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Topics at a glance

Patent Law

Looking back: The first six months of the unitary patent system

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After a long history of creation and numerous setbacks, the European unitary patent system came into force on June 1, 2023. Despite some teething troubles, particularly with the IT system, the start is promising. The Unified Patent Court has the potential to develop into a leading court in patent litigation with an impact far beyond Europe.

The unitary patent system comprises, on the one hand, a new European patent with unitary effect (often referred to as the "unitary patent", for short) in all 17 participating EU Member States (Austria, Belgium, Bulgaria, Germany, Denmark, Estonia, Finland, France, Italy, Latvia, Luxembourg, Lithuania, Malta, the Netherlands, Portugal, Sweden and Slovenia), and on the other hand, a new Unified Patent Court (UPC), which decides on these unitary patents, but ultimately also on all conventional European patents with national validations (so-called "bundle patents"). After decades of planning, the new system has for the first time created a quasi EU-wide patent law.

After a good six months, it is time for an initial review. Have expectations been fulfilled? Is there demand for the unitary patent and the Unified Patent Court? What are the first user experiences with the new system?

Every European patent application goes through the familiar application and examination procedure before the European Patent Office. Following the grant of the patent, the applicant can now opt for the patent with unitary effect instead of national validations in the participating EU member states – in addition to national validations in those countries that do not (yet) participate in the unitary patent system. There are now already over 17,000 patents with unitary effect. They come from all technical fields, with medical technology leading the way with a share of approx. 12 %. However, since June 1, 2023, unitary effect has only been requested for approx. 17 % of all granted European patents. This means that most patent holders are still opting for the traditional bundle patent. On the one hand, this reluctance could be due to the fact that the patent with unitary effect is perceived as too expensive – it usually only pays off with patent protection in at least four EU member states. On the other hand, applicants may want to wait and see how the case law of the Unified Patent Court develops before relying on the unitary patent.

The Unified Patent Court has exclusive jurisdiction for all European patents with unitary effect. For bundle patents, the plaintiff can decide during a transitional period of at least seven years whether to use the Unified Patent Court or the national courts. During this transitional period, the patent proprietor can also decide to exclude his patent from the jurisdiction of the Unified Patent Court by means of an opt-out declaration.

The Unified Patent Court faced considerable IT difficulties at its launch, caused by its cumbersome and rigid electronic case management system (CMS), which led to a system crash on the very first day, after having already necessitated a

three-month postponement of the launch. The case management system cannot be circumvented, as the UPC is largely designed as an electronic court, and continues to demand a great deal of patience and improvisation skills from all users, including lawyers as well as judges and clerks.

Apart from these technical difficulties, however, the launch of the Unified Patent Court has been a success and has lived up to expectations. Over the first six months, a total of more than 100 cases have already been filed, including infringement actions, nullity actions and a number of applications for provisional measures. Most of the cases are pending before the German chambers, with the Munich local chamber currently leading by a wide margin. Interestingly, and to a certain extent unexpectedly, isolated nullity actions without parallel infringement proceedings are also enjoying some popularity. In the meantime, 23 such actions have already been filed with the central divisions in Paris and Munich. The UPC is clearly establishing itself as an attractive forum for reviewing the validity of European patents, sometimes in parallel with ongoing opposition proceedings before the European Patent Office. With over 70 decisions, the UPC has already accumulated an impressive case law in the first few months of its existence. Most of the decisions concern procedural law. The Court of Appeal has also already ruled in two cases.

Overall, it is to be expected that the Unified Patent Court will establish itself in the coming years as an authoritative court with global reach in patent disputes.

We will keep you up to date on the development of the Unitary Patent System here and on our website https://www.boehmert.de/en/upc/ .

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Advertising with Green Claims

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Few issues have been as ubiquitous in recent years as climate change. The crisis is in the news every day. No wonder, then, that the climate is also making waves in competition law: greenwashing – as the demand for environmental friendliness increases, so does the attraction for companies to advertise with such terms, and the potential for misleading.

Growing Demand for Sustainable Products

Consumers want to live green: According to recent studies, 88 % of global respondents say they would buy sustainably if given the opportunity; 77 % want to spend money only on brands with green and sustainable advertising within the next five years' time (dentsu, The Rise of Sustainable Media, 2021). 73 % of Gen Z are even willing to pay more for sustainable products (First Insight, The State of Consumer Spending: Gen Z Shoppers Demand Sustainable Retail, 2020). There is a shift in consumer expectations. Sustainable products and services are increasingly in demand with a high willingness to pay. Many companies are seizing this opportunity. Advertising sustainability is becoming a selling point.

Greenwashing and the Unfair Competition Act

In many cases, however, advertising promises are not kept. In 2021, the EU Commission analysed company websites for their environmental promises. 37 % of websites advertise sustainable, environmentally friendly or carbon neutral companies and their products or services, but in reality they are not or only partially sustainable. 59 % of sites contain unsubstantiated information, making the promises unverifiable. According to the analysis, a total of 42 % of websites violate the Unfair Commercial Practices Directive (EU Commission, Screening of Websites for 'Greenwashing': Half of Green Claims Lack Evidence, 2021). The competition authorities and consumer associations in particular want to remedy these shortcomings and are committed to protecting consumers and the environment. As a result, greenwashing is increasingly becoming the subject of legal proceedings. These proceedings are based on Sections 5 and 5a of the German Unfair Competition Act (UWG). According to these provisions, business activities are misleading if they contain untrue statements or other statements that are likely to mislead, in particular with regard to the essential characteristics of the product or service. The relationship with the environment is one such essential characteristic, as it relates to the nature of the product.

