THE EUROPEAN PATENT WITH UNITARY EFFECT. OPPORTUNITIES AND LIMITATIONS FOR INNOVATIVE PROJECTS

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Introduction/background: in 2023 organizations can apply for a European patent with unitary effect in 25 European Union countries. The system brings many simplifications to obtaining protection, but it also comes with some limitations.
Aim of the paper: the aim is to explore the possibilities and limitations that a European patent with unitary effect can potentially give to organizations concerning the innovative solutions they obtain within their projects.
Materials and methods: this paper uses the formal and dogmatic method typical of legal sciences. It examines the international and EU laws and legal literature.
Results and conclusions: the procedure of obtaining a unitary patent will be faster, simpler, and cheaper, as translations into the official languages of all granting countries will no longer be necessary. A Unified Patent Court will be one institution to decide patent cases, so a unified and consistent line of jurisprudence can also be expected. However, there are some significant flaws in the system – there is complicated construction, peculiar language discrimination in registration and court proceedings, the problem of equal access to the court, and arguments about the system's cost-effectiveness, mainly for entities from rich and technologically advanced member states. Taking advantage of the unitary patent will require a rethink, increased vigilance, and caution from innovation project managers, as well as a calculation of potential gains and losses.

Keywords: European patent with unitary effect, project management, intellectual property protection.

1. Introduction

Projects are becoming more specialized and their success depends more and more on specific knowledge and skills in a given field. This, in turn, is closely related to the issue of intellectual property – its creation or use of the existing one, at almost every stage of the project: from conceptualization of the idea, through research and development activities, to obtaining the product (WIPO, 2005; Negruta, Naftanaila, 2011). Especially in innovative

business projects, we deal with many results in the form of intellectual property items, i.e., works, trade secrets, utility models, industrial designs, and inventions. From the point of view of the organization that manages the project, the most desirable will be those that will help achieve the assumed goal and respond to a specific existing problem. Often, however, the key to success will be the appropriate and effective protection of the project's products. The system of the legal protection of intellectual property provides support here, thanks to which the organization has a chance to enter the market with a product that is ahead of the competition.

The subject of interest of this paper is the protection of an invention by patent – a property right giving exclusivity in the use and disposal. However, this work focuses on the mechanism adopted by some member states of the European Union, which gives possibility to obtain protection in many countries simultaneously with a simplified and faster procedure. Legal analyses in this field have already been carried out in the literature, especially when the relevant law was passed in 2013. However, only now, in 2023, will they enter into force, so it will be possible to start applying them. It is, therefore, worth re-examining these regulations and the current, finally shaped solutions, taking into account the anticipated opportunities and limitations. As it turns out, these opportunities are promising, but the voices of criticism cannot go unnoticed. Therefore, the purpose of the work is to analyze them from the perspective of organizations that would be interested in obtaining patent protection for their innovative solutions at the European level, but with a unitary effect in all countries participating in the system.

2. Patent and its role in an organization

Intellectual property is an important component of the organization's resources, having a significant impact on its functioning and projects undertaken. Effective intellectual property management contributes to the commercial success of implemented projects, including the possibility of transferring their results to practice. On a macro scale, however, the number of registered and cited patents says a lot about the level of innovation of a given economy. Intangible goods, which are the result of creative, inventive, scientific, or design activities of an organization may arise at different stages of the project and be a result of various intentional or accidental actions. Some of these intellectual products of design work can acquire legal protection if they meet some fixed criteria: they are, for example, creative (they are works within the meaning of copyright law) or, what is of interest in this paper, namely, the invention.

Based on the provisions of the European Patent Convention of 1973 (EPC), an invention is a new technical solution (Art. 54), should involve an inventive step (Art. 56), and is susceptible of industrial application (Art. 57). The novelty of the solution means that it does not form part of state of the art; it cannot be known anywhere in the world before (Sieńczyło-Chlabicz, Banasiuk, Zawadzka, 2013). In addition, the solution must have an inventive level and therefore be groundbreaking and surprising even for a skilled expert; it cannot be clichéd or routine use of technical knowledge (Nowińska, Promińska, du Vall, 2008). Industrial application, on the other hand, should be understood as a feature thanks to which, on the basis of the invention, a product may be obtained or a method used, in the technical sense, in any industrial activity, including agriculture. In other words, the invention must be possible to implement in industrial production, repeatable and useful (Kostański, 2010), regardless of its type. It is worth knowing that there are different categories of inventions, that is: products (substances or mixtures), devices (e.g., machines), methods (methods of production), and applications (new use of already known products). However, discoveries, mathematical methods, works, plans, games, or computer programs cannot be considered an invention (Art. 52).

