



EU Patent Reform

On 4 December 2009, the Competitiveness Council adopted a package of measures (“Conclusions on an Enhanced Patent System in Europe”), setting the foundations for both an EU-wide patent and a unified patent litigation system (UPLS) in Europe. The Council Conclusions were a significant milestone, marking political agreement on key components of both the EU patent and UPLS projects, and giving the green light for work to be continued on both dossiers.

This work continued throughout 2010, but the process stalled with Spain and Italy refusing to agree upon the translation arrangements for the EU patent. The Belgian presidency said it would reflect upon the most appropriate steps for taking the dossier forward, and under “any other business” at the Competitiveness Council meeting on 26 November 2010, ministers took note of information concerning the possibility of an initiating an “enhanced co-operation” procedure between several Member States as a way forward with a view to creating a somewhat different version of the EU patent system. This procedure is, in effect, a coalition of the willing, and would give rise to a “unitary” patent, but which had effect in only those countries taking part in the enhanced co-operation project. This was rapidly followed by a letter dated 7 December from 10 countries to the European Commission seeking use of the enhanced co-operation procedure. On 8 December Baroness Wilcox wrote on behalf of the UK government, similarly requesting enhanced co-operation.

The European Commission rapidly moved to support the request, announcing the submission of such a proposal on 14 December. This proposal was approved by the Legal Affairs Committee on 27 January 2011. In its policy paper PP01/11 of 31 January, the Federation welcomed the Commission’s proposal, but warned that:-

“Although there is an understandable desire not to lose momentum of the progress that has already been achieved, it is important not to rush proposals through without due care and full consultation.

The proposal to invoke enhance co-operation says very little about the litigation arrangements for EU patents. The Federation feels it is unthinkable to create an EU patent without a very clear idea of how such patents will be enforced and challenged. To this end, the Federation urges that both aspects of the EU patent reform project continue to be given at least equal priority.”

This warning became all the more prescient when on 8 March 2011 the Court of Justice of the European Union (CJEU) rendered its opinion that the previously submitted draft UPLS agreement was incompatible with the provisions of the relevant EU treaties. The significance of this was, of course, that the previously envisaged agreement would have to be modified so as to be compatible. Nonetheless, the Commission decided on 10 March formally to endorse the enhanced cooperation process. After some deliberation the Commission then decided that a way around the CJEU opinion on the UPLS could be found by excluding non-EU EPC states from the UPLS, and having this litigation system agreed under the auspices of a new international Court agreement which would be a Treaty entered into by the consenting EU countries, rather than an EU legal instrument. There would thus be created what has henceforth been referred to as the Unified Patents Court (“UPC”). (There would also be a separate set of Court Rules regulating the detailed procedure of the UPC.) The Unitary patent, however, would still be created by an EU Regulation, and a further EU

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Regulation would also still be required relating to the language arrangements for the Unitary patent.

Thus, the nature of the project had, within the space of a few months, moved from a project to create a truly Unitary patent for the whole of the EU, together with a court system extending to interested EPC states, to a more limited "Unitary" patent and UPC system. By this time 25 Member States had signed up to the enhanced co-operation procedure; but Spain and Italy had let it be known that they regarded the scheme as unlawful, and on 3 and 10 June respectively filed suits with the CJEU seeking to annul the Council decision of 10 March which had formally endorsed the enhanced co-operation procedure. These suits had no suspensive effect, and it is expected that they will take around two years to be decided. A further consequence of the new arrangement was that the original intention that there should be EU funding for the new court system also fell by the wayside. Hence, the financial arrangements for funding the UPC were thrown into confusion.

Despite these very dramatic changes, the Hungarian Presidency rapidly issued (on 14 June 2011) a draft Court agreement based on the Council Conclusions of December 2009. Importantly, the proposal remained that the UPC would deal not only with the new Unitary patent, but also with existing European Patents designating participating states, subject only to limited transitional and opt-out provisions.

Naturally, the Federation was concerned to examine and comment upon these proposals. The UK IPO's European Patent Reform Consultation Group (which includes representation from the Federation) invited interested parties to comment in detail upon the proposed arrangements, and various members contributed to the resulting paper entitled "Concerns of Principle". In its Policy Paper PP15/11 of 22 September 2011, the Federation formally supported the "Concerns of Principle" paper.

