

Kluwer Patent Blog

'EU should bring Unitary Patent system under its control'

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The Unitary Patent (UP) package becoming a reality would be a great step forward for Europe. Intellectual property, and patents in particular, is a key ingredient in innovation systems. However, more political efforts will be needed to build a truly European system which supports innovation dynamics. And the European Patent Office (EPO) should probably be less independent from the European Union than it currently is. Bruno van Pottelsberghe, Professor at the Solvay Brussels School of Economics and Management (ULB) and a former chief economist of the EPO, explains in an interview with Kluwer IP Law.

Over the past ten years, van Pottelsberghe published numerous reports and scientific articles on the European and the Unitary Patent system. He provides strong evidence that the UP will benefit the business community in Europe, which currently has to cope with a fragmented and complex system, in which patents have to be validated and renewed in the desired states for protection. According to his scientific articles with Malwina



Mejer (2009, 2010, 2011) taking into account procedural, translation and renewal costs, applicants in Europe pay 5 to 10 times more than in any other country for ten years of protection in 'only' six EU countries. Being protected in the whole EU area would raise the cost to more than 20 times the cost of protection in Japan or the US. And the consequences of the currently fragmented system concern much more than cost of patenting, with many incongruities and a high level of uncertainty (2012).

National patent offices (NPOs) will benefit as well, although they have often been hesitant about that. 'It is a bit surrealistic that the main advisors in the creation of the UP system were the head of national patent offices, which feared to lose both power and financial resources due to the new system. Indeed, with the current system, yearly renewal fees are paid to national patent offices in order to maintain in force a European patent granted by the EPO. These renewal fees income are then split 50/50 between national patent offices and the EPO. With the UP package, renewal fees will be paid to the EPO. This income will then be split 50/50 between the EPO and the NPOs. How

much each NPO will receive is a legitimate question, but should not be an influencing factor.’

NPO’s concerns are partly groundless, according to van Pottelsberghe, at least if a sufficient number of countries join the UP package in order to make it attractive. ‘If traditional national and European patents remain popular, and the UP system has a small to medium use only, some national offices may indeed lose some renewal fees income. In case of a strong use of the UP system, however, our research (jointly with Jérôme Danguy, 2011) revealed that patent offices of every UP member state will benefit financially. Only Germany, which currently benefits heavily from the European system, as it enjoys the status of being the largest economy (ie, where patents are renewed for the longest duration) and has benefitted most from the traditional system, could lose some of its resources.’

The more members in the Unitary Patent package the better, according to van Pottelsberghe, who thinks it is unfortunate and a weakness of the UP system that several European countries will not join, particularly important economies such as Spain or Poland. The Czech Republic, Hungary and Greece have no plans to ratify any time soon either, it seems. ‘Some of these states rely on language arguments, the small size of their innovation sector (preferring to facilitate an imitation policy) or the fear of loss in income. It means the system will launch with no more than about 18 member states at best, instead of 28.’

If the system launches at all. Since the ratification of the UK last month, all eyes are now on Germany. Bruno van Pottelsberghe thinks it would be ‘catastrophic’ if the German Federal Constitutional Court decides the complaint against ratification of the Unified Patent Court Agreement is justified and Germany doesn’t join. ‘The UP system will lose much of its attractiveness and become useless if the largest economic area isn’t included.’

Still, even if the German complaint is rejected and the Unitary Patent system enters into force at the end of 2018 or in 2019, van Pottelsberghe doesn’t expect too much of an impact on innovation – which is in principle what patents are all about. ‘One reason is, as I mentioned before, the relatively low number of participating European states; another important reason is that the UP will only create an extra layer of protection on top of the existing European and national patents. So it will make the patent system in Europe quite complex. As a next step a phasing-out project is indispensable: the multi-layer system should evolve toward one single layer of protection, like in China, the U.S. or Japan.’

Moreover, this single layered system should be much more an EU endeavour and not in the hands of a ‘dreadfully independent institution composed of 38 stakeholders of member states’, according to van Pottelsberghe. ‘In any important economy, patent offices are part of the political agenda. The President of the United States appoints the head of the USPTO, in Japan the JPO is part of the Ministry of External Trade and Industry, the SIPO promotes the Chinese goal of having as many patents filed as possible. The EPO, however, is an independent organisation, based on the European Patent Convention with its 38 member states. In that respect it is disconnected to any European agenda for innovation and entrepreneurship.’



‘EU national governments and especially the European Commission should find a way to bring the EPO more under its control. Then it could serve and be part of the EU’s industrial policy, for the sake of European consumers, universities and entrepreneurs. The EPO delivers high-quality patent examination services, probably the best in the world, thanks to highly qualified examiners. This strength should be better connected to European ambitions.’

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