

PATENTS: THE LONG EUROPEAN ROAD THAT HAS LED TO NOWHERE

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Starting at the end, the patent system in Europe, despite the efforts made in recent years, has not undergone any significant change since the London Agreement came in to force in 2008. Nor is any substantial change expected in the short or medium term, due to the paralysis, or even dismantling, of the European patent with unitary effect and of the Unified Patent Court (UPC). After these last 10 years, we are practically back where we started and we maintain the same patent practice in Europe.

The entry into force of the European patent on 1 June 1978 made it possible to grant a patent centrally for most European countries. Subsequently, the London Agreement significantly reduced the costs generated by the translations required for the entries into the national phase as from 1 May 2008. These agreements represented great progress, but a single Community patent in force in all EU countries had not yet been achieved, unlike the Community trade mark and design, which became a reality in 1994 with the creation of the EUIPO.

For decades, the EU has been trying to achieve a framework for patents that is comparable to that of trademarks and designs. The lack of agreement among EU countries has not made this possible. The regulation that created the Supplementary Protection Certificates (SPCs) is the only noteworthy success of the EU in the field of patents.

Spain, and initially Italy, prevented the progress of the Community patent, which required unanimity of the EU member countries. For this reason, it was finally decided to use the enhanced cooperation procedure, which allows at least nine EU countries to reach agreements without the participation of the other countries. This procedure is designed to overcome paralysis, when a proposal is blocked by a single country or by a small group of countries that do not wish to participate in the initiative.

Authorisation to proceed with the enhanced cooperation is granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament. This is not a standard procedure, patents being one of the few areas where their use has been authorised.

Once the obstacle of lack of unanimity was overcome, a complex procedure was designed to make the European patent with unitary effect a reality, including the creation of a new patent court (UPC) by means of an international agreement. Everything pointed to the system coming into force, but that Spain, Poland and Croatia would be left out, at least initially.

For the system to enter into force, at least thirteen contracting states, including Germany, France and the United Kingdom, would have to ratify the regulations giving rise to the European patent with unitary effect, and the agreement to establish the UPC. This court would have different locations, with one of the headquarters of the Central Division (chemistry, pharmacy, and related areas) in London.

However, the project practically came to a standstill with Brexit. Although the United Kingdom ratified its entry into the system, and even declared that it saw its permanence in the system after Brexit as feasible, it has finally declared that it will not be in the European patent with unitary effect.

The abandonment of the second European economy in the system means less interest in the European patent with unitary effect, but also a serious logistical problem as the Central Division, that was planned in London, had to be relocated and the work carried out to create this Division had to be repeated. This undoubtedly led to a significant delay in the possible implementation of the system.

However, the coup de grâce to the system came on 20 March 2020, when the German Constitutional Court ruled that the ratification of the Agreement for the creation of the UPC was not constitutional. This decision is not appealable and forces a new ratification of the agreement by the German federal parliament by at least two-thirds majority, and very possibly a change in the legal framework governing the UPC before its possible implementation. It should not be forgotten that, without Germany's entry into the system, the system cannot get off the ground.

Hardly anyone doubts at this time that the European patent system with unitary effect needs to be completely rethought, including changing the agreement for the creation of the UPC. Moreover, the implementation of the system is now of less interest as Europe's second-largest economy is left out. And, for the time being, also the fourth in the euro zone, which is Spain, and the sixth, Poland. In short, everything seems to indicate that neither in the short nor medium term will there be changes in the current European patent system. It should not be forgotten that Brexit does not affect the current situation, since the European Patent Convention, which regulates European patents, is not EU legislation but an international treaty that will continue to operate as it has done up to now.

The only direct change brought about by Brexit will be for British SPCs, managed by EU regulations so far. However, according to the EU Withdrawal Act, the SPCs will initially be regulated in the same way, maintaining the regulation as a national law. Obviously, at any time, the UK can make changes to its regulations, for example on the implementation of the manufacturing waiver.