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UPC Rules of Procedure - Will they address concerns of small-country SMEs?

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In the wake of the UPC Agreement having been entered into under the Danish presidency, there was widespread euphoria about the many, potentially positive, aspects of Danish SME litigants being able to save substantial costs under the envisaged UPC regime.

The Danish press abounded in positive reviews put forward by politicians and industry representatives alike, who were all able to invoke examples of some of the present system absurdities including mixed outcomes of patent litigation throughout Europe that would now finally be of interest to only legal historians.

One example offered by a representative of the industry was an instance in which a medium-sized Danish enterprise had been forced to initiate litigation in a number of European jurisdictions concurrently - against the same infringer. The costs, as reported, were no doubt substantial and, it was argued, under the UPC Agreement such a scenario would no longer be relevant.

No doubt, it is possible to find numerous examples of similar litigation complexes which, had they been conducted under the UPC Agreement, could have been resolved not only more quickly, but also with litigation in only one place, comprising several jurisdictions.

But leaving aside, for the time being, the costs issue, a growing concern among Danish SMEs in relation to the UPC Agreement now appears to be that although, no doubt, the new regime will offer a more effective and less time consuming means of patent dispute resolution, the envisaged system is undoubtedly biased in favour of the patentee.

Now, the Danish angle here is the same as that of other small countries joining the UPC Agreement:

By and far, most of the patents granted for Denmark are registered to non-Danish entities which means that statistically speaking, far more often than not, Danish SMEs will be defendants in patent litigation in foreign jurisdictions under the UPC Agreement.

Thus, the question arises, from a Danish perspective, whether the rules of procedure will ultimately balance the scales and secure an equal footing for both patentee and alleged infringer or whether the UPC Agreement, under the guise of improved efficiency and cost reduction, will lead to a legal environment in which the patentee's position is favored to a degree where the mere threat of litigation may be enough to coerce SMEs to enter into some sort of settlement.

If the current rules of procedure remain unchanged, it is my fear that the UPC Agreement, rather than encouraging creativeness, innovation and patenting may serve as a powerful instrument to cornering the very SMEs that were to promote creativeness, innovation and patenting.

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