

FRUSTRATING DELAYS TO THE UNITARY PATENT

Patent attorneys have been talking about a single EU patent for 40 years, because it could cut the costs of patent protection and help avoid legal confusion when dealing with national patent laws. But as Annalise Holme explains, political interests are threatening progress.

In March 2011, 25 out of the 27 EU member states (excluding Spain and Italy) finally agreed to enhanced cooperation in order to resolve the language regime and move towards the creation of a unified patent protection system.

The idea is to introduce a unitary patent that will coexist with the current European patent system and the national patent systems of the EU member countries. The European Patent Office (EPO), which already grants European patents, will also be granting EU patents. Accordingly, the unitary patent is to be issued under the rules and procedures laid down in the European Patent Convention (EPC). As is the case today, the specification will be in one of the three official languages (English, French and German) and the claims will be translated into the other two official languages (eg, the specification into English and the claims into French and German). When the EPO finds that the patent can be granted, the applicant can also decide to have a unitary patent and validate the patent in the EPC member states which have decided not to ratify the unitary patent agreements. This proposal was supported by all the member states, except Spain and Italy. The advantage of this proposal is that it does not require unanimity within the EU: member states that want to proceed, can proceed.

This proposal will not require a change in the EPC. The regulation of the unitary patent will, however, enter into force only when a unitary patent litigation system has been created.

National interests have always played a prominent role in the history of the EU. The discussions relating to the EU patent regime are proof of the shortcomings of the EU decision-making process, since substantive arguments have been dismissed and political issues have influenced decisions throughout the project.

It is, therefore, not surprising for anyone who has followed the attempts to create a single EU patent and court system to find that a final agreement on the creation of a unitary patent litigation system that would cover at least 25 of the 27 EU member states,

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is set to be delayed by months. National interests (ie, those of certain countries) have again been put above the idea of creating the most efficient, transparent and cost-effective EU patent regime possible.

The cause of the hold-up is the dispute between France, Germany and the UK over where the central court should be located.

The diplomatic discussion is presently preventing a cost-efficient patent system for business at a time when the entire continent is on the verge of recession.

The establishment of enhanced cooperation by 25 EU member states indicates that there is a strong political will to implement a unified patent system, but it is important that the court procedure is clear. As soon as the location of the seat of the central division is agreed, the regulation is expected to be subject to plenary vote by the European parliament. If the parliament, as expected, votes in favour, the council may proceed to adopt the proposal into European law.

In a reply to a compulsory hearing, the Association of Danish Patent Agents (ADIPA) pronounced that it supports a unitary patent system that involves as many EU member states as possible. In principle, ADIPA also seconds the proposal regarding translation provisions but emphasises the material importance to Danish firms that the entire text of the EU patent is accessible in English.

Also, the Confederation of Danish Industry (DI) is very positive about establishing a unitary patent system. DI expects that a unitary patent system could save the Danish corporate sector over DKK 100 million (\$17.6 million) a year.

Denmark took over the EU Council Presidency from Poland in early January 2012. It is the job of the Danish Presidency to finalise the agreement on the Unitary Patent Court and find a solution for where the central court should be located. The plan is that both agreements will be signed during the Danish Presidency in the first half of 2012.

The court system will, at least in some countries, have to be approved later by the national parliaments. In Denmark, this will require a five out of six majority in the parliament. ■

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Annalise Holme earned her Master's degree from the Institute of Microbiology at the Technical University of Denmark. She specialised in infection microbiology. Her expertise includes the preparation, filing, and proceedings of national and international patent applications with respect to pharmacology, biotechnology, cell biology, biochemistry, genetic engineering and immunology. She is also a C5 (formerly Euroforum) speaker in IP matters and has made several contributions to the *Handbook of European Intellectual Property Management*.