

The Influence of the European Patent with Unitary Effect on Switzerland's Role in the European Patent Organisation

Nach vielen Jahren der Vorbereitung ist das Europäische Patent mit einheitlicher Wirkung am 1. Juni dieses Jahres Wirklichkeit geworden. Seine Einführung kann als eine der bedeutendsten Veränderungen im europäischen Patentsystem in den letzten Jahrzehnten angesehen werden, die den Patentschutz in der Europäischen Union erheblich stärken dürfte. Es wurden jedoch Bedenken geäußert, dass der grössere Einfluss der Union im Bereich der Patente zu einer Marginalisierung von Nicht-EU-Ländern, wie der Schweiz, in der Europäischen Patentorganisation führen könnte. Der vorliegende Artikel geht der Frage nach, inwieweit diese Bedenken berechtigt sind.

Après de nombreuses années de préparation, le brevet européen à effet unitaire est devenu une réalité le 1^{er} juin de cette année. Son introduction peut être considérée comme l'une des évolutions les plus importantes dans le système européen des brevets au cours des dernières décennies. La protection des brevets au sein de l'Union européenne devrait s'en trouver considérablement renforcée. Toutefois, des inquiétudes ont été exprimées quant à l'influence accrue de l'Union dans le domaine des brevets, qui pourrait conduire à une marginalisation des pays non membres de l'UE, comme la Suisse, au sein de l'Organisation européenne des brevets. Le présent article cherche à déterminer dans quelle mesure ces inquiétudes sont justifiées.

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- I. Introduction
 - II. Structure of the European Patent Organisation
 - 1. General
 - 2. European Patent Office
 - 3. Administrative Council
 - III. Financing of the European Patent Organisation
 - 1. General
 - 2. Financing of the Swiss Federal Institute of Intellectual Property
 - IV. Institute of Professional Representatives before the European Patent Office (epi)
 - V. Switzerland as a Filing Country
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I. Introduction

The European patent with unitary effect (hereinafter «unitary patent») and the Unified Patent Court (hereinafter «UPC») together form the so-called Unitary Patent Package. It is an extension of the European patent system, which previously already offered a centralized application and examination

procedure before the European Patent Office (hereinafter «EPO»). The reform is based on enhanced cooperation between the participating Member States of the European Union (hereinafter «EU») within the framework of EU law.^{1,2} The new system is currently in force in the 17 EU Member States which have ratified the Agreement on a Unified Patent Court (hereinafter «UPCA»).³ While unitary patents are also available to foreign applicants, including natural and legal persons based in Switzerland, the new system is closed in a sense that non-EU-countries cannot participate.

With the increasing influence of the European Union on the patent system, concerns have been expressed that Switzerland, as a Contracting State of the European Patent Organisation but not a member of the EU, could be marginalized. The view that the European Patent Organisation would increasingly align itself with the EU Member States

ALFRED KÖPF, Dr. sc. nat. ETH, European and Swiss Patent Attorney.

OLIVER JEKER, Dr. sc. ETH, European and Swiss Patent Attorney.

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- 1 Art. 20 Treaty on European Union, Art. 326 to 334 Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, p. 1–390; Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU), OJ L 76, 22 March 2011, p. 53–55; Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012, OJ L 361, 31 December 2012, p. 1–8; Council Regulation (EU) No. 1260/2012 of 17 December 2012, OJ L 361, 31 December 2012, 89–92.
 - 2 Note however that the Agreement on a Unified Patent Court (UPCA) is an international treaty between the participating Member States.
 - 3 The following EU Member States have currently ratified the UPCA: Austria (AT), Belgium (BE), Bulgaria (BG), Germany (DE), Denmark (DK), Estonia (EE), Finland (FI), France (FR), Italy (IT), Lithuania (LT), Luxembourg (LU), Latvia (LV), Malta (MT), Netherlands (NL), Portugal (PT), Sweden (SE) and Slovenia (SI); see <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001>; May 2023.

has been expressed for example in the consultation for the upcoming revision of the Swiss Patent Act, which envisages a fully examined Swiss patent.⁴ According to the report on the results of this consultation by the Swiss Federal Institute of Intellectual Property (hereinafter «IPI»), such concerns have been mainly expressed by associations of patent professionals as well as *economiesuisse*, *Interpharma* and *scienceindustries*.⁵

The following sections discuss the extent to which these concerns are justified.

