

Europe

Will the European Patent Court ever become reality?

Europe has a long and chequered history when it comes to patent law. Efforts to establish a single EU patent and a European Patent Court system have been ongoing for years. However, more recently, discussions have gained momentum and have even led to the adoption of a draft agreement on a European Patent Court by the Council of the European Union (March 2009), and some rather promising conclusions adopted by the council in December 2009. These are the results of years of intensive discussions among the (now 27) EU member states. However, a recent opinion of the advocates general takes the position that this system does not accord with the EU Treaty. This has seriously jeopardised the chances of creating a single EU patent and a uniform European Patent Court, since it is likely that the Court of Justice of the European Union (ECJ) will follow it.

This chapter elaborates on the current system and its drawbacks. It then provides an overview of the proposed European Patent Court and the changes it would bring about, as well as summarising the concerns raised by the advocates general. Although the chances of the European Patent Court becoming a reality remain low, this chapter sets out other possibilities for enhancing the European patent system.

The current situation: expensive European patents and national litigation

Currently, only two IP rights are granted by EU authorities: the Community trademark and the Community design. Both are administrated by the Office for Harmonisation in the Internal Market in Alicante, Spain. Both were introduced by EU regulations and exist in parallel to national trademark and design rights, with legal recourse to the ECJ guaranteed. However, European patents are issued by the European Patent Office (EPO) which, despite its name, is not actually an EU authority. Rather, it was established by a multilateral agreement, the European Patent Convention (EPC), entered into by all 27 EU member states plus 10 additional non-EU

countries. Once granted, a European patent breaks up into national parts, meaning that the owner actually holds a bundle of national patents. Fees must be paid for each country where protection is requested. The current system is widely regarded as being extremely expensive and complex. Because the costs rise depending on the number of countries in which patent protection is sought, most inventors patent an invention only in a limited number of EU states. The main countries of interest are France, Germany and the United Kingdom. An EU patent validated in 13 countries can cost as much as €20,000 (€14,000 of which is for translations alone). In the United States, in contrast, the average patent costs only €1,850 – which makes a European patent, on average, 10 times more expensive. Although there has been a recent initiative to lower the number of translations required, which resulted in the London Agreement, not all EPO member states ratified this. The EPC countries that did ratify the London Agreement waive, entirely or largely, the translation requirements for European patents. This shows that language is still and will always remain a delicate issue in the discussions.

Each national part of the European patent must be enforced (litigated) before the respective national court; the same is true for alleged invalidity. For example, if a patentee wanted to enforce its European patent in Germany, the United Kingdom and France, it would need to file three different lawsuits. Needless to say, such multiple litigation is a major drawback to patent litigation in Europe, particularly in comparison to the United States. Although litigation in Europe (with the exception of the United Kingdom) is relatively cheap and fast, particularly in comparison to the United States, costs add up if one needs to litigate in several different countries. Moreover, parallel litigation is time consuming and needs to be coordinated. At the end of the day, one might even end up with different opinions from different courts. In sum, the term ‘European’ patent is misleading because, as opposed to trademarks and designs, no single, uniform European-wide patent is granted by any EU authority.

The European Patent Court

The draft agreement seeks to overcome the limitations of this fragmented patent market. It aims to establish a system where courts are competent to rule on infringement beyond national borders and creates a 'one-stop shop'. To this end, the European Patent Court will have a court of first instance and a court of appeals, as well as a registry. The court of first instance shall comprise one central division as well as local (regional) divisions. The local divisions will be set up in the signatory countries (ie, the 27 EU member states plus 10 additional non-EU EPC countries). The panel of the court of first instance will be multinational and consist of three judges (two permanent and one drawn from a pool of judges). The language of proceedings before any division will be the local language (eg, French before the local French divisions, German before the local German divisions). Depending on the number of cases heard by the local divisions, there will be more than one (but a maximum of three) local divisions per country. Infringement actions will be brought before the local division of the country where infringement is said to have occurred or where the defendant is domiciled.

No country is obliged to set up local divisions. If a country does not opt to establish such local division, cases shall be brought before the central division, which hears cases in the language in which the patent in question was granted (ie, German, English or French).

It is contemplated that an appeal may be brought before the court of appeals.

