UPDATE ON EUROPEAN PATENT (EEUPC)

It seems like the proper moment to provide an update on where we are with the creation of a single EU patent and how this EU patent, once created, will be dealt with in Court if it comes to infringement or validity challenges. Some recent development indicate that momentum is gaining for the adoption of a unified EU or Unitary Patent and potentially also on litigating EU patents in Europe on the basis of unified rules.

Recent Encouraging Developments

Firstly, last week, the EU's MEPs agreed on creating a single EU Patent via the so called “enhanced co-operation” procedure, which allows a group of EU countries to go ahead with co-operative ventures even if all 27 countries do not want to join in[1].

Secondly, on March 8, the European Court of Justice will render its judgment on an important hurdle, surrounding the creation of a single EU patent (see below).

A Bit of History and Issues at Hand

For more than 50 years EU is discussing how to get a more rational patent litigation system. Due to political differences there still is no single, unified patent litigation system (UPLS) that can deal with validity and infringement of European patents in one single action covering the European Union. Not only don't we have a single system yet, we have no unified single European Patent Court either. Instead, the present enforcement system is divided up along national lines, resulting in costly, inefficient, parallel litigation across Europe involving "the same" European patent [2]. After grant – for which a unified system is provided by the European Patent Convention since 1977, the patent holder is left with a "bundle" of national patents. Litigation has to be instigated in every national European jurisdiction separately – especially since the European Court of Justice put a hold to cross-border litigation which started in Dutch Courts but received only support from Germany and Switzerland.

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Costs are still a major issues. Under the current system of the EPC (European Patent Convention) the high costs of obtaining an EU-wide patent protection for a single invention is generally seen as the biggest hurdle to go "European", especially for SMEs. Though the patent application procedure has been unified by the EPC. National patent interests dominate the European arena, causing a multiplication of patent fees (about 20.000 EUR per year for an EU-wide protection, US about 1.800 EUR per year) as well a huge multi-language translation costs.

So where are we now?

First we had EPLA, the "European Patent Litigation Agreement", which was a creditable initiative by patent practitioners and judges, but was basically killed by politicians. Subsequently the Council Working Party on Intellectual Property (Patents) under various EU Presidencies has, in close co-operation with the European Commission, been trying to reach a Unified Patent Litigation System (UPLS) for patents in Europe.

The most recent documents relating to the EU patent - or "Unitary Patent" - are:

(a) a draft Agreement on the European and Community Patents Court (ECPC, now called the "European and European Union Patents Court" or EEUPC)

(b) a draft Statute of the Court

(c) (non-official) working paper from the Advisory Work group on the draft Rules of Procedure for a Unified Patent Litigation System (October 16, 2010)

(d) a EU Council document authorizing enhanced cooperation creating a Unitary Patent

(e) a EU Council document on translation arrangements for the European Patent

The discussion based on these drafts is combined with work on the development of a European Community Patent (Compat), now called the European Union patent[3]. Amongst others a Group of Experts, appointed by the Commission, has been trying to be of some assistance during this process[4].

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The Draft Agreement seeks to import the positive features of the EPLA proposals but within the European Union legal order, although the system is designed to be open for non EU-EPC Contracting States, such as Switzerland, Norway and Turkey. The envisaged Court system is designed to combine the best of both legal traditions across Europe, i.e. the Continental (in essence Roman (civil)) law system and the English (common law) tradition, both in terms of substantive as well as procedural law. Although this in itself constitutes a major effort, a consensus seems to be slowly growing among judges and attorneys (and maybe professionals at large) on a European level that this is feasible. It is the politicians that still have to join the bandwagon with real commitment.

THE EEUPC [5]

The EEUPC consists of a Court of First Instance (CFI), with a central division, regional and local divisions, panels of 3 or 4 judges with a maximum of 1 technical judge, always in multinational composition, and a (centralized) Court of Appeal (CoA, also multinationally comprised, but with 5 judges and at most 2 technical judges) and a Registry. There is a pool of judges and a set-up for training facilities for them. As an option infringement and revocation proceedings can be bifurcated (German system), but also tried in the same proceeding, as is presently done in the majority of other jurisdictions outside Germany. The draft provides for a transitional period of 7 years during which the EEUPC will function alongside the national patent courts and in addition there is an opt-out possibility for pending European Patents or applications[6]. On average proceedings for the CFI should last no longer than a year and the same is envisaged for appeal proceedings. CFI proceedings consist of a written phase, an interim phase and an oral hearing (typically not lasting longer than one day) and can be characterized as a moderately frontloaded system. The remedies required by the Enforcement Directive are incorporated under the UPLS.

ECJ'S ROLE IN CREATING A UNIFIED EU PATENT

In June 2009, the EU Council decided to seek the opinion of the European Court of Justice, in accordance with Article 300(6) of the EC Treaty, on the question:

"Is the envisaged Agreement creating a Unified Patent Litigation System (the name changed into "European and Community Patents Court" - ECPC - and was recently renamed again in the

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"European and European Union Patents Court", or EEUPC) compatible with the provisions of the Treaty establishing the European Community?"