II. Structure of the European Patent Organisation

1. General

The European Patent Organisation has administrative and financial autonomy and is not part of the European Union.⁶ It has two organs, namely the European Patent Office and the Administrative Council.⁷ The EPO is the executive arm of the Organisation and is mainly concerned with the grant of European patents. The Administrative Council supervises the EPO as a legislative body.⁸ Decisions of the EPO can be appealed before the Boards of Appeal. Although structurally integrated in the EPO,⁹ the Boards of Appeal are largely independent and bound in their decisions only to the provisions of the European Patent Convention.¹⁰ They are therefore a judicial authority.

The European Patent Convention (hereinafter «EPC») was signed in 1973 by the first 16 Contracting States, Switzerland being one of them.¹¹ Since those early days, the Organisation has grown to 39 Contracting States, 1 Validation State and 4 Extension States (as of May 2023).¹² With such a growth, it is only natural that the weight of each individual state has diminished to a certain extent over the decades.

2. European Patent Office

The EPO is headed by its President, who is currently Mr. António Campinos, a Portuguese national.¹³ He is appointed by the Administrative Council and responsible for the activities of the EPO.¹⁴ In this capacity, the President may submit to the Administrative Council proposals for amending, *inter alia*, the EPC.¹⁵ The President also represents the Organisation as a whole.¹⁶ Historically, it is worth noting that the second President of the EPO was a Swiss national, Mr. Paul Brändli, who led the Office from 1985 until 1995.¹⁷

The participating EU Member States have entrusted the EPO with administrative tasks concerning the European patent with unitary effect.¹⁸ A Unitary Patent Protection Division has been set up for this purpose.¹⁹ The appeal body against decisions of this division is the Unified Patent Court.²⁰

At the end of 2021, the EPO employed a total of 6,261 staff from 34 different EPC Contracting States. 58 employees were of Swiss nationality, corresponding to 0.93% of the staff. Considering that Switzerland accounts for 1.4% of the population of the EPC Contracting States and that

10% of all European patent applications originating from these states were filed by Swiss applicants, it is apparent that the country is underrepresented at the EPO.²¹

3. Administrative Council

The Administrative Council consists of one representative and one alternate representative for each Contracting State.²² The composition of the Administrative Council is published regularly in the EPO's Official Journal.²³ The representative for Switzerland is currently (May 2023) Dr. Catherine Chammartin, Director General of the IPI, and the alternate representative is Dr. Alban Fischer, Vice Director General and Head of Patent Division at the IPI.²⁴

The Administrative Council elects a Chairperson and a Deputy Chairperson from among its members.²⁵ Currently, the Chairperson is Mr. Josef Kratochvíl, President of the Industrial Property Office of the Czech Republic, and the Deputy Chairperson is Ms. Borghildur Erlingsdóttir, Director General of the Icelandic Patent Office. It is worth mentioning that the Administrative Council also has an Honorary Chairman, Dr. Roland Grossenbacher, who is a Swiss national. Dr. Grossenbacher was the Chairman of the Administrative Council from 2000 to 2009. He also was the Director General of the IPI from 1989 to 2015.²⁶

The following participants take part in the deliberations of the Administrative Council:²⁷

1. Representatives of the Contracting States
2. The President of the Office, assisted by EPO staff

4 Section 1.2.1 b) Botschaft zur Änderung des Patentgesetzes vom 16. November 2022, BBl 2023, 7.

5 Section 5.1, Änderung des Bundesgesetzes über die Erfindungspatente – Bericht über die Ergebnisse des Vernehmlassungsverfahrens <<https://www.news.admin.ch/news/message/attachments/67867.pdf>>, all links visited May 2023.

6 Art. 4(1) EPC.

7 Art. 4(2) EPC.

8 Art. 4(3) EPC.

9 Art. 15(f) EPC.

10 Art. 23(4) EPC.

11 <<https://www.epo.org/about-us/timeline.html>>.

12 <<https://www.epo.org/about-us/at-a-glance.html>>.

13 <<https://www.epo.org/about-us/leadership-and-management/president.html>>.

14 Art. 11(1) EPC, Art. 10(1) EPC; R. 3 Rules relating to Unitary Patent Protection (UPR), OJ EPO 2022, A41.

15 Art. 10(2)(c) EPC.

16 Art. 5(3) EPC, Art. 10(2)(3) EPC.

17 <https://www.epo.org/about-us/timeline_de.html>; <https://en.wikipedia.org/wiki/Paul_Braendli>.

