

Intellectual Property

Patent Law

European Patent Law

Draft Agreement on a Unified Patent Court – Summary and Implications



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A European Patent currently consists of a bundle of national patent rights that must be enforced separately in each signatory state to the European Patent Convention. Longstanding intentions to create a single, unitary patent right across Europe and to provide a single court in which to litigate European patents have recently taken a step forward. This article reviews the latest draft proposal for a Unified Patent Court made by the EU Council Presidency and discusses its effect.

Background to the Draft Agreement

Although this article focuses on the system for litigating patents in Europe, the nature of the underlying patent rights themselves are undergoing certain developments. In this regard, repeated attempts over 30 years to create a single European Community

Patent have failed as the Member States of the European Union could not reach unanimity on issues such as language. However, the majority of EU Member States have now teamed up to propose a “Unitary Patent” which would cover 25 out of the 27 Member States, excluding only Italy and Spain. Although the legislative and executive arms of the European Union approved these proposals in March 2011, they remain controversial. The legislative procedure that was used, known as “enhanced co-operation,” has been challenged in the Court of Justice of the European Union (“CJEU”) by the excluded countries.

Turning back to proposals for a harmonised litigation process, these too have met with judicial obstacles in the past.

A first modern attempt to provide a single European patent court was under discussion since 1999. This proposal, known as the European Patent Litigation Agreement (“EPLA”), was supported by a powerful group of patent judges from different European national jurisdictions, and many of its mechanisms have been adopted in subsequent proposals. However, the EPLA would apply only to European Patents as a protocol to the European Patent Convention, and would therefore be entirely separate from the Single Community Patent. In January 2007, the legal division of the European Parliament gave its opinion that the EPLA would be unlawful as a matter of European Community law as it violated the EU’s exclusive jurisdiction governing such matters.

In 2009, a further draft agreement on a European and EU Patents Court (“EEUPC”) was proposed¹ whose jurisdiction would include both European Patents and unified Community Patents. That agreement proposed the establishment of a single court, with regional divisions, a central division and a single court of appeal. The Court would stand alongside national courts, but it would have exclusive jurisdiction on patent matters. Moreover, the Court would be expressly subject to European Community law and answerable to the CJEU. However, in March 2011 (in fact, around the time the European Council approved enhanced cooperation with respect to the unitary patent), the CJEU ruled that the proposed agreement would be unconstitutional² at least

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insofar as it related to unitary patent rights. In particular, this was because the agreement would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law, and thereby deprive the CJEU of its powers to reply to questions referred by those courts.³ Other problems identified were the lack of accountability of the signatory member states and the inclusion of non-EU signatories (such as Switzerland).

Since March 2011, the Commission has therefore been considering how best to revise and implement a unified patent litigation system in Europe in light of the CJEU's opinion. Those considerations led to publication of the Commission's 'non-paper' on "solutions for a united patent litigation system,"⁴ which was presented in advance of the meetings of the Competitiveness Council on 30-31 May 2011. Now, the EU Council Presidency has published the present draft agreement on a Unified Patent Court.

The Structure of the Proposed Court

The structure and operation of the proposed system draws heavily on previous proposals and is, in essence, a restatement of the proposals for the EEUPC.

The Court would comprise a Court of First Instance ("CFI"), a Court of Appeal, and a registry.⁵ The CFI would itself be divided into central, local, and regional divisions.⁶ At present, it is not known where either the central division of the CFI or the Court of Appeal would be located.⁷

It is envisaged that any panel of the CFI will have a multinational composition of three judges.⁸ Judges would be divided into legally and technically qualified: panels of the local or regional divisions of the CFI would be able to request (where appropriate and having heard the parties) allocation of one technically qualified judge to the panel,⁹ while panels of the central division would always comprise two legally qualified judges and one technically qualified judge.¹⁰ All panels of the CFI would be chaired by a legally qualified judge.¹¹

A panel of the Court of Appeal would have a multinational composition of five judges, of which three would be legally qualified judges and two would be technically qualified,¹² and would be chaired by a legally qualified judge.¹³

The Jurisdiction of the Proposed Court

The Court would have exclusive competence on contracting Member States' territories with respect to both unitary patents and to European patents i.e. to the "bundle of national rights" that a patentee can obtain via the European Patent Office under the current system.¹⁴

The Court would have exclusive jurisdiction with respect to actions for infringement, declarations of non-infringement, injunctions, revocation, compensation relating to published applications, prior use rights, and actions relating to compensation for licences

and decisions of the European Patent Office on the basis of specific articles of the Regulation implementing the enhanced cooperation for the unitary patent.¹⁵

Actions for infringement, injunctions, compensation relating to published applications, and prior use rights would be brought before the local division or regional division based upon either the domicile of the defendant or the place where the infringement occurred or might occur. If the relevant contracting Member State does not host a local division or participate in a regional division, such actions would be brought before the central division.¹⁶

Other actions (including chiefly actions for revocation and for declarations of non-infringement) would be brought before the central division, but could only be initiated if no action for infringement had been initiated between the same parties and relating to the same patent before a local or regional division.¹⁷ If a counterclaim for revocation is brought in an infringement action before a local or regional division, that division has discretion (having heard the parties) to either proceed with both the action and counterclaim and request allocation of a technically qualified judge to its panel, refer the counterclaim alone to the central division, or refer the whole case (i.e. including the infringement action) to the central division.¹⁸ However, the parties also have the right to agree to bring any action before a division of their choice, including the central division.¹⁹

These provisions accommodate the two fundamentally different systems for patent litigation that currently exist in Europe, i.e. the bifurcated system wherein infringement and revocation are decided by different courts (such as exists in Germany) and the system wherein infringement and revocation are decided in the same court (such as exists in the vast majority of other EU Member States). At its core, the envisaged system provides that a validity action will be heard by a panel comprising a technically qualified judge, while allowing some freedom for local and regional divisions to deal with other types of action (such as a "pure" infringement action) independently. However, where both infringement and revocation are in issue (which in practice is typically the case) the draft agreement allows flexibility regarding whether or not the cases are heard together and in which division they are heard. It remains to be seen how the different divisions of the Court will apply their discretion in practice.

