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What the European IP World Can Learn from the Euro Crisis

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The creation of a Unified Patent Litigation System seems to have a lot of political momentum these days, with one proposal following the other at fairly short intervals. This blog discusses the latest Council Presidency proposal of a draft agreement on a Unified Patent Court and draft Statute of 26 October 2011. While a lot of desirable progress has been made, the current draft agreement is still far from being ready for signature and requires both thorough consideration and amendment in several quite important aspects, not least as regards finances.

Notwithstanding obvious differences in nature, certain parallels between the Eurosystem and the planned Unified Patent Litigation System (UPLS) are so striking that one should not dismiss the opportunity to learn from them too light-headedly. Both projects have the laudable objective of helping Europe to grow together, harmonizing the different legal and economical systems and realities, easing the creation of a true internal market within the EU and thus strengthening the EU as a whole. Both systems aim at avoiding a waste of money for EU citizens and enterprises, which previously had to adjust to dozens of national peculiarities, rooted more in the accidents of history than in any substantive difference of opinions. As a result, both systems were advocated to Europe as milestones towards unification and to their (future) users as a chance to save considerable sums of money and avoid the inconveniences of having to adjust to national peculiarities.

At the same time, however, both systems suffer from surprisingly similar and equally fundamental birth defects.

1. Firstly, both systems were welcomed by a number of EU member states, but not by all of them, and until now there has been strong disagreement as to whether the Euro was and whether a EU patent and a Unified Patent Court (UPC) will be a good idea. Be that as it may, it is at least clear that the purposes of unification, creation of a true internal market and abolishing inconvenient national peculiarities for pan-European enterprises will be compromised if and when the system does not include the entire EU. So far, the UPLS seems to be more generally accepted than the Eurosystem, with 25 of the 27 member states having agreed to an enhanced cooperation to establish a unitary patent and a UPLS. However, in the past few weeks substantive concerns have been voiced both by the European Patent Lawyers Association EPLAW, represented by its German President Dr. Jochen Pagenberg, and by a high-ranking sub-group of the European Patent Reform Consultation Group constituted by the UK IPO, including The Rt Hon Sir Robin Jacob. In my opinion, many of these concerns uttered by experienced practitioners are weighty enough to be taken very seriously and the draft agreement and the accompanying EU Regulation concerning the future EP patent with unitary effect should be amended accordingly to achieve widespread

acceptance.

2. Secondly, both systems only harmonized a segment of the EU but failed to harmonize the bigger scheme of which they are part. The monetary union was established without really harmonizing fiscal policy and without endowing the newly created organ of the Union, i.e. the ECB, with the power or at least with a sufficiently clear mission to defend the Euro in case of a crisis. The "patent union" will probably be established without really harmonizing the EU court system and civil procedural law, which has already caused considerable difficulties with regard to the definition of the role of the Court of Justice of the European Union (CJEU) in the new Unified Patent Litigation System (see my contribution to this blog entitled "European Court of Justice Trashes Planned Unified Patent Litigation System" of 8 March 2011). While there is probably no realistic way of harmonizing Europe other than step by step, experience has shown that it may sometimes be better to either approach harmonization more boldly and comprehensively, or to not harmonize a part at all if the harmonized part does not fit into the system.

3. Thirdly, it appears both in the case of the Eurosystem and in the case of the UPLS that a lot of the harmonization that politicians have been unable to achieve among themselves has been left to the system and its evolution in practice. The main task of the European Central Bank is to maintain the euro's purchasing power and thus price stability in the euro area. However, how exactly this is to be achieved and whether, for example, this task also includes financial measures to rescue the Eurosystem as a whole, even if these measures may possibly later affect the euro's purchasing power, remains a matter of fierce debate within the ECB's Governing Council. So even within the ECB, we do not seem to have complete harmonization in regard to very fundamental questions such as the Central Bank's role and function. Similarly, the main task of the UPLS is to establish a unified patent litigation system. However, the exact shape this is supposed to take is to some degree a matter for speculation. The current state of "harmonization" of infringement proceedings according to the draft agreement is laid down in Art. 15a and is a typically European, messy compromise: thus, we may expect one local or regional division of the new UPC to hear an infringement case together with an invalidity counterclaim and decide on both together (Art. 15a(2)a), either with or without the aid of a court expert (Art. 36), whilst another local or regional division will just hear the infringement case and refer the invalidity case to the central division, either with or without a stay of the infringement case (Art. 15a(2)b), and whilst a third division may give up right from the beginning and refer the whole case to the central division (with the agreement of the parties) according to Art. 15a(2)c. So in other words, the harmonization consists in all local or regional divisions having the discretion to do basically whatever they want, so that all courts can continue with their previous local practice, but now under a European hat and (at least this much is prescribed in Art. 6 (1)) in a moderately multinational composition, i.e. two local judges plus one of a different nationality. Real harmonization is then left to the UPC judges among themselves, or perhaps to the court of appeal, and finally to a revision by the Administrative Committee six years after entry into force of the agreement or once 2000 infringement cases have been decided, whichever is later (Art. 58d), provided we ever get there. It is no secret that at least many UK IP practitioners and judges hope that this will then finally put an end to the German bifurcation system in the UPLS, given that Germany only has one vote in the Administrative Committee, like any other state.