18 Art. 9 Regulation (EU) No 1257/2012; R. 1 UPR; Art. 143 EPC.

19 R. 4 UPR.

20 Articles 32(1)(i) UPCA; Art. 47(7) UPCA.

21 Section 1.1.5, EPO Social Report 2021.

22 Art. 26(1) EPC.

23 See for instance OJ EPO 2023, A13.

24 According to a recent press release from the IPI, Dr. Fischer will retire by 1 July 2023. His designated successor is Mr. Marcus Ehnle <<https://www.ige.ch/de/uebersicht-dienstleistungen/newsroom/news/news-ansicht/marcus-ehnle-wird-neuer-leiter-der-patentabteilung>>.

25 Art. 27(1) EPC.

26 <https://en.wikipedia.org/wiki/Roland_Grossenbacher>.

27 Art. 1–7 Rules of Procedure of the Administrative Council of the European Patent Organisation.

3. Board of Auditors
4. Staff Committee of the EPO

The Administrative Council has the competence to amend time limits laid down in the EPC as well as certain parts of the Convention in order to bring them into line with an international treaty relating to patents or European Community legislation relating to patents. It can also amend the Implementing Regulations.²⁸ Furthermore, the Administrative Council is competent, in accordance with the EPC, to adopt or amend, amongst other things, the Financial Regulations and the Rules relating to Fees.²⁹ The Rules of Procedure of the Boards of Appeal are subject only to approval of the Administrative Council.³⁰ Any revision of the EPC going beyond the competencies of the Administrative Council may only be decided by a Diplomatic Conference of its Contracting States.³¹

Apart from the President, the Administrative Council also appoints other senior EPO staff, including the Vice-Presidents and the members of the Boards of Appeal and the Enlarged Board of Appeal.³² The Administrative Council also exercises disciplinary authority over these senior staff.³³

In principle, each Contracting State has one vote on the Administrative Council.³⁴ The Administrative Council has the following bodies:³⁵

- B28 – Board of the Administrative Council
- Boards of Appeal Committee
- Budget and Finance Committee
- Committee on Patent Law
- Select Committee
- Technical and Operational Support Committee

The Select Committee was set up by the 25 EU Member States initially participating in the enhanced cooperation leading to the Unitary Patent Package. Its purpose is to supervise the activities of the EPO entrusted to it in the context of unitary patent protection and to determine the amount and distribution of the renewal fees for European patents with unitary effect.³⁶ Switzerland attends the meetings of the Select Committee as an observer.³⁷

It can be concluded from the above that neither the voting rights nor the weight of Switzerland's votes in the Administrative Council will be directly affected by the introduction of the unitary patent. Furthermore, it would appear that the Select Committee, merely concerned with the administrative activities entrusted to the EPO in the context of unitary patent protection, should not have a broader influence on the decisions of the Administrative Council.

III. Financing of the European Patent Organisation

1. General

The budget of the European Patent Organisation is financed, *inter alia*, by its own resources, including revenue from fees imposed by the EPO, as well as payments made by the Contracting States in respect of renewal fees for granted European patents levied in these States.³⁸ The Administrative Council defines the share of fees to be remitted

to the Organisation, presently 50% for each Contracting State.³⁹ In 2021, these payments amounted to EUR 641 million,⁴⁰ which corresponded to 33% of the Organisation's overall operational income.⁴¹ Switzerland contributed EUR 21.8 million, representing 3.4% of all national fees. This means that Switzerland has a comparatively small financial impact on the European Patent Organisation.

2. Financing of the Swiss Federal Institute of Intellectual Property

Like the EPO, the Swiss Federal Institute of Intellectual Property (IPI) is also an autonomous organization which keeps its own accounts.⁴² The IPI is financed entirely by the fees incurred for its sovereign activities as well as by remuneration for the services it provides.⁴³ For the accounting period from 1 July 2021 to 30 June 2022, the IPI had a gross operational revenue of CHF 64.4 million. Of this income, 22.9 million (35.6%) are annuities for Swiss parts of granted European patents.⁴⁴ These figures show that the IPI is financially strongly dependent on the European Patent Organisation. This risk has been recognized and is discussed in the IPI's 2021/2022 financial report.⁴⁵ The scenario that the number of validations in Switzerland might decrease due to the unitary patent has however not been mentioned.

