

Enhanced Patent System in Europe

Dr. Karsten Brandt

I. Introduction

On December 4, 2009 the Council of the European Union adopted conclusions on an enhanced patent system in Europe.

These conclusions partly reflect the steps which have already been taken towards a European patent system, partly contain an agreement on the basic structure which a European patent system should have, and partly outline the agenda for the realisation of an enhanced patent system in Europe.

The European patent system shall stand on two pillars:

The first is the grant of a European patent which is at the same time valid in all member states of the European Union.

The second is a European Patent Court (EUPC) which shall have jurisdiction over infringement as well as validity.

II. The Grant of European Patents

With the entry into force of the Treaty on the Functioning of the European Union (TFEU) (Lisbon treaty), the European Union replaced and succeeded the European Community and has been endowed with legal personality.

According to the plan, the legal personality of the European Union shall become a member of the European Patent Convention and the European Patent Office shall be competent to grant patents for the EU.

This concept involves agreements and regulations on different levels. One level is the European Union and its members states; the other level is the European

Patent Organization, which has member states which are not members of the European Union.

1. First level: Council Regulation on the European Union Patent

According to the plans of the Council of the European Union, a European Union patent regulation is planned which shall govern the highly disputed translation arrangements for EU patents. This regulation shall be adopted by the Council with unanimity in accordance with Article 118, second sub-paragraph of the Treaty on the Functioning of the European Union.

A draft of this Council Regulation on the European Union Patent of November 27, 2009 already exists.

According to this draft (Art. 2, par. 1), the European Patent Office plays a central role in the administration of EU patents, and would alone be responsible for examination of applications and the grant of EU patents.

2. Second level: Revision of European Patent Convention

The planned accession of the EU to the European Patent Convention implies a revision of the European Patent Convention, which has to be settled in a diplomatic conference. The revised European Patent Convention needs to be accepted by all 36 member states.

Note that the amendments of the "European Patent Convention 2000" have already lasted for more than seven years.

If this plan is realized, the European Patent Office would be competent to examine and grant European patents, which are bundles of national patents as well as EU patents which are at the same

time valid in all countries of the European Union.

There is actually no “road map” for this diplomatic conference.

III. Validity and Infringement

It is planned that a European and EU Patent Court (EEUPC) will be established having jurisdiction over the validity and infringement of European patents as well as EU patents.

The European and EU Patent Court shall be established by a “mixed agreement”. On one side, the agreement has to be accepted by the member states of the European Patent Convention which are not members of the European Union (for example, Switzerland). On the other side, the competence to negotiate this agreement shall be shared between the EU and its member states.

The establishment of a European Civil Court which has jurisdiction over specific aspects of civil law is new in Europe. Since it is not clear whether this concept is in conformity with the existing European treaties, the Council submitted a request to the European Court of Justice (ECJ) in June 2009 for review of the compatibility of this plan with the EU treaties. The judicial review of the European Court of Justice takes place before the conclusion of the agreement, and is given in the form of an opinion. The opinion is expected at the earliest by Summer 2010.

The Court shall have a First Instance and a Court of Appeals as well as a Registry. The Court of First Instance shall have a central division as well as local and regional divisions.

The European Court of Justice shall ensure the primacy of EU law and its uniform interpretation.

All details about the composition of the courts, the language of the proceedings and the competence of regional and

central chambers are highly disputed in the interested community.

IV. Future Outlook

The concept of an enhanced patent system in Europe as it stands now is fairly ambitious. Many serious hurdles have to be overcome. The planned amendments to the European Patent convention may take several years, because the amendments require the participation of all 36 member states.

The same applies with regard to the court system and the planned “mixed agreement”. It involves the participation of non-EU member states and will require their willingness to transfer sovereign rights and submit their industries in important aspects to the jurisdiction of an EU and European Patent Court. It is hard to evaluate whether the EPC member states which are not EU member states – Albania, Switzerland, Croatia, Iceland, Liechtenstein, Monaco, Macedonia, Malta, San Marino and Turkey - are willing to do this.

The willingness of the EU member states, however, is not much easier to evaluate when it comes to the details. This applies despite the fact that the Council of the European Union came to the abovementioned political conclusions.

In summary, it appears to be rather uncertain whether the planned concepts can be realized within the next few years.