FUNDAMENTAL REFORMS AHEAD FOR EUROPEAN PATENT LAW*

An overview of the new system of the European Patent with Unitary Effect and the Unified Patent Court

The Member States of the European Union are in the process of preparing the introduction of a new European Patent with Unitary Effect and the creation of a single Unified Patent Court with divisions located all over Europe. With the realization of this patent reform package, the significance and the scope of patent litigation in Europe will increase substantially. The creation of a truly unitary European patent protection and the respective court system is aimed at fostering the attractiveness and the competitiveness of patent enforcement in the European Union with a view particularly to the United States of America and China. From both a legal and economical perspective, the new system and in particular the introduction of the new Unified Patent Court will present the biggest game-changer in European patent law ever, bringing about fundamental changes for patentees, defendants, their counsel, judges and everyone involved in patent litigation in Europe.

Status quo and reform objectives

Patent protection for inventions may currently be achieved in Europe on two paths: either through national patents, which are valid and provide protection only in the respective granting Member State, or through a European Patent, which is granted by the European Patent Office based in Munich. However, contrary to what its name suggests, such European Patent is not a single uniform intellectual property right providing protection in the entire European Union. Instead, it must be validated with the respective national patent offices and then only exists as a bundle of national patents. Thus, the patentee must bring separate infringement actions before the competent courts in every single jurisdiction where the infringement occurs. Equally, the defendant must endeavor to have the patent invalidated separately in every jurisdiction. This system is not only costly and burdensome for the parties, it also bears the inherent risk of conflicting decisions.

The imminent introduction of the so-called “European Patent with Unitary Effect” and the creation of the “Unified Patent Court” are aimed at creating a homogenous patent protection for the entire territory of the European Union. On this basis, it will be possible to obtain an injunction of an infringing product for the entire European territory (i.e. for the participating Member States) with just one legal action. For the companies involved, this will put the vast majority of the Single European Market at stake in future patent litigation in Europe, thereby significantly increasing the economic and strategic importance of such cases.

The European Patent with Unitary Effect

The new European Patent with Unitary Effect will be based on the existing European Patent. During the application or subsequent to the grant of a European Patent, the patentee must apply for such patent to be afforded unitary effect. The European Patent Office will continue to be the competent body for examination and granting of such patent applications, as well as for handling opposition proceedings. Contrary to the current European Patent, the European Patent with Unitary Effect is one single patent, providing unitary protection in all participating European Member States.

The Unified Patent Court

The centerpiece of the patent reform package is the Agreement on a Unified Patent Court (UPC), signed by 25 Member States of the European Union in early 2013. The UPC will make it possible to enforce, attack and defend a patent before one single court with effect for all participating Member States. The UPC will have jurisdiction not only for the new Unitary Patents, but also for the existing European Patents, pending patent applications and Supplementary Protection Certificates. The Court of First Instance is composed of Local Divisions (which are set up in single Member States, four in Germany, one per Member State in other jurisdictions), Regional Divisions (which can be set up jointly by Member States who do not wish to establish a Local Division of their own), and the Central Division.

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The Central Division will be based in Paris, London and Munich. The Appellate Court will be set up in Luxemburg. The local jurisdiction in the individual case will be determined amongst the Local and Regional Divisions in view of the place of infringement or the defendant’s seat.

In principle, the Local and Regional Divisions have competence to handle infringement suits, while the Central Division shall handle invalidity actions. However, under the new system, an invalidity action may also be brought before the Local or Regional Divisions as a countersuit to a pending infringement action. Thus, while the UPC retains the principle of bifurcation known from the German system, in practice many cases are expected to be handled as combined infringement and validity proceedings before the same division.

Once it is up and running, the UPC will have exclusive jurisdiction for such cases from day one. An exception exists for the European Patents, patent applications and Supplementary Protection Certificates existing at that point in time in two respects: for a transition period of initially seven years, the UPC and the national courts will have alternative jurisdiction. Moreover, the patentee may declare to “opt out” of the jurisdiction of the UPC, either for individual patents or entire portfolios. By declaring an “opt out”, the patentee can prevent his patent from being declared invalid by the UPC with effect for all participating Member States. On the flip side however, the patentee thereby also deprives himself of the possibility to obtain an injunction for infringement of the patent with pan-European effect.

This puts the burden on patent holders, including not only European, but all global companies with important European Patents in their portfolios, to evaluate whether and for which patents opting out of the jurisdiction of the UPC provides strategic advantages. Large industrial European patent holders such as Siemens have announced their intention to test the new system with only a part of their patent portfolios.

The proceedings before the Local Divisions will be held in general in the official language of the Member State where the respective Local Division is seated. Due to the very high number of patent cases being brought to court in Germany each year, Germany will be the only Member State to host four Local Divisions (based in Munich, Mannheim, Düsseldorf and Hamburg). There is an ongoing debate whether English should be permitted as a second language for proceedings to be held in. At the Regional Divisions, the participating Member States are free to decide on any of their official languages to be the language of the proceedings before that Regional Division. For example, Sweden, Estonia, Latvia and Lithuania have agreed on English as the language of their joint future Nordic-Baltic Regional Division with its seat in Stockholm. Generally, parties are also free to agree, with the consent of the court, on the language of the patent as the language of the proceedings. At the Central Division, the language of the patent which is currently English for the vast majority of European patents, will always be determinative.

**Outlook**

As of today, 25 of the 28 EU Member States are fully participating in the new system. Only Spain and Croatia do not participate, Poland participates only partially (not in the UPC). Spain filed two complaints against various aspects of the patent reform package with the Court of Justice of the European Union, both of which were eventually dismissed. The Agreement on a Unified Patent Court will
enter into force after ratification by at least 13 participating Member States, which must include Germany, France and the UK. Until then, a set of procedural rules is being created, the (currently 18th) draft of which is far advanced. Furthermore, a couple of questions of practical implementations must be solved, including selection and training of judges, the implementation of a unitary IT-system and the specification of the court’s fees. Against this background, the UPC is currently not expected to be fully operational before 2017.

In the first few years, the new system will come with considerable legal uncertainty. Many of the new material and procedural provisions will require interpretation, and the quality of the Local and Regional Divisions scattered all over Europe will initially be hard to assess. It will take some time until reliable lines of case law have been established. In view of the substantially increased significance of these cases, there are interesting times ahead for European patent law – and for all those involved.

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