One step closer to European unity

After almost a decade of failed negotiations, 2009 saw EU member states commit to the creation of an EU patent and single patent court. A panel of leading IP professionals discuss their hopes and expectations for a unified European patent system

By **Sara-Jayne Clover**

A meeting of the European Union's Competitive Council in Brussels in December last year resulted in a political agreement to introduce a unitary patent system to Europe. The commitment to create a single patent court and an EU-wide right granted by the European Patent Office (EPO) offers hope to innovators looking for more affordable and consistent patent protection across the European Union.

Negotiations for what were previously called the Community patent and the European and Community Patents Court began in 2000. The agreement reached in December is by far the most significant step taken by member states since discussions got underway. However, in order to push the vote through, member states have had to sidestep several highly contentious issues, notably relating to translation requirements for the EU patent. Under the Lisbon Treaty, while most decisions can now be agreed on by majority vote, the issue of languages still requires unanimity among all 27 member states. This controversial matter will now be decided under a separate regulation. Many member states agree that excessive translation costs will make the patent unattractive to applicants. Yet there are several countries that would like to see all EU patents fully translated into their official languages. They have so far refused to agree to any proposal limiting translations to English, German and French – the official languages of the EPO.

However, while there are still obstacles to overcome along the path to a harmonised EU patent system, progress is undoubtedly being made. In order to discover what those in the IP community hope for the future of Europe's patent system, *IAM* asked some key players to give us their views and, in particular, to consider the following:

- Do you think the political agreement reached by the member states of the EU on 4th December is a significant step towards the creation of the EU patent and single patent court?
- When the right and court finally emerge, what will be the key elements in ensuring their success?
- Does Europe need a single patent right and patent court?
- Are you confident that they will come into force and that they will be popular?

All respondents agree that harmonisation of the patent systems across member states is essential if Europe is to be a truly common market. There are hopes that the current inconsistencies in court decisions in different jurisdictions will cease, and that patent protection across the EU will become more affordable. The political agreement reached at the end of last year, it is felt, is a good start and the unitary right and court are expected eventually to come to fruition. Nobody, however, is expecting the process to be quick or easy.

Alison Brimelow
President, European Patent Office
"The lack of a unitary title and the absence of a unified patent litigation system make the patent system complex and costly"

Axel Horns
European patent and trademark attorney, and author of the IPjur blog
"If national vanity in the question of patent translations should prevail, the entire project will be doomed"





Alison Brimelow
President, European Patent Office, Germany

Europe clearly needs a single patent right and patent court: the existing system is only a partial reflection of the original idea of a unitary European patent for the common market. As none of the so-called Community Patent Conventions have become a reality, the European patent system is still incomplete. Stakeholders have repeatedly reported that the current fragmentation of the patent system in Europe, and in particular the lack of a unitary title and the absence of a unified patent litigation system, make the patent system complex and costly and hamper the effective enforcement of patents.

Although EU member states have now politically committed themselves to the basic architecture of a unitary patent system, there is still much work to do before such a system can become operational. The EU plans require the adoption of a variety of legal instruments: two separate EU regulations (in particular the crucial one on the thorny translation arrangements still to be proposed by the Commission and requiring unanimity in the Council); one international agreement under EU law for the integrated court system; and a revised European Patent Convention (EPC) which would permit accession of the EU to the EPC.

Although both the EU patent and the litigation system are now a step closer to realisation, it is difficult to assess at this stage whether and when the envisaged system will become operational. Once established, the popularity, success and sustainability of the system will in essence depend on its flexibility, its potential to simplify the grant of an EU-wide patent and its ability to provide decisive cost savings as well as effective enforcement. The quality of work and the level of legal and technical expertise in the court panels are also significant parameters in this respect. The envisaged architecture foresees that the EU patent is granted by the European Patent Office. Hence, the system's overall success presupposes that the EPO's central role in granting both EU and European patents remains unaffected, and that the EPO's efficient and well-accepted grant procedure is fully relied upon.