Constantly increasing costs and labour inputs for innovative activity and the risk associated with the subsequent implementation of its effects can be compensated by the state by granting the exclusive right to economic exploitation of innovations. The legal protection of an invention consists of its registration in the appropriate state institution (patent office), which may grant a patent after careful examination of whether the invention meets the criteria mentioned above. Of course, the organization that manages the project should be aware of them, especially since the identification of possible patentability of the emerging solutions takes place during research and development activities. A patent is a document confirming the property right excluding other entities from the possibility of using the invention, creating and selling products based on it, methods of use for a maximum of 20 years, provided that recurring payments are made. The scope of the patent is defined in the patent claims contained in the patent description, and it is from them that the exclusivity for the patent owner results, and not from the essence of the invention (Kostański, 2010). The use of the invention by other entities is possible only with the rightsholder's consent expressed in the form of an agreement authorizing the use of the invention (license agreement). The subjective right can be sold as well. Therefore, patents seem to be of significant importance because they promote innovation, motivate further discoveries and develop ideas, and diffuse knowledge (Furman, Nagler, Watzinger, 2018). Obtaining a patent makes it easier to recover expenditures for the development and implementation of solutions, as well as to gain funds for further projects. This monopoly is supposed to guarantee the patent owner full control and benefit from the invention he owns, which can bring economic and competitive advantages if appropriately managed (Ernst, Fisher, 2014). Patents are also sometimes used as specific measures of innovation, which, being part of an organization's rich portfolio, constitute

specific information addressed to external stakeholders, e.g., investors (Acs, Anselin, Varga, 2002). They are also a significant entry barrier for competitors, i.e., patents are a source of competitive advantage. An organization holding this exclusive right can exploit the product covered by it cheaper than those who have to pay license fees (Koczerga, 2011).

It is also worth mentioning some risks associated with patenting one's inventions. Due to the need for a detailed description of their essence and functionality in the patent application, all sorts of technical information regarding the invention will become public. In addition, patent proceedings take a relatively long time before getting a granting or refusing decision, can be costly because of the necessity of application and maintenance fees, and, at the same time, there is no guarantee that it will bring any benefits to the owner. In addition, there is also the need to control compliance with the patent by third parties. An organization considering applying for a patent should take these arguments into account.

One of the decisions, the implications of which will determine the profitability of maintaining a patent, is the choice of the territorial scope of the desired patent protection. It is because it's territorially limited, i.e., granting a patent in one country does not give the same protection in another. This means that there are various national and regional markets to which patent applications can be directed (Grandstrand, Holgersson, 2014). In the case of organizations wishing to commercialize the inventive results of their projects in more than one country, they can file separate applications in each selected country or use the more practical application at the regional office, in particular at the European Patent Office (EPO, established based on the EPC). However, the procedure is expensive and complicated due to the scope of the examinations to be carried out. In other words, each Member State indicated in the patent application must carry out its prescribed validation procedure.

Another way of transnational protection that extends to the area of the European Union's single market is the European patent with unitary effect (hereafter the unitary patent), the validity of which extends to the territory of all member states participating in the system.

3. The concept of a patent with unitary effect

Unification of the patent law system in the European Union has been the subject of work of European institutions and Member States many times over the last few decades (more precisely, since signing of the EPC in 1973). The aim was to construct such a right that would protect the invention throughout the Community and would not require separate patent applications in the Member States. Undoubtedly, this concept rightly assumes that in the conditions of the EU single market, the fragmentation and complexity of the patent protection system is not conducive to the competitiveness of the EU economy in relation to major players in the global economy. Therefore, the possibility of protecting an invention

throughout the EU with a single application should be an obvious solution that is simpler, faster, less costly and developmental. Moreover, similar solutions already exist in the EU for trademarks and designs (Almeida, Oliveira e Costa, 2018).