IV. Institute of Professional Representatives before the European Patent Office (epi)

The Institute of Professional Representatives before the European Patent Office (hereinafter «epi») is the professional association of all European Patent Attorneys working

28 Art. 33(1) EPC.

29 Art. 33(2) EPC.

30 Art. 23(4) EPC.

31 Art. 172(1) EPC.

32 Art. 11 EPC.

33 Art. 11(4) EPC.

34 Art. 34(2) EPC; However, see Art. 36 EPC.

35 <https://www.epo.org/about-us/governance/administrative-council/bodies.html>.

36 Art. 9 Regulation (EU) No 1257/2012; R. 2 UPR; Art. 14 Rules of Procedure of the Administrative Council of the European Patent Organisation; Art. 145 EPC.

37 Art. 6(3) Rules of Procedure of the Select Committee of the Administrative Council; Communiqué – 6th meeting of the Select Committee of the Administrative Council of the European Patent Organisation (Munich, 10–11 December 2013; <https://www.epo.org/about-us/governance/communiques/2013.html>).

38 Art. 37 EPC.

39 Art. 39(1) EPC; OJ EPO 1984, 296.

40 EPO Financial Statements 2021.

41 In 2021, the Organisation's overall operational income amounted to EUR 1.94 billion. It should be noted, however, that the EPO had an additional finance revenue of EUR 1.61 billion.

42 Art. 1 Para. 2 Bundesgesetz über Statut und Aufgaben des Eidgenössischen Instituts für Geistiges Eigentum (IGE); Strategische Ziele des Bundesrates für das Eidgenössische Institut für Geistiges Eigentum 2022–2026, BBl 2022, 1332.

43 Art. 12–14 IGE.

44 Jahresrechnung Eidgenössisches Institut für Geistiges Eigentum, Rechnungslegungsperiode 1. Juli 2021–30. Juni 2022.

45 See Appendix 3.

in both industry or in private practice.⁴⁶ The Institute currently (May 2023) has about 13,700 members, 628 (4.6%) of them having their place of business or employment in Switzerland.⁴⁷ Membership to the epi is mandatory for all Professional Representatives.⁴⁸

The Regulation on the establishment of the epi has been adopted and amended several times by the Administrative Council of the European Patent Organisation.⁴⁹ The Institute is governed by a Council of representatives and substitutes elected from among its members. Each Contracting State to the EPC forms a constituency. With more than 500 voters, the Swiss constituency is entitled to elect 6 representatives and additionally the same number of substitutes. This number corresponds to the maximum, which means that the Swiss delegation on the Council is the same size as those of larger EPC Contracting States, such as Germany. The Council elects a Board from among its members, including the President of the Institute, two Vice-Presidents, the Secretary-General and the Treasurer. Mr. Peter Thomsen, representing Switzerland, was recently elected as President.⁵⁰

It follows from the above that Switzerland has a relatively strong weight in the epi. However, given the modest direct influence of the epi on the European Patent Organisation, this weight should not be overestimated.

V. Switzerland as a Filing Country

In 2022, 4.7% of all European patent applications filed originated from Switzerland. This corresponds to 11% among the EPC Contracting States. Moreover, with 5.9% Switzerland had the highest relative growth among these states, while the overall growth in the EPC Contracting States was only 0.1%.⁵¹ In the same year, Switzerland was ranked first in the Global Innovation Index published by the World Intellectual Property Organization (WIPO), for the 12th year in a row.⁵² It is therefore no understatement to say that, with regard to innovation and patent filings, Switzerland is one of the most prolific countries in Europe. There is no conceivable reason why the introduction of the unitary patent should change this.

46 <https://patentepi.org>.

47 <https://www.epo.org/applying/online-services/representatives.html>.

48 Art. 134a(2) EPC.

49 Art. 134a(1)(a) EPC; OJ EPO 2023, Supplementary Publication 1, 133.

50 <https://patentepi.org/en/epi-bodies/board.html>.

51 <https://www.epo.org/about-us/annual-reports-statistics/statistics/2022.html>.

52 https://www.wipo.int/global_innovation_index/en/; <https://www.kmu.admin.ch/kmu/en/home/New/news/2022/switzerland-remains-world-s-most-innovative-economy.html>.

