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European Patent Law Reform

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I. Introduction

Until now, the cross border patent protection already envisioned by the founders of the European Economic Community (EEC) failed due to differences regarding language provisions.

On December 4, 2009, the European Council of Ministers resolved upon core elements of a reform of the European patent system. The central element of the proposition is the so called European Patent (formerly "Community Patent"). The resolution was referred to the European Parliament for further deliberation.

The ministers' proposition contains both, criteria regarding the distribution of patent fees between the member states as well as provisions concerning cooperation between patent offices. Procedurally, the Council of Ministers continues to prefer leaving the choice of whether infringement proceedings and invalidity proceedings are to be conducted separately (system of separation; Germany and Austria) or in a single proceeding (joint system; remaining member states) within the courts' autonomous decision making powers. The courts remain composed of only one international judge; the language of proceedings shall be the respective member state's language.

In addition, the ministers favor the establishment of a single European patent court in order to facilitate enforcement of patents and prevent contradictory decisions from different member states' courts. The European patent court shall build upon tried and tested court structures of the member states and serve as an appellate court in close geographical proximity to the parties. It is the Commission's view

that this could result in cost savings for the European economy amounting to up to 289 million Euro per year.

According to expert estimates, half of all patent infringement litigation in Europe per year is conducted in Germany. The details of the organization of a European patent court shall be negotiated over the coming year. At this time, the European Court of Justice is verifying whether the present text is compliant with European law.

II. The EU-Patent

The goal of an EU-Patent is to grant an applicant uniform patent protection for the territory of the entire European Union.

Until now, patents in Europe are protected by two means: First through the national patent offices (in Germany: the German Patent and Trademark Office DPMA), with protection limited to the territory of the respective state. Second, inventions can be registered at the European Patent Office (EPA, seated in Munich) which, based on the European Patent Convention (EPC) may grant a "European Patent". This European Patent, however, other than its name might suggest, is not a single patent but rather a bundle of national patents for which the laws of the currently 36 member states of the European Patent Convention of 1973 apply. This bundle system therefore only standardizes the application procedure.

Not the least because of the exorbitant translation costs, a "European Patent" granted for 13 member states of the European Union is currently about eleven times more costly than a US patent.

Accordingly, the resolution of early December would essentially mean that the European Union joins the European Patent Convention and absorbs a majority in the administrative organization of the patent office. In this way, it is envisioned that in the future a patent valid in all 27 member states of the European Union could be granted.

III. Reactions

In a first reaction, it was applauded that the national courts shall remain free to decide on using the joint system or the separation system. The British initiative to eliminate this choice was widely rejected. However, it should be noted that the court procedure would have to be reexamined after six years or 2.000 cases at the latest. Due to German lawyers' lack of experience in joint infringement and invalidity proceedings, the British initiative was faced with well-founded criticism in the past, in particular based on the belief that the German system is more favorable to the plaintiff and more cost efficient. The high numbers of new cases filed with German specialized courts are proof of widespread acceptance of the German system.

Furthermore, German lawyers' concerns that English would effectively become the informal language of the courts with increased numbers of international judges were dispelled. Yet this point also will have to be revisited after six years.

The seat of the patent court appears to remain open: Luxemburg was long regarded as a probable candidate but in the interim, the governments of the U.K. and France favor Paris.

Should the ministers' proposition be implemented, three entry level courts would be established in Germany. The most likely candidates according to JUVE-Information are Düsseldorf and Mannheim, as well as Hamburg or Munich.

The present proposition of the ministers therefore is a balanced compromise between the British and the German positions.

IV. Future Developments

Due to the necessary revision of the European Patent Convention, the European Patent Office is dampening hopes for quick enactment of the provisions concerning the EU-Patent, referring to the revision negotiated in 2000 which only became legally effective in 2007.

The compromise negotiated with regard to jurisdiction will likely also only be implemented mid-term since it must first be verified by the European Court of Justice. An opinion of the ECJ-Justices is expected in May of this year.

According to JUVE-Information, optimistic estimates by the EU Commission assume that the resolutions can be implemented in 2015 at the earliest.

In addition, it must be taken into account that it is not yet clear whether Spain will drop its demand to recognize Spanish as an equal official language in patent matters aside from English, French and German. Therefore, the rules of the European Patent Office in Munich (EPO) continue to apply until further notice. Implementing a procedure of computer-based translation as Japan has done does not appear to be a workable solution for the European Union with its 23 official languages.

This client information is only an overview about the addressed subject matter and without commitment. It does not replace legal advice. The following attorneys are gladly available to provide additional information on the topic and to provide legal advice: Dr. Thomas Nägele, Dr. Christian Engelhardt LL.M., Dr. Steffen Henn

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