The most important change would be that the decisions of the court of first instance (central or local divisions) would have effect:

- for the whole territory of the European Union, in the case of an EU patent; and
- for the territory of the countries in which the patent is in effect (at most, this would be 27 EU member states plus 10 additional non-EU EPC countries), in the case of a European patent.

The biggest change brought about by the draft agreement would be that any holder of an EU patent or European patent could effectively stop infringement in Europe by initiating one single patent infringement trial against the accused infringer.

In addition to infringement actions, the new European Patent Court would have jurisdiction over revocation actions. These may be raised either as a counterclaim by the defendant when being sued for infringement or when no action for infringement has been initiated (in which case they shall be heard by the central division).

The central divisions would also be competent to hear actions for non-infringement and actions for the grant or revocation of compulsory licences and compensation for licences.

ECJ decision expected by the end of 2010

The proposed legal framework and various provisions of the draft agreement have raised certain legal concerns, which is why the EU Council decided to request an opinion from the ECJ on whether the draft agreement accords with EU law. A hearing took place in May 2010. In July 2010 the advocates general of the ECJ, in a leaked opinion, took the position that the current proposals for a unified patent litigation system in Europe are "incompatible" with EU treaties. The advocates general provide the ECJ with opinions that are non-binding. However, in the majority of cases the ECJ ends up following their opinion. The reasons for the current proposals' incompatibility with EU law may be summarised as follows:

- The draft agreement is regarded as providing insufficient guarantees to ensure full application and observance of the pre-eminence of EU law;
- The remedies available in case the European Patent Court infringes EU law are regarded to be insufficient;
- The draft agreement fails to satisfy the requirement to ensure effective judicial control and uniform application of EU law in administrative proceedings concerning the granting of EU patents; and
- The draft language system violates the defendant's rights because, in some cases, a defendant may be required to defend itself in a foreign language, even if it is active only in the domestic market.

It is widely expected that the ECJ will follow the opinion of the advocates general and regard the draft agreement as incompatible with EU treaties. Of course, changes may be discussed. However, any proposed change will delay adoption of any new draft agreement. Decision making in the European Union is a complicated matter. Still, it may be possible to overcome some of the concerns raised. For example, it would not be difficult to allow a defendant to defend itself in its own language. However, what will likely prove difficult will be for non-EU countries to accept the supremacy of EU laws and legal recourse to a European court. At this point, it is difficult to imagine that such consent could be reached.

Other parts of the package

The draft agreement on the European Patent Court is only one part of a package of measures designed to

establish an enhanced patent system in Europe. Another strand is the proposed regulation for an EU patent. Despite consensus in the industry that translation requirements are a problem, since they drive up the costs of obtaining protection in different countries, an agreement on translation arrangements has been difficult to reach, mainly because some countries fear that their domestic industries will be harmed if the patent system acknowledges only foreign languages.

The European Commission issued a proposal on July 1 2010 that would significantly reduce translation requirements. The EU patent would be examined, granted and published in one of the EPO's official languages (ie, English, German or French); this would be the legally binding text. The claims of the patent would then be translated into the other two official EPO languages, but no further translations into any other language would be required. (The only notable exception is that in the case of a legal dispute regarding an EU patent, the patent holder may be required to provide further translations (either into the language of the alleged infringer or the language where the central division is located)). The European Commission also proposes some accompanying measures – for example, high-quality machine translations of EU patents into all official languages and permission for applicants from countries

whose language is not English, German or French to file applications in their own language.

The European Commission estimates that under this proposal, the costs would be significantly reduced. For an EU patent covering 27 member states, it is estimated that costs would be less than €6,200 (of which only 10% would be due to translations).

However, one should not be overly optimistic (or, depending on one's viewpoint, pessimistic) that this proposal will be accepted without lengthy discussion. Language is an important issue and, despite the fact that English, German and French are clearly the most important patent languages, in practice, countries such as Spain and Italy are likely to remain determined to obtain translations into their own languages as well.

Conclusions

Assuming that the ECJ will reject the draft agreement, the European Patent Court is probably dead. It is hard to imagine how the various non-EU countries involved will accept a framework that is governed by the application of EU laws and legal recourse to EU courts. This would probably jeopardise the whole system envisaged, including the proposed EU patent. In the end, it may prove nothing more than another futile attempt by Europe to enhance its patent system.



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