Zusammenfassung

Zusammenfassend lässt sich sagen, dass die Schweiz eine reiche Innovationsquelle mit einer hohen Anmeldetätigkeit beim EPA ist. Dies spiegelt sich in einer starken Gemeinschaft von zugelassenen Vertretern wider, die sowohl in nationalen als auch in internationalen Verbänden organisiert sind. Es liegt auf der Hand, dass das Europäische Patentamt für die Schweizer Anmelder eine wichtige Rolle spielt.

Umgekehrt hat die Schweiz nicht das gleiche Gewicht für die Europäische Patentorganisation. Bis zu einem gewissen Grad ist dies nur natürlich, wenn man bedenkt, dass der Schweizer Markt im Vergleich zu ganz Europa relativ klein ist. Hinzu kommt, dass die Organisation seit ihrer Gründung durch den Beitritt neuer Vertragsstaaten erheblich gewachsen ist, was zwangsläufig zu einem Rückgang des Einflusses jedes einzelnen Staates geführt hat.

Parallel dazu haben die Mitgliedstaaten der Europäischen Union in den letzten zwei Jahrzehnten Fortschritte bei der Zusammenarbeit im Bereich der Patente gemacht. Dies hat ihnen sicherlich geholfen, in der Europäischen Patentorganisation mit einer Stimme zu sprechen. Die europäischen Bemühungen gipfelten schliesslich im sog. Unitary Patent Package, das dieses Jahr in Kraft getreten ist.

Die Autoren sind jedoch nicht der Ansicht, dass dieses isolierte Ereignis unmittelbare Auswirkungen auf die Position der Schweiz haben wird. Vielmehr kann das Unitary Patent Package als ein natürlicher Schritt auf dem Weg der Europäischen Union zu einem voll funktionsfähigen Binnenmarkt betrachtet werden. Wie in vielen anderen Bereichen ihrer Beziehungen zur EU wird die Schweiz auch im Patentsystem ihren eigenen Weg finden müssen. Dieser sollte nach Ansicht der Autoren auf Partnerschaft und Kooperation statt auf Isolation beruhen. Das vollgeprüfte Schweizer Patent kann nicht dazu dienen, das europäische Patent zu ersetzen. Es sollte jedoch eine wertvolle Ergänzung des schweizerischen Patentsystems sein, die den Nutzern neue Optionen bietet, und – für den Fall der Fälle – kann es nicht schaden, vorbereitet zu sein.

Résumé

On peut dire pour résumer que la Suisse est une riche source d'innovation et qu'elle est à l'origine de nombreux dépôts de demandes auprès de l'OEB. Cette situation se traduit par une forte communauté de mandataires agréés, organisés en associations aussi bien nationales qu'internationales. Il va de soi que l'Office européen des brevets joue un rôle important pour les déposants suisses.

Inversement, la Suisse n'a pas le même poids pour l'Organisation européenne des brevets. Dans une certaine mesure, ce n'est que naturel si l'on considère que le marché suisse est relativement petit par rapport à l'ensemble de l'Europe. De plus, l'Organisation s'est considérablement développée depuis sa création du fait de l'adhésion de nouveaux États contractants, ce qui a entraîné inévitablement une diminution de l'influence de chaque État.

Parallèlement, les États membres de l'Union européenne ont progressé dans leur coopération en matière de brevets au cours des deux dernières décennies. Cette collaboration renforcée les a certainement aidés à parler d'une seule voix au sein de l'Organisation européenne des brevets. Les efforts européens ont finalement culminé dans le dispositif dit du brevet unitaire (*Unitary Patent Package*), qui est entré en vigueur cette année.

Les auteurs ne sont toutefois pas d'avis que cet événement isolé aura des répercussions directes sur la position de la Suisse. Au contraire, le dispositif du brevet unitaire peut être considéré comme une étape naturelle sur le chemin de l'Union européenne vers un marché intérieur pleinement opérationnel. Comme dans de nombreux autres domaines sur lesquels portent ses relations avec l'UE, la Suisse devra trouver sa propre voie dans le système des brevets. Selon les auteurs, celle-ci doit se fonder sur le partenariat et la coopération plutôt que sur l'isolement. Le brevet suisse soumis à un examen complet ne peut pas servir à remplacer le brevet européen. Il devrait toutefois représenter un complément précieux au système de brevets suisse, offrant de nouvelles options aux utilisateurs et permettant à la Suisse, le cas échéant, d'être préparée.