This is the function of the unitary patent, which may be granted by the European Patent Office for an invention that meets the conditions set out in previously cited provisions of Art. 52-57 of EPC. Although the procedure is to take place in the same regional institution granting the European patent, thanks to the Agreement on the Unified Patent Court (AUPC) concluded in 2013 and the relevant EU regulations (Regulation 1257/2012 and 1260/2012), it will be possible to ensure uniform protection and guarantee the same effect in all signatory countries, without the need to validate a European patent in national patent offices. However, it should be emphasized that the discussed regulation is not fully a part of EU's secondary law, but is an international agreement concluded between some Member States and, to enter into force, it is required ratification by at least 13 countries, including France and Germany, which have the most patent applications (Nowicka, 2013). Therefore, we are not dealing with a patent of the European Union, because it is not a party to the Agreement. The regulation assumes, however, that at the request of the rightsholder, the patent has effect in the territories of the Member States participating in the so-called enhanced cooperation, i.e. those that have signed the AUPC. The accession is therefore voluntary. Hence Croatia, Spain and Poland, which have not signed the Agreement, remain outside the system. Inventors from these countries (and actually others from around the world) will still be able to apply for a European patent under the existing rules within EPO (Fox and Hoffmann, 2022), and also to obtain unitary patents in those countries where European patents will have unitary effect (Nowicka, 2013).

The Agreement is about to enter into force on June 1, 2023, and thus the Unified Patent Court (UPC) will finally begin its operations (UPC, 2022). This institution is of key importance here, because the uniformity that a patent is to have must also refer to its judicial protection and relevant case-law. This court will have exclusive jurisdiction in matters relating to the unitary patent, including, in particular, infringements in the territory of the countries participating in the system (Skubisz, 2013), invalidation of the patent, etc. It is therefore a single, common and specialized court that will settle European patent law disputes replacing national courts in this respect. The procedure is two-stage. The Court of First Instance is decentralized and divided into central (Paris and Munich), regional (Nordic-Baltic division for Estonia, Latvia, Lithuania and Sweden located in Stockholm) and local divisions located in Member States (currently Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal and Slovenia [Decision, 2022]). A country can host up to four local divisions, and a group of two or more states can set a regional division. Thanks to this solution, proceedings can be conducted in principle in the own country of the party and in the official language of the hosting country. If it is a court for a regional division – in the language chosen by the sharing states. Host countries may also decide to admit the

official language of the UPC or the language in which the patent was granted as the language of the proceedings. In the central division, proceedings will be conducted in the language in which the EPO granted the patent (Art. 49, AUPC). The Court of Appeal is located in Luxembourg, and the language of the proceedings will be the one in which the case was heard at first instance, or the language in which the patent was granted (Art. 50, AUPC).

It is also important to pay attention to the competencies of individual divisions. In general, in accordance with Art. 33 of AUPC, e.g., actions for revocation of patents shall be brought before the central division. Local and regional divisions are hearing infringement actions at the place where the infringing act took place or where the defendant is based. The central division may also hear infringement actions in cases where an action could have been brought in a local or regional division, but a member state does not have one.

The essence of the unitary patent is its effectiveness in all member states (Regulation 1257/2012, Art. 3). After filling a patent application, together with an application for granting a unitary effect, and successful completion of the procedure at the EPO, the unitary patent will be automatically validated in all the participating member states. Therefore, it will not be a new type of exclusive right, but the same one with an extended scope (Szkaradek, 2020). Applying for a unitary status will also be possible for patents granted under the standard European procedure, including those remaining in the registration process (Fox, Hoffmann, 2022). Once granted, the unitary patent will be recognized as an object of property in each member state as a national patent (Art. 7). The unitary patent will co-exist with national patents of EPC signatory countries that are not EU members or which, although EU members, have not joined the unitary patent system. Moreover, it is not intended to replace national patents individually granted by Member States (Almeida, Oliveira e Costa, 2018).

