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DRAFT REPORT

on jurisdictional system for patent disputes
(2011/2176(INI))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on jurisdictional system for patent disputes
(2011/2176(INI))

The European Parliament,

– having regard to the Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection[1],

– having regard to the proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection (COM(2011)0215),

– having regard to the proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (COM(2011)0216),

– having regard to Opinion 1/09 of the Court of Justice of 8 March 2011[2],

– having regard to Rule 48 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Industry, Research and Energy and the Committee on Constitutional Affairs(A7-0000/2011),

A. whereas an efficient patent system in Europe is a necessary prerequisite for boosting growth through innovation and to help European business, in particular small and medium-sized enterprises (SMEs), to face the economic crisis and global competition;

B. whereas pursuant to Council Decision 2011/167/EU authorising enhanced cooperation in the area of the creation of unitary patent protection, Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, France, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and the United Kingdom were authorised to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection, by applying the relevant provisions of the Treaties;

C. whereas on 13 April 2011, on the basis of the Council's authorising Decision, the Commission adopted a proposal for a Regulation of the European Parliament and the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, and a proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements;

D. whereas on 8 March 2011 the Court of Justice gave its opinion on the *European and*

[1] OJ L 76, 22.3.2011, p.53.
[2] OJ L 211, 16.7.2011, p.2.

Community Patents Court proposal raising the point of its incompatibility with Union law;

E. whereas effective unitary patent protection can only be ensured through a functioning patent litigation system;

F. whereas, following the opinion of the Court of Justice, the Member States participating in the enhanced cooperation engaged in the creation of a *Unified Patent Litigation Court* by means of an international agreement;

G. whereas the Unified Patent Court must fully respect and apply Union law, in cooperation with the Court of Justice of the European Union as is the case for any national court;

H. whereas the Unified Patent Court should rely on the case-law of the Court of Justice by requesting preliminary rulings in accordance with Article 267 TFEU;

I. whereas respect for the primacy and proper application of Union law should be ensured on the basis of Articles 258, 259 and 260 TFEU;

J. whereas the Unified Patent Court should be part of the judicial systems of the Contracting Member States, with exclusive competence for European patents with unitary effect and for European patents designating one or more Contracting Member States;

K. whereas an efficient court system needs a decentralised first instance;

L. whereas the efficiency of the litigation system depends on the quality and experience of the judges;

M. whereas there should be one set of procedural rules applicable to proceedings before all divisions and instances of the court;

N. whereas the Unified Patent Court should strive to provide high quality decisions without undue procedural delays, and should help, in particular, SMEs to protect their rights or to defend themselves against unsubstantiated claims or patents which merit revocation;

1. Calls for the establishment of the Unified Patent Litigation System, as a fragmented market for patents and disparities in law enforcement hampers innovation and progress in the internal market;

2. Encourages Member States to conclude the negotiations and to ratify the agreement without undue delays;

3. Insists that the Court of Justice, as guardian of Union law, must ensure uniformity of the Union legal order and the primacy of European law in this context;

4. Considers that the Member States which have not yet decided to participate in the enhanced cooperation in the area of the creation of unitary patent protection may participate in the Unified Patent Litigation System in respect of European patents valid on their territories;

5. Stresses that the Unified Patent Court's priority should be to enhance legal certainty and

to improve the enforcement of patents while striking a fair balance between the interests of right holders and parties concerned;

General approach

6. Acknowledges that the establishment of a coherent patent litigation system in the Member States taking part in the enhanced cooperation should be accomplished by an international agreement ('the Agreement') between these Member States ('Contracting Member States') creating a Unified Patent Court ('the Court');

7. Accordingly stresses that:

(i) the Contracting Member States can only be Member States of the European Union;

(ii) the Agreement should come into force when a minimum of nine Contracting Member States, including the three Member States in which the highest number of European patents was in force in the year preceding the year in which the Diplomatic Conference for the signature of the Agreement takes place, have ratified the Agreement and when Regulation XXX of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection and Council Regulation XXX implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements are in force;

(iii) the Court should be a Court common to the Contracting Member States and subject to the same obligations as any national court with regard to compliance with Union law; thus, for example, the Court shall cooperate with the Court of Justice by applying Article 267 TFEU;

(iv) the Court should act in line with the body of Union law and respect its primacy; in the event that the Court of Appeal infringes Union law, Contracting Member States should be jointly liable for damages incurred by the parties to the respective procedure; infringement proceedings pursuant to Articles 258, 259 and 260 TFEU against all Contracting Member States should apply;