Andrew Farquharson
Senior Patent Director, AstraZeneca, United Kingdom

AstraZeneca supports the principle of a Community patent and the establishment of a European Community Patent Court (ECPC). We believe this will remove inconsistent litigation outcomes between EU member states and reduce costs arising from the present need to carry out multi-state litigation. We also believe that before the ECPC is established, suitable regulations must be agreed to ensure consistency, quality and appropriate cost of all ECPC procedures. Protecting intellectual property is vitally important to innovative organisations like AstraZeneca that invest billions each year all over the world in developing new medicines.

Axel Horns
European Patent and Trademark Attorney, and author of the IPjur blog, Germany

If the European Union wants to take itself seriously in the big game of globalisation and world trade, especially *vis-à-vis* the US





Ron Hymers (far left)
Managing patent attorney, BP
"A litigation system that performs in the best interests of all users (plaintiffs, defendants and the public at large) is more important than whether there is a single court"

Ilias Konteas (left)
Senior adviser, intellectual property, BUSINESSEUROPE
"European business needs a single patent court system and an EU patent with the highest quality, cost-effectiveness and legal certainty"

and China, a unified patent system is indispensable. There should be no doubt that the European Council's conclusions as laid down on 4th December last year represent a major step towards the creation of the EU patent and single patent court. We now appear to have a statement precisely setting out the areas on which a political agreement has been reached so far. However, it is also clear that the question of the rules on patent languages and translations is not yet resolved. According to the present consensus, the EU Patent Regulation will be accompanied by a separate regulation governing the translation arrangements for the EU patent. These must be unanimously adopted by the Council in accordance with the Treaty on the Functioning of the European Union. Although machine translation is seriously under consideration, there appears to be plenty of opportunity for political discord.

And disagreement over translation is not the only threat to this project. In 2009 the EU Council decided to include non-EU states, such as Turkey, in a pan-European court system. To this end, the areas of the agreement pertaining to the EU patent court are drafted under international law. It appears as if even the proponents of this approach are not quite sure whether such an undertaking is in accordance with existing EU treaties. Hence, the EU Council has referred a set of questions concerning points of law relating to the court system – which strangely were not published at the time of writing this – to the European Court of Justice for consideration. Moreover, building a court system on the basis of an agreement outside the Lisbon Treaty means that the painstaking process of ensuring ratification by all EU member states plus interested states outside the EU has to start again. The Danish government has already indicated that this would require transference of competence which, according to the Danish Constitution, would require either a national referendum or a 5/6 majority in the Parliament.

I am afraid that the fate of a unified European patent system might resemble some elements of the making and ratification of the Lisbon Treaty: if it does eventually succeed, it will most probably be quite a narrow victory. However, assuming that these obstacles can be overcome and the unitary patent and single patent court brought into force, their success will depend on the total costs for users. It is vital that the average cost of court proceedings not be excessive, as is the case in some jurisdictions today. And that translation costs don't run high: if national vanity in the question of patent translations should prevail, the entire project will be doomed. An all-English language policy would probably ensure widest acceptance of the new structures. However, it does not look as though such a solution can really be expected.

Ron Hymers
Managing Patent Attorney, BP, United Kingdom

Business performs best in a stable and predictable environment. We cannot afford to get the European patent litigation system wrong. If the system is unnecessarily complex, it will lead to high costs and wasted business opportunities. The agreement by the Competitiveness Council on 4th December represents a significant step in the development of both a unified patent litigation system and a Community patent for the European Union. The conclusions of the Council have the capacity, in the longer

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term, to provide a basis for a satisfactory European patent litigation system.

A single patent, granted in respect of the whole of the European Union, has an obvious attraction. However, industry will support it only if it can provide a significant advantage over the current system. As the single market has strengthened and the national litigation systems improved, the predictability and consistency that they provide have made it more difficult to make out a good economic case for the single patent. The Community patent will succeed only if it has simple language arrangements and its costs are reasonable. Ideally, the costs should be no more than the cost of obtaining national patents in about three EU states.

