

Kluwer Patent Blog

‘Renewal fees of the unitary patent are not meant to sustain national patent offices’

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‘It’s one big mess.’ At times Emil Pot, co-founder and general counsel of biopharmaceutical company ActoGenix, had difficulty containing his frustration at the Congress on the EU patent package, which took place at 17 October 2014 in Brussels. The issue: the discussion on determining the renewal fees of the future unitary patent (UP), and – on top of that – the fact the crucial European markets are not part of the unitary patent regulation.

The level of the UP renewal fees is seen by many as crucial for the success thereof. Earlier that day, Margot Fröhlinger, Principal Director Patent Law and Multilateral Affairs of the EPO, said two criteria were important: On the one hand, low levels will make the UP attractive for European companies. On the other hand, the renewal fees should be high enough to ensure that the EPO and national patent offices are financially sustainable.

Bruno van Pottelsberghe, specialist of innovation and IP at the Université libre de Bruxelles (ULB) and Dean at the Solvay Brussels School of Economics and management, had blown away his audience with impressive slides on costs and benefits of the UP for all participating countries. For a moment it seemed like a congress of math professors. But with some further explanation, Van Pottelsberghe succeeded very well in showing his point: it’s all about money. Member states have one question only: what do they gain or lose from the new UP? Under the current European patent (EP) system, the EPO and patent offices equally share the revenue from renewal fees. But how will this be under the UP? This question lies at the core of Van Pottelsberghe’s forthcoming working paper, jointly authored with Jérôme Danguy (also ULB) and entitled ‘The policy dilemma of the Unitary Patent’.

Pointing out the relevant numbers on his slides, Van Pottelsberghe showed that Germany, where most patents are validated and an revenue of over 100 million euro is generated every year, will definitely lose out most. It will have to share the revenue of future UP renewal fees with Member States where fewer patents are validated and maintained under the current EP system. Only if UP fees would be extremely high (annual increases of 1500 euro) could this be prevented. On the other hand, smaller countries will profit under the new system.

Meanwhile, Van Pottelsberghe acknowledged that it is very hard to predict how the system will eventually work, as the EP, UP and national patent systems will coexist side by side. According to his educated guess, perhaps 20 percent of patents, mainly the strong pharma patents, will use the UP system, whilst the rest will continue to use EP or national patents.

Having said that, Van Pottelsberghe also thinks national patent granting should be ended as soon as possible: 'It's crazy, like driving on two sides of the road.'

He favors a UP renewal fee equivalent to the cumulated EP renewal fees of at most four countries (annual increases of 200 euro). This is less than the annual increases of 500 euro he thinks the EPO would aim for, and considerably less than what Germany would opt for.

Van Pottelsberghe made an interesting point: why discuss just the UP renewal fee, while national patent offices can compensate for the loss of revenue by increasing the traditional EP renewal fees?

Back to Emil Pot of ActoGenix, a typical SME, with 21 employees. He stressed the importance of SMEs for the economy: they account for 99% of the companies and for two-thirds of employment. A solid IP position is the only real asset innovative biotech start-ups have, Pot made clear. On the basis of its patents, ActoGenix has been able to raise 35 million euro from investors.

According to Pot, a few countries account for a large proportion of the sales of biopharmaceuticals: North America is good for 41% of sales and Europe for 27%. But fee costs in Europe are much higher than those in the US and will remain so under the UP unless the renewal fees go down much more than currently under discussion. As Pot mentioned:

'Do you think an equivalent of 6, 7 or 8 EP renewal fees is attractive? SMEs will have to validate their patents in three or four other countries that are not part of the unitary patent system as well. Italy, Spain, Turkey and Switzerland are very important markets. So it may cost SMEs up till 12 times the EP renewal fee. Do you think that is interesting? No!'

'I was sad and annoyed to hear people say renewal fees are meant to sustain national patent offices. I thought the fee structure was meant to make companies in Europe more competitive with the rest of the world. With a better IP system and much lower renewal fees, SMEs will be able to create so much more work. The fee level should be discussed with companies, not solely between politicians and institutions!'

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