Structure of the Patent Litigation System

8. Considers that an efficient court and litigation system needs to be decentralised and is of the opinion that:

(i) the litigation system of the Court should consist of a first instance ('Court of First Instance') and an instance for appeal ('Court of Appeal'); in order to avoid inefficiencies and lengthy proceedings, no further instances should be added;

(ii) a decentralised first instance should consist, in addition to a central division, also of local and regional divisions;

(iii) additional local divisions in the first instance should be set up in a Contracting Member State upon its request when more than one hundred cases per calendar year have been commenced in that Contracting Member State during three successive years prior to or

subsequent to the date of entry into force of the Agreement; further proposes that the number of divisions in one Contracting Member State should not exceed four;

(iv) a regional division should be set up for two or more Contracting Member States upon their request;

Composition of the Court and qualification of the Judges

9. Underlines that the efficiency of the litigation system depends most of all on the quality and experience of the judges;

10. To that extent:

(i) acknowledges that the composition of the Court of Appeal and the Court of First Instance should be multinational; considers that the composition must be adapted to the existing court structures; proposes, therefore, that the composition of the local divisions should become multinational after a transitional period of five years, while it has to be ensured that the standard of quality and efficiency of the existing structures is not reduced; considers that the period of five years should be used for intensive training and preparation for the judges;

(ii) believes that the Court should be composed of both legally qualified and technically qualified judges; the judges should ensure the highest standards of competence and proven capacity in the field of patent litigation and antitrust law; this qualification should be proven inter alia by relevant work experience and professional training; legally qualified judges should possess the qualifications required for judicial offices in a Contracting Member State; technically qualified judges should have a university degree and expertise in a field of technology as well as knowledge of civil and civil procedural law;

(iii) proposes that the provisions of the Agreement on the composition of the Court, once in force, should not be amended unless the objectives of the litigation system, i.e. highest quality and efficiency, are not fulfilled because of these provisions; proposes that decisions regarding the composition of the Court should be taken by the competent body acting unanimously;

Procedure

11. Considers, with regard to the procedural issues, that:

(i) one set of procedural rules should be applicable to proceedings before all divisions and instances of the Court;

(ii) the proceedings before the Court, consisting of a written, interim and oral procedure, should be dealt with by the Court in a flexible manner taking into account the objectives of speed and efficiency of proceedings;

(iii) the language of proceedings before any local or regional division should be the official language of the Contracting Member State hosting the division or the official language

designated by the Contracting Member States sharing a regional division; the parties should be free to chose the language in which the patent was granted as language of proceedings subject to the approval of the competent division; the language of proceedings before the central division should be the language in which the patent concerned was granted; the language of proceedings before the Court of Appeal should be the language of proceedings before the Court of First Instance;

(iv) the Court should have the power to grant preliminary injunctions to prevent any impending infringement and to forbid the continuation of the alleged infringement; such power must, however, not lead to inequitable forum shopping; and

(v) the parties should be represented only by lawyers authorised to practise before a court of a Contracting Member State; the representatives of the parties might be assisted by patent attorneys who should be allowed to speak at hearings before the Court;

Jurisdiction and effect of the Court decisions

12. Underlines that:

(i) the Court should have exclusive jurisdiction in respect of European patents with unitary effect and European patents designating one or more Contracting Member States;

(ii) the plaintiff should bring the action before the local division hosted by a Contracting Member State where the infringement has occurred or may occur, or where the defendant is domiciled, or to the regional division in which this Contracting Member State participates; if the Contracting Member State concerned does not host a local division and does not participate in a regional division, the plaintiff shall bring the action before the central division; the parties should be free to agree before which division of the Court of First Instance (local, regional or central) an action may be brought;

(iii) in case of a counterclaim for revocation, the local or regional division should have the discretion to proceed with the infringement proceeding independently of whether the division proceeds as well with the counterclaim or whether it refers the counterclaim to the central division;

(iv) rules on the jurisdiction of the Court, once in force, should not be amended unless the objectives of the litigation system, i.e. highest quality and efficiency, are not fulfilled because of these rules on jurisdiction; proposes that decisions regarding the jurisdiction of the Court should be taken by the competent body acting unanimously;

(v) decisions of all divisions of the Court of First Instance as well as decisions of the Court of Appeal should be enforceable in any Contracting Member State without the need for a declaration of enforceability;