Legal Development: Prohibition of Misleading Claims and Information Requirements

Environmental claims are in principle allowed. However, as in the case of health advertising, they are subject to strict legal standards – following a ruling by the Federal Court of Justice in the 1980s. The main reason for this is the emotional appeal of sustainability advertising. It arouses consumers' concern for their own health and a sense of responsibility for future generations.

The risk of being misled is particularly high with terms whose meaning and content are (still) unclear: environmentally friendly, sustainable, organic, to name but a few. There is an increased need for clarification on the part of the target public. A clearly visible, informative label is therefore required. The stringency of this label will be determined on a case-by-case basis, depending on the type of product and the degree and extent of its environmental friendliness. In the case of relative sustainability, for example, the respective advantage of the product must be explicitly stated (Higher Regional Court Bremen, judgement of 23 December 2022, 2 U 103/22). Climate or CO_2 neutrality is understood by the courts to mean a balance of CO_2 emissions, which can be achieved either through avoidance or through compensation. In the case of compensation measures, it must be explained in the advertising whether, for example, CO_2 certificates have been purchased or third-party climate projects have been supported. If a quality label is used, information on the test criteria must be provided (Higher Regional Court Frankfurt/Main, judgement of 10 November 2022, 6 U 104/22). As far as the scope of information requirements is concerned, it is generally true that consumers become more interested in details the more prominent an issue becomes in their minds. And climate change is currently omnipresent.

Recommendations and Outlook

Advertising with environmental claims is lucrative for companies. But caution is needed. To avoid misleading consumers, an informative reference to the more detailed circumstances to which the claim refers is usually required. Companies should therefore be specific about the benefits of their product or service. The reference must be consistent, clear, and easily readable. Eco-labels must also be accurate and verifiable.

In the future, companies should keep abreast of current legislative projects in this area. The EU Commission is committed to climate protection. There are proposals to amend the Unfair Commercial Practices Directive to empower consumers for environmental change through better protection against unfair practices and better information (COM/2022/143) and for a Directive on environmental claims (COM/2023/166). In addition, the financial market will be incentivised as it can direct capital flows towards sustainable investments to achieve sustainable and inclusive growth. The Disclosure Regulation (EU 2019/2088) in conjunction with the Taxonomy Regulation (EU 2020/852) are particularly relevant.

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Privacy Shield 2.0: Rushing data flow between the EU and the US?

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On July 10, 2023, the European Commission's adequacy decision for secure and trustworthy data traffic between the EU and the U.S. ("EU-US data protection framework") was adopted. After years of legal uncertainty, this provides a secure basis for the transfer of personal data to the USA, at least for the time being. However, the adequacy decision is no free ticket for data transfers to the U.S.

Meaning of the adequacy decision

Since a ruling by the European Court of Justice (CJEU) in 2020 ("Schrems-II", see our special edition of July 21, 2020), legally secure transatlantic data exchange has faced seemingly insurmountable obstacles. The reason is a disparity in the level of protection of personal data in the EU on the one hand and the U.S. on the other, as determined by the CJEU. Criticism focused on laws in force in the U.S., such as the Foreign Intelligence Surveillance Act of 1978 and the Cloud Act, which in the opinion of the Court allowed insufficiently controlled access to personal data by government authorities. The newly adopted adequacy decision seeks to address this criticism by introducing new binding safeguards to limit U.S. intelligence agencies' access to EU data to a necessary and proportionate level and to provide EU citizens with sufficient legal remedies.

Regulatory Content of the EU-US Data Privacy Framework

The Data Privacy Framework primarily addresses U.S. organizations and companies. These can join the EU-US Data Privacy Framework by committing to comply with detailed data protection obligations.

In addition, there are binding guarantees that restrict access to data by U.S. intelligence services. In 2020, the European Court of Justice had presupposed in its ruling that data protection may only be restricted with a legal regulation that is proportionate. The new legal framework provides for two such statutory restrictions: Data processing for law enforcement purposes and for national security reasons. To avoid rampant application, EU citizens will not only be able to sue for damages in U.S. courts in the event of a breach of these statutory regulations. With the Data Protection Review Court, they also have legal recourse to another newly created supervisory authority.

In addition to effective mechanisms within companies to address complaints from data subjects, compliance with these privacy framework principles will be ensured by the Federal Trade Commission and the Department of Transportation as regulators. In addition, a dispute resolution body will be created and an arbitration procedure will be established.

Prerequisites for data transfer: certification procedure

The (self-)certification mechanism already known from Privacy Shield 1.0 returns: Only to appropriately certified U.S. companies can data be transferred in a legally secure manner on the basis of the EU-U.S. data protection framework. Successfully certified companies will be included in a list published by the U.S. Department of Commerce. Certification must be renewed annually.

It is important to know for the transferring companies that the EU-US data protection framework exclusively addresses the requirement of an adequate level of data protection in third countries pursuant to Art. 44 et seq. GDPR. All other data protection requirements, such as a sufficient legal basis, measures to ensure data security and transparency, and a sufficient contractual basis with data processors and joint controllers, must be met separately. The EU-US data protection framework should therefore by no means be understood as a free ride. Many of the data protection issues, especially in the context of cooperation with U.S. industry giants such as Facebook, Microsoft and others, thus continue to exist.

Outlook

The EU-US data protection framework once again provides a straightforward basis for transatlantic data transfers, which brings enormous practical relief and creates legal certainty for companies. There is a need for action for German companies with regard to the adaptation of their data protection notice in accordance with Article 13 of the GDPR, and all other data protection requirements must also continue to be individually reviewed and observed.

It remains to be seen how long the EU-US data protection framework will remain in place as the basis for transatlantic data transfers, because a judicial review by the European Court of Justice has already been initiated. Whether the problems attested to in Schrems II have really been remedied, as the European Commission claims, remains to be seen.

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