Another issue that needs to be emphasized is the cost of obtaining a unitary European patent. In the current EPO system, it is necessary to bear the costs of translating patent applications into national languages of countries where protection is expected. In the case of a unitary patent, this will not be necessary as the application for registration will have to be submitted in English if the proceedings at the EPO will be in French or German, or in any official language of a Member State which is an official language of the Union if the language of the proceedings at the EPO is English (Regulation 1260/2012, Art. 6). However, such regulation is intended to be only temporary until high-quality (i.e., non-automated) machine translations into all EU official languages are developed. The intention expressed in Art. 3 is that in the future an application for registration can be submitted to one of them. It is worth adding that due to the protection of inventions, support of technological progress and making the system attractive to everyone, it will be possible to apply for reimbursement of translation costs up to a specified limit. Small and medium-sized enterprises, natural persons, non-profit organizations and even universities will be eligible (Art. 5).

The second category of financial burdens includes the costs necessary to keep the patent in force. Let's remind that the legal protection of an invention is possible only on the condition of paying recurring fees, otherwise the patent expires. According to Fox and Hoffmann (2022), such a cost in the case of a unitary patent will be approximately equivalent to the cost of maintaining the conventional European patent with indication of protection in four of the member states.

The system described above appears to be a response to the long-standing expectation of creating unitary patent protection in the European Union. Of course, this mechanism is a consequence of the unification of various economic areas and issues within the Single Market. Businesses and scientific entities will thus be able to apply for a patent for their invention, which will be valid in all countries (in practice, excluding a few of them), there will be a unified judicial body dedicated to it, and the whole procedure is supposed to be faster, simpler and cheaper. It has its obvious advantages, but these actors should also be aware of the limitations, which appear to be significant.

4. Opportunities and limitations of application of the unitary patent

The above short analysis of the regulation of the European patent with unitary effect prompts the search for answers to crucial questions about the possibilities and limitations of its use by an organization implementing innovative projects and wishing to obtain the protection of exclusive rights with a broader than national scope.

The creation of a unitary patent certainly provides its holders with protection over a large territory, even in 25 countries of the European Union. Just one application submitted in one of the official languages of the EPO (English, French, or German) is enough to gain protection in all Member States, as well as the possibility of broader and more effective commercialization of solutions beyond the borders of one's country. This should make it easier for rightsholders to manage their industrial property. It should also be much cheaper since there are no costs of translation into the national languages of all countries where protection is sought; it suffices to limit oneself to the official language of the EPO. As already mentioned, entities such as SMEs, universities, or research institutions may apply for reimbursement of translation costs up to a certain amount. In addition, the EPO is to carry out a much simpler, less formalized, and faster procedure that does not require validation at national levels.

However, the territorial unity of a patent has more questionable consequences. First, in member states where national patents naturally vastly outnumbered European patents, there will automatically be more patents that have been given a unified effect from the outside, as it were. Statistics for 2021 show (Patent Index, 2021) that of all patent applications

registered at the EPO from EU countries (67713), more than half (36506 – 54%) come from France and Germany, with a median value of 286. This means that organizations coming from countries with significantly fewer applications (in 2021. the number of 1,000 did not exceed as many as 17 countries) and seeking legal protection for their innovative solutions will have to take into account this surge in the additional number of exclusive rights in their R&D work, not only in terms of assessing the patentability of their developed solutions but above all given the threat of possible infringement of an existing European patent with unitary effect (Skubisz, 2013). In other words, rights owners from more technologically developed countries have a potential competitive advantage over those from less advanced countries, limiting development activity and widening disparities. The phenomenon of patent trolling, i.e., the deliberate acquisition and maintenance of patents, which are only disclosed by the right holder with license or compensation claims when the solution in question reaches the market through an unwitting entrepreneur or organization, will also be of significance. The unitary patent system may encourage this phenomenon due to the existence of strong players in the European innovation market located most often in the most technologically advanced and wealthy countries, where most European patent applications originate (Malaga, 2016; Beldas et al., 2014). An additional "incentive" for trolls may also be the language regime and jurisprudential exclusivity of the UPC, which we will look at later in the paper.