(vi) the relationship between the Agreement and Regulation (EC) No 44/20011 should be clarified in the Agreement;

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[1] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

Substantive law

13. Is of the opinion that the Court should base its decisions on Union law, the Agreement, the European Patent Convention (EPC) and national law having been adopted in accordance with the EPC, provisions of international agreements applicable to patents and binding on all the Contracting Member States and national law of the Contracting Member States in the light of Union law to be implemented;

14. Stresses that a European Patent with unitary effect should confer on its proprietor the right to prevent direct and indirect use of the invention by any third party not having the proprietor's consent in the territories of the Contracting Member States, that the proprietor should be entitled to compensation of damages in case of an unlawful use of the intervention and that the proprietor should be entitled to recover either the profit lost due to the infringement and other losses, an appropriate licence fee or the profit resulting from the unlawful use of the invention;

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15. Instructs its President to forward this resolution to the Council and the Commission and to the governments and parliaments of the Member States.

EXPLANATORY STATEMENT

The rapporteur is of the view that an efficient patent system in Europe can majorly contribute to achieving growth through innovation. European businesses, in particular SMEs, need such tools to face the current economic crisis and remain globally competitive.

The existing patent system in Europe provides for national patents granted by Member States' industrial property offices or for a European patent granted by the European Patent Office (EPO). When a patent is granted, the European patent splits it into a bundle of national patents, covered by national legislation. This system is very costly and is subject to very expensive and risky multi-forum litigation, often resulting in contradictory judgments.

The proposals regarding the unitary patent protection and the language regime, currently under the legislative scrutiny of the Parliament and the Council, intend to do away with the existing fragmented patent system. The rapporteur is convinced that the envisaged creation of a unitary patent protection is inseparably linked to the establishment of a unified patent court. It seems appropriate that the Parliament as co-legislator on the two legislative proposals should express its views on the envisaged agreement.

The rapporteur strongly welcomes the efforts undertaken by the Council to create a unified patent litigation system between the participating Member States.

The creation of the Court by international agreement is - particularly in light of the Opinion 1/09 of the Court of Justice - a viable and promising way to establish a coherent patent litigation system. The respect of the primacy and proper application of Union law by the Court should be ensured by providing for the possibility of preliminary rulings pursuant to Article 267 of the TFEU, infringement proceedings in accordance with Articles 258, 259 and 260 of the TFEU and by clarifying that the Contracting Member States should be liable for damages caused as a result of breaches of Union law by the Court. Furthermore, the proposed system would be situated within the judicial system of the Union, since Contracting Member States may only be EU Member States.

By relying on the existing structures of the patent court system of the Contracting Member States, a maximum of both quality and efficiency of proceedings can be achieved. The Unified Patent Court will also help to cut drastically the litigation costs because parties will no longer have to litigate in parallel in different countries. Studies show that the proposed litigation system would allow for substantial savings for European businesses.

The overriding objectives of quality and efficiency also have to be taken into account when considering the composition of the court and the necessary qualification of the judges.
The creation of multinational panels is desirable, as far as the standards of efficiency and quality are ensured. This might require a gradual transition to a multinational composition of local divisions.

Qualification of judges is essential for the functioning of the patent litigation system. Besides patent law, judges should also have at least basic knowledge of antitrust law. In this way, judges will be more sensible to possible attempts of a party to misuse patents as a tool to

abuse its dominant position on the market to the detriment of its competitors. Since patent disputes involve complex technical issues, the panels of the court should comprise technically qualified judges.

It is of utmost importance that parties are represented by lawyers with the necessary experience in both patent and procedural law. Patent attorneys not authorised to practice before a court of a Member State can play an important supportive role and should therefore be allowed to speak before the Court.

A functioning unified patent court can provide legal certainty through the uniform interpretation of the applicable rules of law. Especially for SME's, it is essential that the court system to be created is efficient while at the same time ensuring high quality decisions. Consequently, in case of counterclaims for revocation, the local or regional division should be given the possibility to refer the counterclaim to the central division and proceed with the infringement claim independently. In this way, undue delays regarding the infringement proceedings can be prevented.

By replacing the widely differing national court systems and procedural rules by one coherent system, the enforcement of patents as well as the defence against unfounded claims and patents, which should not have been granted, can be improved.

After decades of failed attempts, a true Single Market for patents that can provide legal certainty and be internationally competitive is in reach. The Parliament should support this project.