The Joint Opinion of the Advocates General of the European Court of Justice (ECJ) of July 2, 2010 was "leaked". The full text with informal English translation can be found here. The ECJ is expected to render its judgment on March 8, 2011. If the ECJ follows the opinion of the Joint Advocates-General then we may expect four areas of problems to be resolved (see par. 123 Joint Opinion, under *"Conclusions"):*

1. The present draft proposal for the EEUPC in Article 14 *bis*, par. 1 b) is lacking sufficient remedies for a possible infringement of Union law by the Patent Court and adequate protection of the autonomy of the Union's legal system.

2. The remedies available in the event of the PC's infringement of Union law and in the event of non-observance of its obligation to effect a preliminary reference pursuant to article 48 paragraph 1 of the draft agreement are insufficient (see points 104 to 115 of the Joint Opinion).

3. The linguistic system faced by the central division of the PC may affect the rights of defence (see points 121 and 122 of Joint Opinion).

4. The draft agreement, read in the light of all the measures contemplated concerning patents, does not satisfy the requirement of ensuring effective judicial control and a correct and uniform application of Union law in administrative proceedings concerning the granting of Community patents (see points 68 to 75 of the Joint Opinion).

The Issues mentioned under 2 and 4 are generally considered the most serious ones. Common perception seems to indicate that all points can be addressed and should be no show-stoppers. In short:

ad 1. the idea would be to amend art. 14 bis,

ad 2. the idea would be to allow Advocates-General to instigate so called "cassation in the interest of the law" (this would be a sort of appeal that would not affect the rights of the original parties to the suit, but is only in the interest of the development of the law), or,

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alternatively, provide for a right to claim for damages against Member States who take part in the new system

ad 3. the idea would be to provide translation facilities upon request (see also the practice by Dutch courts in patent litigation cases where real time translation services are provided for by professional translators in translation cabins in the court room)

ad 4. Lack of Court control in EPO administrative granting proceedings (only relevant for future unitary EU Patents for EP's it will be a task for the EEUPC and only relevant for refusing to grant EU unitary patents). This issues seems to be *ultra questionem* - no business of the EU legal order

The good news is what the Joint AG's said on the legality of the idea of a joint Patent Court in general (see Joint Opinion under 58 and 60), namely that EU law allows creating a European Patent Court outside the judicial EU system and Member States are free to create a "common patent court". This makes a revival of EPLA legally possible in theory. EPLA was and is an *optional* UPLS-Protocol to the EPC 2000, for a true "coalition of the willing", which got nearly unanimous support from Patent Judges gathered in Venice 4 years ago. Lord Hoffman, Pagenberg and Robert van Peursem supported this again in the last Venice Forum, however political feasibility might be low in near future.

After March 8, no doubt we may expect a new impetus for the Unitary Patent, or, EU patent (although officially EU Patent implies that all EU countries will follow, but as we saw above Spain and Italy are no part of the "enhanced cooperation"- coalition of the willing and therefore EU patent would be somewhat misleading. We keep on calling it that way, anyhow.

Follow us further on March 8 when the ECJ speaks out. Meanwhile we add a new section (on the right of this blog) where we permanently make the most recent documents available relating to the EU or Unitary Patent. For further reading see our blog: "New Impetus on EU Patent, Unified EU Patent Court and UPLS" and Jochen Pagenberg, "EU Patent and the EEUPC Agreement: What can still happen?"

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[1] Together with the request for *enhanced cooperation*, the EU Commission changed the name of the "smaller" patent from "EU Patent" to "*Unitary Patent*".

[2] see for a comprehensive overview on where we are with the single EU Patent and EU patent litigation, Robert van Peursem, *"The future UPLS for patent litigation in Europe"* (2011), published in *"A century of patents in the Netherlands"* (Anniversary publication NL Agency - NL Patent Office, July 2010

[3] The latest draft Regulation, dated 27 November 2009, was politically approved during the Internal Market Council of 4 December 2009 under the Swedish Presidency. In the least pessimistic view this could enter into force around 2020 at the earliest.

[4] This Expert Group consists of representatives from industry (Business Europe, EICTA, EFPTA) and 5 judges and 5 attorneys from 7 Member States, mainly board members from IPJA (Intellectual Property Judges Association) and EPLAW (European Patent Lawyers Association): Judges Sir Robin Jacob (CoA London), Alice Pézard (Cour de Cass, Paris), Dr. Klaus Grabinski (BGH, Karlsruhe), Eurico Reis (CoA Lisbon) and Robert van Peursem (District Court The Hague), attorneys Kevin Mooney (London), Pierre Véron (Lyon/Paris), Dr. Jochen Pagenberg (Munich/Paris), Jorge Grau (Barcelona) and Dr. József Tálas (Budapest).

[5] with consent taken from the article by Robert van Peursem, *"The future UPLS for patent litigation in Europe"* (2011), see note (2).

[6] Dr. Jochen Pagenberg has suggested to introduce a permanent opt-out possibility not only during the transitional period, but permanently, for cases without cross-border aspects, in less far reaching form limited to a first action of a patentee or alleged infringer, so that any further action would have to go to the EEUPC. In a survey conducted among European patent judges at the 4th Venice Judges' Forum in November 2008, 2/3 of the respondents were in favor of this idea without restrictions, that presently is not in the Draft Agreement. The survey can be consulted at the EPLAW website, www.eplaw.org, together with Dr. Pagenberg's paper for the Strasbourg Colloquium of October 2008 where he first ventured this idea, as well as an outline of the results of the survey.

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