Secondly, a European unitary patent as a property right is treated in each participating state as a national patent governed by the patent law of that state if the right holder had its domicile, seat, or principal place of business there at the time of filing. If such a place cannot be determined, the patent is treated as a national patent of the country where the EOP is established (Regulation 1257/2012, Art. 7), in this case, Germany. In practice, this means that an organization from a country not bound by the AUPC or enhanced cooperation, such as Poland, can apply for a European patent with a unitary effect, but the content of that effect will be governed by German law. Thus, the protection will be indeed unitary, but the content of the effects of specific unitary patents will be determined by different laws depending on the place of residence or business (Nowicka, 2013). Thus, following Orfin (2021), it may be said, that the granted exclusivity will be a mixture of uniform effects depending on the laws of the member states. Additionally, activities of the EPO in the field of European patents will partly be subject to EU law, because the unitary effect is regulated by the Regulations, and therefore also to the cognizance of the Court of Justice of the European Union. One can see here the confusion in the construction of the system here, due to the diversity of legal sources, since the other crucial normative basis of the system, i.e., the AUPC, is an international agreement concluded outside the structures of the EU, and therefore outside the control of its institutions, including the CJEU. It seems, therefore, that some broader issues related to fundamental rights, the institutional design of the EU, or the specifics of member states' policies, may be overlooked by the UPC, which, after all, specializes in patent law, not EU law, as does the case-law-rich CJEU. This complexity and multiplicity of application of different sources of

law (EU, international and national) must be assessed as a significant drawback of the adopted patent system with unitary effect, which is a view often found in the literature (Almeida, Oliveira e Costa, 2018; Orfin, 2021; Malaga, 2016).

Given the idea of unifying various aspects of the economy, related institutions, and regulations, the creation of the UPC, a single and specialized patent court, will undoubtedly lead to the unification of jurisprudence, the development of common standards in all participating countries, thereby increasing certainty about the law and its interpretation on the part of right holders (Baldan, Van Zimmeren, 2012). In other words, the settlement of disputes and adjudication of infringements of European patents will take place in a single court instead of independently in national courts, and its rulings will be effective and enforceable in all member states. These common standards should result in a higher level of protection for inventions, which could be a definite advantage not only for patent owners but also for the European Union itself, which will be able to be treated on an equal footing with other economic powers. Nevertheless, it is necessary to point out the problems that are associated with the functioning of the Unified Patent Court.

First of all, there is a constitutional issue in the member states, namely the obligation to completely cede judicial competence in the adjudication of patent rights (and thus private law disputes) to an external, supranational judicial body. For example, in the case of Poland (which has joined the enhanced cooperation), there are significant constitutional obstacles against this, precluding the country from adopting the AUPC. Indeed, it is impossible to reconcile the surrender to an international court, which *de facto* is the UPC, with the content of Article 175 of the Polish Constitution of 1997, which stipulates that the administration of justice in Poland is reserved to the Supreme Court, common courts, administrative courts, and military courts. The Polish Constitutional Tribunal ruled in 2010 that it was unacceptable under Polish law to transfer entirely to an international court the competence of the judiciary in a specific field of cases (Ruling K32/09, 2010). Making an exception in this respect does not seem possible without amending the Constitution, requiring broad political agreement. Therefore, it is unlikely that Polish organizations in the near future will gain the opportunity to register a European patent with a unitary effect also in Poland. Recall that this also applies to Croatian and Spanish entities, which have not joined either the AUPC or the enhanced cooperation. These entities can apply for a unitary patent on the territory of the system's member states, but the benefits of such an arrangement may be debatable. After all, the rights granted are treated as German national patents, the revocation of a patent with unitary effect will mean loss of protection in all countries, and any legal disputes in this regard will be heard by the UPC. At the same time, it must be admitted that the absence of these countries in the system leads to a kind of fragmentation and thus only partially achieves the stated goal of a unitary patent system throughout the EU.