Language

The language of proceedings before any local or regional division shall be the official language of the Member State or the official language of other contracting Member States hosting the relevant division or the official language designated by contracting Member States sharing a regional division.²⁰ Alternatively, contracting Member States may designate one or more of the official languages of the European Patent Office (i.e. English, German, or French) as the language of proceedings in their local or regional division.²¹ Parties may agree on the use of the language in which the patent was granted, subject to approval

by the competent division. If said approval is not forthcoming, the parties may request that the case is referred to the central division.²²

In the central division, the language of the proceedings is the language in which the patent was granted.²³

In the Court of Appeal, the language of proceedings is the same as that before the CFI,²⁴ unless the parties agree on the use of the language in which the patent was granted.²⁵

Addressing Legislative Hurdles

The single biggest development in the draft agreement compared to previous proposals is the Court's position within the "legal order" of the European Union. Rather than provide a separate court outside of the EU system, various states from within the Member States of the EU would establish the Court by an agreement. Notably, neither the EU itself nor countries outside of the EU, particularly Switzerland, would be signatories. Thus, the Court is expressed to be a part of the judicial system of the European Union and subject to the same obligations as Member States' national courts with regards to respect of European Union law.²⁶

The draft agreement states explicitly, in an unqualified stand-alone provision, that the Court shall apply the entire body of EU law and respect its primacy.²⁷ Further, it specifies that the Court shall cooperate with the CJEU to ensure the proper application and uniform interpretation of EU law in the same way as the national courts of EU Member States.²⁸ In particular, the Court should request preliminary rulings from the CJEU on the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the EU in accordance with Article 267 TFEU, in the same manner as national courts,²⁹ and such rulings would be binding upon the Court.³⁰ Further, the contracting Member States would be jointly and severally liable for damages incurred by parties before the Court of Appeal and arising from breach of EU law by the Court of Appeal.³¹

All of these provisions are aimed squarely at addressing the CJEU's concerns as expressed in their opinion on the EEUPC and are clearly intended to address the CJEU's opinion directly.

Implementation

Despite the efforts to overcome the CJEU's objections, certain obstacles to the implementation of the proposal remain.

The first is the potential incompatibility of the proposed agreement with the Brussels I Regulation,³² which provides (inter alia) that the courts of each Member State shall have exclusive jurisdiction in proceedings concerning the validity of any European patent granted for that state.³³ As such, in order to proceed with the agreement in the form currently drafted, at least that particular EU regulation will need to be amended.

The complex mechanisms for amending Regulations mean that political objections from countries such as Spain or Italy may threaten adoption of the agreement in the short term.

In addition, the compatibility of the proposal with EU law and national constitutional laws has not been tested. The CJEU's opinion in relation to the EEUPC was somewhat unexpected, and it would not be surprising if a further opinion is sought in relation to the draft agreement, which would introduce further delay and uncertainty.

It must also be borne in mind that the CJEU did not previously address any question of compatibility in relation to a system for litigating existing European Patents granted under the EPC. Whether the current proposal is sufficient to address residual concerns following the European Parliament's rejection of the EPLA (see above) also remains to be seen.

Conclusion

The political triumph of pushing through measures which might achieve the longstanding dream of a single European patent that can be litigated in a single European court have given way to legal complexities and uncertainties. The most clearly stated legal objections against a single patent litigation system have been addressed by the current proposal, in large part by acknowledging the primacy of EU law and of the CJEU in the field of patents. However, this in itself raises questions as to whether the proposed system will be attractive and workable for its users. Other areas of intellectual property law in which the CJEU is the final arbiter, such as supplementary protection certificates, patent protection under the Biotech Directive and in the field of registered trademarks, are notoriously unclear. The prospect of similar uncertainties being introduced into patent law (if applied to existing European Patents) is unlikely to be seen as a better alternative to the existing system. However, the tortuous political and legal process still to be completed, together with the number of outstanding issues to be resolved suggests that the proposed system is still some years away.

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¹ Draft Agreement on the European and Community Patents Court, 7928/09, 23 March 2009.

² Opinion 1/09 of the Court (Full Court), 8 March 2011.

³ Id. at paragraph 89.

⁴ "Solutions for a unified patent litigation system – the way forward after the opinion 1/09 of the CJEU: non-paper of the Commission Services", available at <http://www.eplawpatentblog.com/eplaw/2011/05/eu-commission-non-paper-solutions-for-a-unified-patent-litigation-system.html>.

⁵ Article 4(1).

⁶ Article 5(1).

⁷ Article 5(6) and 7(4).

⁸ Article 6(1).

⁹ Article 6(5).

¹⁰ Article 6(6).

¹¹ Article 6(8).

¹² Article 7(1).

¹³ Article 7(2).

¹⁴ Article 1.

¹⁵ Article 15(1).

¹⁶ Article 15a(1).

¹⁷ Article 15(3).

¹⁸ Article 15(2).

¹⁹ Article 15(6).

²⁰ Article 29(1).

²¹ Article 29(2).

²² Article 29(3).

²³ Article 29(5).

²⁴ Article 30(1).

²⁵ Article 30(2).

²⁶ Article 1.

²⁷ Article 14a.

²⁸ Article 14b(1).

²⁹ Article 14b(2).

³⁰ Article 14b(3).

³¹ Article 14c(1).

³² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³³ Id. at Article 22.4.