The EU Patent and the European and EU Patents Court
- An update March 2011

Following the CJEU opinion on the unified patent litigation system on the 8 March and the European Council vote on the unified patent on 10 March this is an update of our earlier review\(^1\) looking at the current state of play of the two ongoing initiatives aimed at achieving a unified patent system for Europe namely:

- The European Union Patent (EU Patent) (formerly the Community Patent) – a unitary patent right for the EU Member States; and
- The European and EU Patents Court (EEUPC) - a one-stop shop for litigating European Patents and (when they come to exist) European Union Patents.

The next steps to watch out for are:

- In the next couple of weeks, new proposals for the EEUPC in light of the CJEU’s decision; and
- On or before 30 March 2011, the publication of draft regulations covering the EU Patent and the proposed translation system.

The European Union Patent

Background

A draft Regulation on the EU Patent was agreed, at least on a general level, by the EU Competitiveness Council as far back as December 2009.

However, the vexed issue of the official language(s) of the EU Patent remained the focus of attention. This is despite the European Commission’s preferred approach of a trilingual system (based on the EPO approach of English, French and German), and the suggested compromise of Belgium, when it held the presidency of the EU Council last year, involving, effectively, access to cost-effective translation for member states with a “home language” other than English, French or German. Many member states, particularly Spain and Italy, remained vigorously opposed to, or at least highly sceptical of, a trilingual system as being discriminatory and/or likely to fail in the aim of managing the administration costs of a unified patent system for Europe.

Matters came to a head in December 2010 following a decision by a number of Member States to ask the European Commission to engage with them on working towards a unified patent system under the EU’s “enhanced cooperation” procedure. This rarely-used procedure essentially allows a group of Member States, in the event of an apparent impasse, to “go it alone” and move forwards towards a goal at the EU level, whilst leaving behind the opposing Member States. The European Commission presented a proposal opening the way for “enhanced cooperation” to create unitary patent protection in the EU on 14 December. The Commission’s proposed decision to authorise enhanced cooperation on unitary patent protection would allow some Member States to move forward immediately, leaving the possibility for others to join at a later stage.

Latest developments

The proposed decision to authorise enhanced cooperation on unitary patent protection received the approval of the Legal Affairs Committee of the European Parliament on 27 January and the European Parliament voted on an EU Patent by enhanced cooperation at its plenary session on 15th February. Then, at the 10 March meeting of the Competitiveness Council, a formal decision was taken by 25 of the 27 Member States to work towards a unified patent system under the EU’s “enhanced cooperation” procedure. Spain and Italy have chosen to exclude themselves from the process. They refuse to accept the proposed rules regarding the choice of official languages.

This was described by Zoltán Cséfalvay, Hungarian Minister of State for Strategic Affairs during the press conference following the decision as a huge breakthrough with the new patent being cheaper, simpler and avoiding the fragmentation that exists under the present patent system. Hungary currently holds the Presidency of the Council of the EU.

The Commission have now said that they will

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publish draft regulations; firstly one creating an EU Patent and secondly one dealing with the translation arrangements by the 30th March 2011. Once the legislative proposals are published, then normal EU legislative procedures will be followed.

It now looks ever more likely that we will have an EU Patent that covers some, but not all, of the EU Member States? However it is clear that Spain and Italy will be free to join at any time and the new European Patent will be available to all.

The potentially more difficult issue not covered by the Council of Ministers’ agreement on 10 March is the setting up of a common system for litigating the now likely EU patent and the existing European Patent. The Commission has stated that the creation of unitary patent protection is legally distinct from the creation of a European Patents Court.

The EEUPC

Background

As previously reported in InFocus (July 2010), the Court of Justice of the European Union (“CJEU”) was asked to adjudicate on the question of whether or not the current draft proposal for a unified patent litigation system and establishment of a European patents court is compatible with the provisions of the treaties of the European Union.

The proposal is, in nature, an international treaty being negotiated by the EU, its component Member States and a number of third countries (the non-EU countries of the European Patent Convention). It was foreseen that under the proposal the proposed patents court would be a separate body from the CJEU.

The Advocates General Opinion (1/09), presented to the CJEU on the 2 July 2010, concluded that the proposal, in its current state, was not compatible with the treaties. The concerns centered on what the Advocates General considered to be insufficient means in the proposal for recognising and ensuring the primacy of European Union law, a linguistic system (based upon English, French and German) which may affect the rights of defence established under EU law, and insufficient means of ensuring the correct application of EU law in relation to European Union Patents by the EPO - for example, any administrative review of a decision of the EPO on the granting of/ opposition to a European Union Patent would be carried out by the EPO itself, with no recourse to the Court of Justice.

Latest developments

The CJEU in an opinion handed down on 8 March, followed the Advocates General Opinion (although not adopting all of their reasoning). In particular, criticism was made of the fact that although the proposed Patents Court will have a mechanism to seek a preliminary ruling from the CJEU, it would operate outside the institutional and judicial framework of the European Union. In effect, the CJEU would have no way to require the Patents Court to apply and enforce EU law.

The CJEU’s decision, however, makes no reference to the two other issues raised in the Advocates General Opinion, namely the proposed trilingual system and its potential impact on the rights of defence and the absence of any mechanism to challenge the grant, or otherwise, of a EU Patent by the EPO.

This decision means that those involved in drafting the proposals for a unified patent litigation system, (the Commission, senior judges from the member states and some of Europe’s leading intellectual practitioners) will now have to re-think their approach and go back to the drawing board. One thing is clear from the CJEU opinion, the CJEU will require ultimate control over any court adjudicating on European patent law.

3 http://reaction.taylorwessing.com/reaction/Newsletters/InFocus/2010_07_08.html
4 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=Avis%201/09
Despite the setback on the 8 March, the Commission have already committed to continue working on this initiative, taking into account of course the issues identified in the recent ruling of the CJEU. Michel Barnier the EU commissioner for the internal market and services said at the Press Conference\(^5\), following the Competitiveness Council Meeting on 10 March,

“ In a few weeks’ time, I think we’ll be able to come up with a common position on this with the Council, while of course respecting the Court’s ruling.”

**Concluding remarks**

There is still much work to do before the goal of a fully unified Europe in terms of patent coverage and patent enforcement is realised. Indeed, while Spain and Italy remain on the side lines, this is not something that can be achieved. Furthermore, the Commission’s response to the CJEU’s ruling on the EEUPC will be critical. There has, to date, been some reluctance to put forward a litigation system with the CJEU as the ultimate arbiter of appeals. However, given the CJEU’s decision, it is difficult to see how a system complying with the decision can be proposed without having the CJEU at the top.

\(^5\) [http://ec.europa.eu/avservices/player/streaming.cfm?type=ebvod&id=175483](http://ec.europa.eu/avservices/player/streaming.cfm?type=ebvod&id=175483)