Secondly, the jurisdiction of the UPC is mandatory, and one cannot opt out of it. It has several implications. Proceedings in the first instance will be conducted in one of a dozen local or regional divisions in Europe, while a right holder from a country that does not host a local division or does not share a regional division will have to file a lawsuit or can be sued before the central division. Member states may create new local or regional divisions in the future, but in the current state of affairs (beginning 2023), Bulgaria, Cyprus, Greece, Ireland, Malta, and Romania do not have their own, so proceedings in cases involving organizations from those countries will, from their perspective, be litigated abroad in a foreign court. This, in turn, will generate a certain cost related to participation in the proceedings, issues of procedural representation, and, finally, the need to proceed actually in a foreign language (currently, only eight of the official EU languages are represented, depending on where the court has its central or local division). Organizations from countries participating in regional divisions may be similarly constrained, as, for example, entities from Estonia, Latvia, and Lithuania will have to use a court located in Stockholm, and the language of the proceedings will be English, which, incidentally, will also apply to Swedish litigants. The above implications may raise the question of equality of access to the court on the part of different entities, both those seeking patent protection and those forced to defend their innovations against possible allegations of infringement of someone else's exclusive rights. Consequently, there are also concerns about the right to defense and due process in general. In fact, it is possible to observe a peculiar preference for subjects from those countries whose native languages have been recognized as official languages or as languages of proceedings (Nowicka, 2013; Szkaradek, 2020; Orfin, 2021).

Another linguistic issue in this unitary patent system is that it will be granted in the language in which the application was filed, that is, English, French or German, possibly another official EU language if the proceedings were in English. It will also be available in this version in all participating countries, although additional machine translations into all official EU languages will be provided in the future. At the same time, there is a concern about the possibility of a correct and precise understanding of the invention and patent claims by different organizations and, thus, the scope of protection. The certainty of the law and the solutions achieved within the projects becomes questionable. After all, to avoid encroaching on another's exclusive rights under a patent for an invention, it is necessary to have a precise understanding of the invention's description, specification, and functionality. These, in turn, are disclosed in published, mandatory patent descriptions. Their availability in a foreign language, which uses highly specialized terms and phrases that are not always obvious to understand, can provide problems and confusion. Significantly, this problem seems to have been recognized by France and Germany, who were opposed to narrowing the system to English, while similar concerns from Spain and Italy were at the same time dismissed (PMC, 2016).

The opportunities and limitations of the use of a European patent with the unitary effect presented above should make organizations rethink their strategy concerning their design activities and their intellectual property. It is especially true for those from countries with less patent potential. Taking advantage of the mechanism can be formally, financially, and organizationally challenging, so it requires a detailed review of one's resources, plans, and capabilities, but also a calculation of potential gains and losses. Certainly, however, once the system becomes operational, it will require increased vigilance and caution from innovation project managers.

5. Conclusion

Although the European Union has long embodied the idea of a single market, unifying and harmonizing various areas of law, including intellectual property rights, one common EU patent has not yet been achieved. However, there was a need to ensure the EU's competitiveness against economic powers such as the US, China, and Japan. Another approach, therefore, has become the European patent with unitary effect, which is not a new type of exclusive right, but one that already exists within the EPO, and can be given effect in all countries under the relevant EU regulations. It means that an organization wishing to obtain protection for the results of its innovative projects no longer has to expect individual national patents to be granted by the countries indicated in the application for a European patent since the new regulations will make it effective by operation of law in all participating countries. Therefore, the procedure will be faster, simpler, and also cheaper, as translations into the official languages of all granting countries will no longer be necessary. On top of that, a common Unified Patent Court will soon be up and running to decide patent cases, so a unified and consistent line of jurisprudence can also be expected.

The analysis carried out in this work shows that the system, despite the validity of its stated goals and these listed obvious advantages, also has significant drawbacks. It has been shown that the construction of the system is quite complicated in several aspects and can pose problems for entities whose activities revolve around the sphere of patent law. First and foremost, among these is the peculiar linguistic discrimination in application proceedings before the EPO (honoring only three languages as official) and judicial proceedings before the UPC (languages of countries hosting local divisions of the court; language chosen by countries sharing a regional division). In addition, the locations of the divisions of the courts where adjudications are to be made are only in some countries (although the creation of local ones will be possible in any), and in some situations, the regulations reserve the jurisdiction of the central division. Finally, and not to be overlooked, are arguments about the cost-effectiveness of the entire system, primarily for active entities from the largest and most

technologically advanced EU countries at the expense of those from which there are far fewer European patent applications.

There are somewhat more problems of a typically legal nature (concerning, e.g., the principles of the single market and the free movement of goods or the cognition of the CJEU) nonetheless, they are beyond the scope of analysis in this work and have no direct and clear impact on organizations seeking patent protection for their innovative solutions. It seems a good idea to carry out future analysis to examine the effect of the system already in operation to verify the concerns raised above.

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