Regrettably, however, the Polish presidency (which took over on 1 July) has pressed on with the dossier with undue haste, with the intention of reaching a full political agreement by the end of 2011. In doing so, the Poles have taken the view (vocally supported by the Commission despite it having no formal say in the matter) that large areas of the Court agreement were non-negotiable because the Hungarian draft had been based on the 2009 political agreement. Similarly, the draft Regulations re-issued by the Commission following the CJEU opinion have in effect also been non-negotiable. The result of this has therefore been that virtually all of the points raised by users have been totally ignored. There are perhaps three areas of very major concern, though there are many others of real importance.

Three major concerns

The first concern relates the inclusion of Articles 6-8 in the Unitary Patent Regulation. The Federation has issued PP19/11 (25 November) on this issue in an attempt to persuade MEPs to vote for the deletion of these provisions when the matter comes before the European Parliament for its approval early in 2012. At the time of writing, the EP Legal Affairs Committee looks set to endorse a version of the UPP with Articles 6-8 left in. The provisions are in the view of many totally unnecessary since they are duplicative of provisions in the Court agreement in any event. The view of the Commission on the other hand, is that they are necessary to make the Regulation less susceptible of attack by the CJEU. However, the effect will be to give the CJEU jurisdiction over infringement issues. The result would likely be long delays in cases whilst references were decided, and the same degree of confusion brought to the law as the CJEU has "achieved" in the area of trade mark law. The UK IPO's European Patent Reform Consultation Group has expressed the unanimous view that these provisions should be a "red-line", such that the UK should not participate in any arrangement which includes these provisions.

The second concern is of the combined effect the Court agreement provisions on bifurcation, constitution of local Court panels, and jurisdiction. Bifurcation is optional under the Court agreement. Local panels are to be made up of two local judges and one visiting judge (who may, therefore be out-voted). The jurisdiction provisions permit forum shopping. This combination could easily result in the German division (perhaps two German

judges and one Austrian judge) routinely bifurcating, and issuing injunctions with no concern for validity. Their injunctions would, of course, be of pan-European effect. Further, under German jurisprudence, injunctions are never refused. Hence patent trolls will be empowered to an extent never before seen in Europe. Worse still, a rogue local Court could decide it should grant interim injunctions more easily than is normal to attract business. The result could be a European version of the Eastern District of Texas. To add insult to injury, present proposals include that SMEs (as most trolls would be) should have their Court fees subsidised by large industry's fees.

The third major concern is the total lack of any draft Court rules such that one cannot know anything about how the new Court would operate procedurally. States are being asked to sign up to an agreement to create a new Court with no real idea as to its mode of operation, and based on the past record, users can have no confidence that their concerns would be listened to.

So far as can be ascertained at the time of writing, the Competitiveness Council meeting of 5 December did not agree the final form of the Court agreement, but neither were the above concerns addressed. Debate appears to have centred on the location of the Central Division of the UPC. On this, the Federation has lobbied Baroness Wilcox by letter of 16 November (PP18/11), asking that the UK bid for the Central Division to be located in London, and most definitely not in Munich as Germany had suggested. The UK did indeed make a late bid, but the Polish Presidency has suggested that Paris be given this prize. (The Court of Appeal would be in Luxembourg, and the other minor prizes (the mediation and training centres) would go to Portugal, Slovenia and Hungary.)

It is still unclear, therefore, whether the initialling ceremony planned for Warsaw on 22 December will proceed. In view of the dire consequences for industry which would result from the arrangement as presently constructed, it is sincerely to be hoped not, and the Federation has, in PP20/11 (2 December 2011) urged that the UK should not initial, agree or sign anything which would preclude further discussion of the Federation's concerns. If the ceremony does proceed, then the understanding is that the wording of the Court agreement would be "locked". Hence, lobbying efforts will have to be redoubled so that the agreement is revisited under the forthcoming Danish presidency despite this "lock". Alternatively, the UK might pull out and join Spain and Italy on the sidelines, or kill the proposal in its current form such that a better agreement could be negotiated in a more careful and considered manner. Failing that, it seems likely that much of industry will simply revert to the 1970s system of applying for national patents, and the progress of the last 40 years will have been undone.

Alan Johnson, 12 December 2011