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Europabio position on the European Patent Litigation Reform – the question of exclusivity

Summary

Europabio takes the position that European patent holders should not be forced to litigate (a) existing and (b) future European patents in the proposed new European patent litigation jurisdiction and the system should be optional for both categories. Furthermore the new litigation system should only deal with cross-border cases and that the cases with impact at only one Member State should remain with the respective national courts (without any cross-border impact).

A proposal for an exclusive jurisdiction

The purpose of the proposed reforms, which build on earlier discussions of the Community Patent and European Patent Litigation Agreement, is to create a jurisdiction under which all European (and future Community) patents will be litigated in a single proceeding with pan-European (or Community) effect in a newly created European Patent Court.

The proposal under discussion is that “the EU patent jurisdiction should be an exclusive jurisdiction dealing with validity, infringement and inter-related proceedings concerning European patents and future Community patents”^{1, 2}.

Advantages and risks

The intended advantages are to reduce the cost of patent litigation in Europe and to ensure that inconsistent decisions on the same patent are not reached in different national courts. At least some in the Commission and elsewhere believe that these advantages will be significant drivers of innovation, particularly for SMEs.

¹ Working Doc 14492/07, 30 October 2007, section 2

² Note that under previous proposals whether or not to apply for a Community patent which could be litigated across Europe in a single action would have been an option for the innovator to choose. He could choose instead to apply under the existing system and would have litigated under the existing arrangements. Only if the EPLA had come into force would a pan-European action relating to European, as opposed to Community, patents have been possible. Under the last draft of the EPLA, patent owners would have had the option of litigating their existing patents under either the existing or the new system for at least 7 years, after which they would have been forced into a multi-jurisdictional Court. The current proposal restricts this transitional period to only 3 years.

The biggest disadvantage is that patents could be invalidated (or construed very narrowly) in a single action throughout Europe.³ The enormous **commercial consequences** of such a decision for an innovative pharmaceutical company, particularly in relation to a patent for a marketed product, are self-evident. This is true both for “big pharma” and for SME’s in the pharmaceutical sector whose principal asset may be one or more patents relating to a single product under development. It also applies in other biotechnology sectors particularly where products are highly regulated and require marketing approval and consequently individual products and their associated patents are high value assets.

At the other end of the scale, are disadvantages to small SMEs which may well have applied for European patents but find they need to take action in only one state, whereby the costs involved in being forced to sue in a European Court instead of a national court could be prohibitive, as could the cost of defence to a central attack of validity to their European patent.

Not only are the potential commercial consequences very significant, but until there is significant experience of how the Court will operate in practice⁴ and how it will approach various different legal issues⁵, we cannot be certain of the quality of the system or the decisions it produces.

This means that during the period in which the Court is developing its *modus operandi* and its approach to important legal questions, there will be significant unpredictability as to the likely outcome of cases and difficulties in advising management as to likely outcomes.⁶ Thus, in the early years at least, there will be great **legal and therefore commercial uncertainty**.

These problems are particularly serious in relation to existing patents and applications (which may relate to products that are already on the market.) When these patents were applied for, innovators took the risk of pan-European revocation in EPO oppositions (often relatively early in the R&D process) but otherwise risked having patents invalidated only on a country by country basis. Thus, a new system which forces these patents into a central court effectively changes the rules for these patents in a very significant way.⁷

A central system which forces patent holders to litigate their European patent centrally even for cases with impact in only one Member State is also of great disadvantage to, in particular, small SMEs which have previously chosen to seek patent protection via the European system for reasons of economy.

³ This could happen either in infringement proceedings brought by the patent owner or on the initiative of generic companies in actions for revocation or declarations of non-infringement.

⁴ For example, who the judges will be, where cases will be heard, what language cases will be heard in, what procedures will be followed

⁵ At present, judges in different countries approach some significant questions of substantive law in different ways e.g. obviousness, claim construction and damages.

⁶ Under the present proposals, many cases will be litigated in national or regional chambers dominated by local judges. This will almost certainly increase the period of time it will take to develop a consistent “European” approach to litigating patent cases and in which there is uncertainty.

⁷ In contrast, if the new system were to be compulsory only for patents applied for after it came into force, there would be steps companies could take (if they wished) to avoid these risks. For instance, they could apply for some or all patents in Europe through national patent offices. The new system would not apply to these patents

Europabio approach

Europabio urges that the reforms produce a system that produces decisions of the highest quality⁸ and in which risks are minimised.

Work on quality will involve technical legal discussion of various substantive and procedural issues.

A key means of minimising risk would be to ensure that patent owners have the option of using the new system but do not have to. So, a patent owner can choose whether or not to sue in the new Court⁹.

Europabio requests:

1. that for both existing and future patents and applications use of the system should be optional for the patent owner
2. at the very least, for **all existing patents** (and applications) European patent holders should have the option, and not be forced, to litigate in the new system, and for future patent applications the transition period should be substantially more than 3 years as currently proposed.¹⁰
3. at the very least, for both existing and future patents and applications use of the new system should be optional for the patent owner in cases having impact in only one Member State/no cross border impact.

⁸ As it has done in previous discussions on the Community Patent and EPLA

⁹ If it chooses to do so, its patent could, of course, be revoked in those proceedings.

¹⁰ For the sake of legal certainty patent owners could be required to endorse the patent register with a notice as to their choice of litigation forum for every patent