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European Patent Lawyers Association

Press Release

New European Patent Court: An unwanted Present for Industry

- **An Unnecessary Rush in Brussels**

Background

In a globalized world, efficient protection of innovation is the key to success for industry. No matter whether companies are small, medium-sized or large: they need to invest heavily in research & development to be able to compete. Equally, they need to be able to prevent third parties from taking a free ride on their technical achievements.

Patents are supposed to serve this purpose. Patents grant inventors, and their companies, a monopoly right for a limited time. Patents can - and need to - be enforced against third parties to halt infringement by way of injunctions granted by civil courts. However, obtaining patents and enforcing those costs money – too much money for many companies. Furthermore, patents are presently national rights, while infringement frequently occurs on an international basis, often making infringement proceedings necessary in not just one, but many countries.

The issue

For more than 40 years, Europe's member states have been working on an improved and more cost efficient patent system. 40 years, during which the process of obtaining patents was significantly improved through the establishment of a European patent office. However, also a period in which Europe's member states failed to establish a unified patent court allowing enforcement throughout Europe in only one court instead of in many countries. The most recent failure - and a serious disappointment also for the Commission - was on March 8th, 2011, when the European Court of Justice found the then proposal by the European Commission for a unified patent court system was in contradiction with European law.

Since March 2011, efforts have been made to overcome that set-back. An enhanced cooperation of EU member states worked together with the EU Commission and the Polish Presidency of the EU to rush to a solution. After many years there suddenly seemed to be significant pressure from various sources for the effort to simply come to an end. In Brussels, on 1 December, such an end indeed seemed to be near but ironically, after all that time, the current proposal is unfinished and not at all fit for purpose.

What is missing?

First of all, the question of what constitutes infringement is to be made will not be decided by the new Unified Patent Court which be obliged to refer many questions of interpretation to the European Court of Justice. In other words: the new Unified Patent Court cannot decide on its own the subject matter it is created for – a rather alarming result given the uncertainty, delay and cost that this will create for future litigants, since judges of the European Court Justice have no patent experience. This also is against clear rejections of the proposed system by various organizations representing EU businesses – among them Business Europe representing 20 million small, medium and large companies employing 120 million people in 35 countries - and therefore against the interest of the future users.

Secondly, for obvious reasons, any court can only be as good as its' judges. Despite this simple insight, it is currently absolutely unclear how it can be ensured that the Unified Patent Court with its numerous local and regional divisions could ensure that all cases are handled by experienced judges. To the contrary, it seems rather likely that in the proposed system of national proportionality ["quotas"] will outweigh qualification.

Thirdly, after a short transitional period, patent owners will be forced to decide upfront whether they would enforce their existing European patents through the new Unified Patent Court or – as now – through the national courts. Such decision will have to be made without knowledge of whether the new system will be more efficient and less costly than the existing system of national courts having regard to each individual case. However, if this new system is created to help industry and offers at least the same quality, why is it not offered as a choice in addition to the existing system, such that each company can pick the best option for each case? In other words: what is the point, for example, of expensively litigating small, local acts of infringement before a large European court? By members of Parliament, by the Commission and by the Council small and medium sized enterprises (so-called SMEs) are constantly mentioned as the main target groups which should benefit of the new system; so far there is very little in the texts which could be attractive for them.

Finally, and somewhat surprising for a system which is supposed to be designed to save costs: the costs of filing cases in the new system are unknown. So far, not even the court fees and the procedural rules are fixed and hence even these basic issues remain unresolved, although reduction of cost and efficiency have been advertised as the main attractions of the new system.

Unnecessary haste for political expediency

The current process has been driven with undue haste. Initialing of the planned package of documents is said by the EU Presidency to take place within a couple of weeks and prior to completion of the underlying texts, despite the above and many other open issues, and without any clarity on the proposed rules of procedure that the new Unified Patent Court will apply. This rush is totally inappropriate after so much time and so much effort devoted to what was promised to become the most efficient litigation system in Europe. Even worse: the deficiencies of the current proposal are so fundamental that the system is bound to fail. Industry cannot afford a failing system as the only means for the protection of their greatest assets. After 40 years of work it is surely worth taking a few more months to get it right and avoid disaster.

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