

ADIPA's høringsvar på EU-Kommissionens høring om supplerende beskyttelsescertifikater (SPC) af 5. april 2022:

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13353-Medicinal-plant-protection-products-single-procedure-for-the-granting-of-SPCs/details/F2995581_en

Feedback reference	F2995581
Submitted on	05 April 2022
User type	Non-governmental organisation (NGO)
Organisation	Association of Danish Intellectual Property Attorneys
Organisation size	Medium (50 to 249 employees)
Country of origin	Denmark
Initiative	Medicinal & plant protection products – single procedure for the granting of SPCs

The Association of Danish Intellectual Property Attorneys (ADIPA) support a Unitary Supplementary Protection Certificate, providing a uniform scope in the same territory as the Unitary Patent which serves as its basic patent, should be made available under the enhanced cooperation between EU member states.

As the basic patent of a Unitary SPC, only European patents with unitary effect (Unitary Patents) should be eligible.

A central authority, or a single authority-procedure utilizing the joint competence of the national authorities currently handling SPC applications, should be tasked with handling of and deciding on applications for Unitary and national SPCs. It is of importance that the authority entrusted with the decision-making powers for a Unitary SPC, shall have expert competence in patent law.

Some members of ADIPA have, however, raised the following potential obstacles to a centralized procedure:

Since patents with unitary effect will co-exists with national validated EP's at least for some member states of the EPC, and since some proprietors may prefer national routes over the unitary route, there will be a mix of different authorities handling SPC applications (national, national validated or unitary). Thus, if SPC applications are examined centrally for only some basic patents and nationally for others (and in some situations the "same" patent in those jurisdictions where selection of unitary effect is not an option), providing a central examination for (some member states) of the EU, will not provide the desired consensus.

If consensus is aimed at by agreeing that the same group of experts should examine SPC application for all kinds of basic patents (national validated and unitary), the fact that CJEU decisions regarding SPC-matters would not be binding for all of the national validated patents (non-EU EPC contracting states) would prevent complete consensus (or in practice align all non-EU member state interpretation with the CJEU).

It is not possible to get a community MA for certificates regarding plant protection products. Thus, a central unit would have to deal with MAs from each state. If the basic patent has unitary effect but no MA exists for all of the countries wherein the basic patent is in force – the protection will not be unitary since it would not apply to member states wherein no MA exist.

Presently, it is unpredictable whether applicants will prefer one route over the other (unitary vs. national validations even for member states where unitary effect could be chosen). Thus, for at least a period, it is difficult to predict what kind of set-up for a centralized examination unit would make the most sense. As reflected by the number of referrals to the CJEU regarding how the SPC-regulation should be interpreted, the consensus in applying the SPC regulation nationally is far from aligned. Accordingly, some members of ADIPA suggest that the institution of a centralized handling of some/all of SPC applications is postponed until experience is gained in relation to the expected number of basic patents having unitary effect vs. nationally validated basic patents and pure national patents (by-passing the EPO route).