A litigation system that performs in the best interests of all users (plaintiffs, defendants and the public at large) is more important than whether there is a single court. The success of the court system will be very much dependent on the quality and consistency of the judicial decisions, the arrangements made concerning the language of the proceedings and the selection of the division of the court to hear particular cases. The rules of procedure must allow cases to be tried quickly to a reliable and fit-for-purpose standard. As regards language, the language of the patent being enforced should be used by the court, unless the parties agree otherwise. Plaintiffs should be allowed to sue for infringement in the central division of the European patent court and defendants that are sued other than in their state of domicile should be able to seek to transfer the case to the central division.

The steps taken by the Competitive Council towards a unified European patent system are a good start, but there remains much to do. The success or failure of the system will depend on details that are still to be worked out. There have been many attempts to find solutions to the problematic issues over many years. A unified court system and a single patent for a single market may be inevitable, but it is hard to foresee that either will be achieved easily or quickly.

Ilias Konteas
Senior Adviser, Intellectual Property, BUSINESSEUROPE, Belgium

Europe needs a single patent court system because the existing fragmented patchwork of national patent systems is a barrier to intellectual property protection for companies and especially SMEs. A common patent jurisdictional system would bring important cost savings of approximately €300 million that companies could devote to further R&D. To ensure its success, the single patent court will need highly experienced, legally and technically qualified judges sitting in multinational panels and applying common procedural rules. Flexible solutions to handle validity and infringement disputes should be provided. Effective transitional mechanisms, including the possibility of an opt-out of the system for applicants, should be put in place to allow companies to gain trust in the new system. BUSINESSEUROPE also strongly believes that Europe’s policymakers should start without delay to work towards building a real patent and language competency for judges to be appointed to the proposed patent court, so that it may become operational from day one.

In addition to the unified court, BUSINESSEUROPE believes that a cost-effective EU patent is needed. Current patenting costs in Europe are prohibitive for companies in terms of maintenance fees and translation. These costs make a patent in





Don Rosenberg (far left)
EVP & general counsel, Qualcomm
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Lothar Steiling (left)
Chief patent counsel, Bayer Aktiengesellschaft, and chairman, Federation of German Industries IP Committee
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Europe up to 15 times more expensive than, for example, a US patent. The EU patent is important to boost Europe's innovation. It is key that the cost level for obtaining and maintaining an EU patent be accessible for all companies and in particular SMEs.

BUSINESSEUROPE considers the political agreement reached at the 4th December Competitiveness Council meeting a positive step in the direction of creating the EU patent and a single patent court system. European business needs a single patent court system and an EU patent with the highest quality, cost-effectiveness and legal certainty. Whether a final agreement can be reached depends on the willingness of EU member states to take seriously their commitments to Europe's innovation and competitiveness. The 4th December agreement is a first step. A number of important issues still need to be resolved.

Don Rosenberg
EVP & General Counsel, Qualcomm, United States

The concept of a single EU patent and an EU-wide patent court goes hand in hand with the concept of a single European market. The present differences between processes, procedures and decisions of the national courts create barriers — in terms of cost and access to justice — to free competition that are contrary to the central tenets of the EU. The current fragmented system does not help the growth of European business and is prohibitively expensive for many European SMEs. A system that efficiently and cheaply provides decisions that are both consistent and predictable will quickly become popular with users. The fears and uncertainties that accompany anything new will quickly fall away once the system is seen to be working.

