-speaking world. In the digital era that is ours, it also aims to inform the public on the dangers of an exclusive appropriation of information and knowledge by private interests.

The association has over 5,000 members, using or producing Free Software.

For more information, you may go to the following website: <http://www.april.org/>, contact us by phone at +33 178 769 280 or through our [contact form](#).

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