4. Fourthly, I dare say that both systems were created without a sufficiently thorough consideration of the costs and risks, particularly the costs and risks in the case of a (be it financial or judicial) crisis. It indeed seems that the politicians creating both systems did not foresee crises as possible developments, for which adequate precautions should be taken. Even worse, in the case of the

UPLS, the question of who is to finance the system has still not really been resolved, to put it mildly. The current Draft agreement buries everything in two laconic sentences of Art. 18 (1), i.e. "The budget of the Court shall be financed by the Court's own financial revenues. The budget shall be balanced." What this actually means for parties filing an action in the UPC and, in particular, how this is to be accomplished in the first few years of the court's existence, i.e. when parties may still opt-out of using the UPLS, and even later in the (hopefully unlikely) case that the court is not widely accepted by the users of the system, remains a mystery. To get a feeling for the order of magnitude of the likely costs, let us do some maths, based on a number of simplified assumptions, as follows: A judge at the CJEU has an annual pre-tax salary of roughly 250,000€ (http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=39). Let us assume, for the sake of simplicity, that the UPC judges will be paid somewhat less, say 200,000€ p.a. on average. (Note that the exact remuneration of the judges has not been worked out in the draft agreement and will be left to the Administrative Committee.) The UPLS will likely have 25 member states, so let us further assume, for the sake of simplicity, that there will be 25 local divisions. True, Germany may want to establish three local divisions, but let us hope that some other states agree on setting up a regional division rather than insisting on their own local division. Very unfortunately, the current draft provides no obligation and no incentive whatsoever to set up regional divisions – so nothing will hinder even very small states with no significant history of patent cases from setting up their own local division of fairly well paid European patent judges at the expense of the UPLS as a whole. Again for the sake of simplicity, let us assume that each local division only consists of one panel of three judges (even though more are possible according to the draft agreement). This makes 75 first instance judges to begin with. Add to this 10 judges for the central division of the first instance court and (initially) 15 judges for the Court of Appeal and we end up with a fairly conservative estimate of about 100 judges with a total annual salary of 20 million €. Do not forget that these judges will need staff, such as a registry etc., so we shall estimate very roughly a quarter of this sum for them, which brings us to 25 million €. It must further be considered that many of the judges will have to travel across Europe quite a bit and so we shall budget 10,000 € per judge and year as expenses, i.e. another million. Add one more million for translation services to be provided by the court pursuant to Art. 31 of the draft agreement and for the planned internal training of the Court (Art. 9 draft Statute) and we are talking about annual costs of the UPLS in the order of 27 million €.

Thus, if the budget is supposed to be balanced, this will roughly be the sum that the users of the system will have to pay for their litigations. Assuming that the UPC deals with 500 new cases per year, you will end up with average court fees per case of 54,000 €. But is it really realistic to expect that the UPC will receive more than 200 cases p.a. in the first two years, i.e. during a period when many IP stakeholders may still be cautious? Take this figure as a basis, and you end up with average court fees per case of 135,000 €. Neither of these two figures is inconsiderable and even the lower of the two is considerably higher than the comparatively high court fees in Germany, which amount to about 31,000 € for an average case with a value of the matter in dispute of 1 million €. While I am prepared to be criticized and happy to be corrected in each of my assumptions of this budget estimate, there are two points I would like to make here: (i) the costs of the UPLS should definitely be made more transparent and should be calculated or at least estimated as accurately as possible, otherwise the promise that a UPLS will be beneficial to the users of the system, and particularly SMEs, lacks credibility; and (ii) in my modest opinion, the UPLS cannot even begin to function without a significant initial contribution from the budgets of the member states (as is provided in Art. 19(2) of the Draft Agreement) and without a lot of discipline among those member states where little patent litigation activity has taken place in past

years. If each member state insists on having its own local division equipped with four or five judges, then costs of the UPLS will not only become unbearable for the users, but there may also be a considerable unfairness in the workload between the individual local divisions. In my opinion, it would therefore be better to make the right of an individual member state to establish its own local division dependent on a certain minimum number of patent litigation cases in the recent past. However, the current draft simply stipulates in Art. 5(2) that “a local division shall be set up in a Contracting Member State upon its request in accordance with the Statute”. The Statute in turn imposes no conditions on the setting up of a local division other than a request by the member state and a decision of the Administrative Committee. If I understand this correctly, the Administrative Committee cannot say no to any such request. The only obligation of the member state is that it must provide the facilities for the local division.

All in all, the above should have made it abundantly clear that the costs of the UPLS will be significant and could indeed be an absolute killer for the success of the system. They should therefore be made as transparent as possible before any (foul) compromise is concluded, which we might bitterly regret at the end of the day. Namely, even though a failure of the UPLS is certainly less dramatic than a failure of the Eurosystem, one should not underestimate the risks associated with such a failure either: Should industry and particularly SME’s and their advisers consider the quality of the UPC too erratic and/or its costs too excessive, they will most likely turn away from the UPLS, either by opting out according to Art. 58(3) of the draft agreement, or even worse – when opting out is no longer possible – by no longer filing EP applications and instead reverting to the good old national patent applications. In the extreme, this may put the EPO and 40 years of European achievements in the patent field at risk.

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