After more than 30 years of argument, a “European patent package” has been agreed, which, the European politicians say, will come into effect in 2014. Whilst their timescale is optimistic, it is now clear that in the short term there will be a “unitary patent” effective across most of the European Union, and a “Unified Patent Court” for the settlement of disputes not only about the new patents but about European patents generally.

These new proposals will impact on European applications being filed and prosecuted now. Any organisation which files patent applications at the European Patent Office (“EPO”) will need to consider if its strategy for patent filings needs to be changed.

**The Unitary Patent**
A Community Patent, to come into force across the whole of the European Single Market, was first suggested in the 1970s, and legislation, which never came into force, was published in 1978 alongside the European Patent Convention (“EPC”). The stumbling block was always the cost of translating the granted patent into the language of each member country. Now the European Parliament has agreed a regulation for the creation of a “unitary patent” which will have unitary effect across 25 of the 27 countries of the European Union. Spain and Italy have declined to join the system.

To obtain a unitary patent, an applicant will file and prosecute a European patent in the usual way. At grant, instead of choosing individual ones of the 25 countries in which to validate, the applicant will be able to request the EPO to grant a unitary patent. For a transitional period, currently set at 12 years, the request will need to be accompanied by a translation of the full specification. Reflecting the primacy of the English language, a European patent application prosecuted in German or French will need to be translated into English. To aid in training translation engines, a European patent application prosecuted in English can be translated into any official language of the EU. This translation of the complete specification is in addition to the usual requirement to translate the claims of the European patent into two languages on grant.

The European patent may, additionally, be validated in Spain and Italy individually, as at present, as well as in EPC countries which are not members of the EU such as Switzerland, Turkey, and Norway.

The unitary patent will have effect across all 25 countries and renewal fees will be payable to the EPO. The unitary patent will need to be transferred or licensed for the entire region of member countries meaning that opportunities to have different licensees in different countries will be curtailed.

For proprietors who are resident in one of the 25 countries, or who have a place of business there, the national law of their base country will determine issues such as ownership and how to assign the patent. Where the proprietor is not based in one of the 25 countries, such formal matters will be determined by German law. Of course, substantive matters such as patentability and infringement will be determined by the new regulation.
The Unified Patent Court

To give effect to the unitary patent, a new court, to be known as the Unified Patent Court (“UPC”) is to be set up. However, this court is to be given exclusive jurisdiction to hear all disputes relating to European patents and SPCs related to European patents. That is, European applications being filed now may have to be litigated in the new court. However, the regulation provides a transitional period of 7 years after commencement during which, the proprietor of a European patent which is in force when these measures come into effect, can choose to litigate in national courts as at present. During the 7 year transitional period, proprietors may also file an opt out for any pending applications. Thereafter, all European patents will have to be litigated in the new court.

The structure of the new court is complex and it is not yet known who the judges will be. The court of first instance will have a central division, and local and regional divisions. The central division will work in the language of the proceedings, but the local and regional divisions may use local languages. The central division, which will generally hear validity issues is based in Paris, but will have sections in London and Munich. Infringement actions are usually to be brought in the local or regional divisions. Therefore, it is possible for infringement and validity to be heard in different courts and in different languages.

There is to be a Court of Appeal, to be based in Luxembourg.

The court proceedings will enable disclosure of documents, and expert and other evidence can be presented. Experiments may be undertaken. The losing party will be liable to pay the costs of the other side, up to a ceiling, and damages and other remedies can be awarded. There will be a 5 year limitation period for initiating action.

Practical Implications

The competence and cost of the UPC is unknown. There is also the risk that infringement and validity issues can proceed in different courts and in different languages. Some applicants are already taking steps to avoid the UPC by filing national patent applications in European countries as well as, or in place of, European patent applications.

Presently, we are not advising clients to avoid the EPO. It will still be possible to validate European applications being filed now in a selected number of European countries. That is, presently, it is not intended that the unitary patent will be compulsory. Furthermore, as the regulations come into effect, a proprietor could file an opt out in respect of all of its European patents to avoid the UPC, at least during the transitional period.

Of course, if you have any particular concerns at this stage, or require further information, please contact us.

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