A central granting procedure with simple language requirements will help to reduce costs from their present level, providing greater access to a wider range of businesses and organisations. A successful EU patent system will provide a fair balance between the needs of all users of the system. It will provide efficient enforcement proceedings with the same flexibility as the current system when it comes to procuring, maintaining and enforcing patent rights. A central court system will lead to greater consistency and, for the first time, EU-wide legal certainty in European patent litigation. The element of balance as a requirement for success cannot be overstated. This is particularly true in the enforcement system, where the rights of patent holders and the need to preserve incentives to innovate must be considered carefully when establishing the laws for determining liability and awarding remedies, including injunctive relief and damages.

Although many of the details have yet to be worked out, the agreement reached by the member states in December is a clear sign of the political desire for an EU patent and a single patent court. The agreement will add impetus to the efforts of many to find a balance between the wishes of different member states and the needs of different users of the patent system.

Lothar Steiling
Chief Patent Counsel, Bayer Aktiengesellschaft, and Chairman, Federation of German Industries IP Committee, Germany

Since the Lisbon Agenda, it has been clear that Europe needs a single patent right and patent court. European industry has always

Jonathan Zuck
President, Association for Competitive Technology (ACT)
"SMEs cannot and should not spend more money on patent lawyers than they do on innovation"



wanted such a reform of the system. However, it will be of benefit only if it is truly unified and efficient, and provides adequate legal certainty. With regard to quality and efficiency, there is probably much to be learned from the German patent court system, which is highly respected and accepted. In fact, Germany is often the jurisdiction of choice even for conflicting parties from other member states. The new court will need to be quick, with efficient trial proceedings and legal certainty with regard to the language used.

After several years of controversial discussions, the European Council's conclusions definitely help to demonstrate that the EU member states are willing to move forward to a single EU patent and patent court. Now that the basic elements of such a patent and court system have been agreed, certain abstaining member states will hopefully be motivated to join the others in helping to create a single patent court. It is well known that finalising the conclusions was a political challenge right up to the very end. Therefore, the Council's conclusions can be seen as a significant step towards the creation of a court.

There are most certainly still many unsolved questions regarding the potential popularity of the system when it eventually comes into force. If the EU succeeds in creating a truly user-friendly patent system which provides the necessary key elements, it will most certainly be well accepted by its users.

Jonathan Zuck
President, Association for Competitive Technology (ACT), United States

The lack of a European patent is a significant challenge for innovative small and medium-sized enterprises (SMEs) doing business in Europe. European innovators often do not protect their inventions due to the complexities of different patent definitions between member states, patent pendency times of up to 44 months and high costs for applications (partly due to translation requirements, which are still significant). SMEs that want to protect their patents from infringers may be required to initiate court proceedings in every state in which the patent is operating – an excessive burden for small firms with limited budgets. SMEs are desperate for the simplicity, costs savings and legal certainty that an EU patent system can deliver. SMEs cannot and should not spend more money on patent lawyers than they do on innovation.

The fact that the 27 member states have an agreement in principle to move forward the dossier is a significant and important step. Although details need to be finalised, this is a crucial tool for Europe to foster economic growth and innovation.

When defining a unified European patent system, the keys to success will be quality and accessibility. The final system must apply rigorous patentability criteria in order to provide legal certainty and avoid litigation and abuse. SMEs will only trust a patent system with these core characteristics.

The new system must also be accessible to SMEs. It cannot impose disproportionate administrative burdens and must be easy to use. In short, we need a practical system to register and protect our innovations rapidly throughout the EU, which will promote, not deter, innovation.

ACT is confident that these measures will come into force to support Europe's capability to innovate and to encourage the free circulation of knowledge. The European Union has delivered the exchange of goods, services, capital and people across the 27 member states. But SMEs will not profit fully from the internal market unless they can also protect their innovations across Europe.

We hope that the Spanish presidency recognises the added value of a European patent that will effectively protect patents throughout the European Union and continue with these important negotiations. For SMEs, rapidly reacting to market developments and taking advantage of opportunities are crucial. Thus, the generation and protection of intellectual property are critical factors in their success. *iam*

Sara-Jayne Clover, reporter, *IAM* magazine