On the doorstep of the unitary patent protection in Europe
European Parliament – Committee on Legal Affairs
Public hearing - Brussels 11 October 2011

WHAT MODEL FOR THE JURISDICTIONAL SYSTEM FOR PATENT DISPUTES IN EUROPE?

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I am speaking as a practitioner having devoted my entire professional life to patent litigation, very often in an international context[1]; I will try to convey 40 years (around 1000 cases) of experience in this area.

In my academic activity, I have taught European patent litigation — i. e. the litigation of patents in various European countries — at the Centre d'Études Internationales de la Propriété Intellectuelle in Strasbourg; I am also the director of the *Concise International and European Intellectual Property Law* (Kluwer Law, 2nd edition 2011); I wrote the chapter of this book on the so-called "Brussels I" regulation (No. 44/2001), which sets the law on jurisdiction for patent litigation within Europe.

In 2001, with some friends having a similar profile and experience (Winfried Tilmann, Kevin Mooney, Willem Hoyng, Fernand de Visscher, Mario Franzosi, Peter Heinrich, Jochen Pagenberg), we founded the European Patent Lawyers Association (EPLAW) which gathers the most experienced patent litigators in Europe (now around 200 members); one of the main achievements of our association has been the setting up, with the EPO's enthusiastic support, of the event known as the Venice Forum, where patent judges and lawyers from almost all the countries of Europe meet to discuss and exchange on the harmonization of patent litigation practice; another achievement has been advising EU Commission on the topic of this hearing; this has been made possible thanks to the extremely dynamic and open-minded Dr Margot Fröhlinger, Director, DG Markt, Knowledge Based Economy, European Commission whose wisdom and tenacity have played a key role in the progress of the proposal which we are discussing today.

[1] I had the privilege of arguing the first case involving a European patent before the court of Paris, in 1990, i. e. 12 years after the filing of the first patent application under the European Patent Convention (EPC) on 1 June 1978: this is mentioned to stress the time gap between the first patent application and the first litigation.

Unitary patent protection within Europe is what we, patent people, would call a "long felt need"[2]: we should never forget that we *have* had an international agreement, the Luxembourg Convention[3] signed to solve this problem, since 1975.

We all know that this agreement could not enter in force because it did not solve adequately two main issues: the language and the jurisdiction.

Today I will focus only on jurisdiction.

What are the **main downsides** of the current patent enforcement system in Europe?

First, enforcement at a purely national level means that a patent holder facing infringement in various EU countries may be obliged to sue in several courts; this is not always the case if the alleged infringer is based in Europe (e. g. a Dutch defendant may be sued in the Dutch courts for a pan-European infringement and the Dutch courts may, to a certain extent, issue an injunction and grant damages with pan-European effect); however, if the defendant is not based in EU (e. g. a US, Japanese or Chinese company), there may be no other option than suing in several countries; available data suggest that, out of a 100 patents litigated in Europe, 10 are litigated in two countries, of which 2 in more than two countries simultaneously; this is a source of duplication of efforts and costs that SMEs representatives often complain about.

Second, there is no harmonization of the case law among various European countries; even though they apply the same substantive patent law (the Munich Convention on European Patents[4] and their national law derived from the Strasbourg Convention[5]), the judges from one country may reach conclusions different to those of the judges from another country on the same legal problem; although the judges deciding patent cases in Europe do meet and exchange ideas, it happens every month that the court of one country holds a patent valid, while simultaneously, the same (parallel) patent is held invalid in another country; while some companies complain of the current situation, other, often big companies, have learnt how to live with it; they do not "put all their eggs in the same basket" (meaning that they do not take the risk of protecting a blockbuster product with a single European Patent that may be revoked for the whole Europe by a single decision; instead they file national patent applications which can only be revoked by the courts of the countries where they have been filed).

Unitary patent protection is an extremely desirable goal; but it will not achieve any tangible result if it does not come with a unified patent litigation system.

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2 When assessing inventive step of a patent (one of the main criteria for validity of a patent, in addition to novelty), the European Patent Office and the courts sometime note that the invention satisfy a "long felt need", meaning that, if the need for a solution to a technical problem has been existing for long, the solution to this problem was probably not obvious.

3 The Convention for the European Patent for the common market, or (Luxembourg) Community Patent Convention (CPC), was signed at Luxembourg on December 15, 1975, by the 9 member states of the European Economic Community at that time.

4 The Convention on the Grant of European Patents of 5 October 1973, commonly known as the European Patent Convention (EPC), is a multilateral treaty instituting the European Patent Organisation and providing an autonomous legal system according to which European patents are granted.

5 The Convention on the Unification of Certain Points of Substantive Law on Patents for Invention, also called the Strasbourg Convention or theStrasbourg Patent Convention, is a multilateral treaty signed by Member States of the Council of Europe on November 27, 1963 in Strasbourg, France aiming at the harmonization of patent laws across European countries.

A unified patent litigation system is a formidable challenge:

- the proposed court will be the first European court to deal directly with civil law disputes between citizens or businesses (such disputes being currently decided by national courts, with the ECJ acting only on referral of them); the United States of America did that in 1982, but they had a long experience of federal courts beforehand, which we do not have on this side of the Atlantic;
- it will lead to the creation of a body of substantive European law (only the law on validity of patents is currently unified by the European Patent Convention; the law on infringement is not unified and differences exist among the countries on important topics like infringement by equivalence or the experimental use exception).

The patent community is extremely proud to be at the centre of such interest.

However, economic actors always fear the unknown; they usually refuse to change their habits if they are not sure that it will be for better — not for worse.

What are the **main concerns** about the proposed system[6]?

The first concern is about the experience of the judges.

In surgery, it is often said that the number of interventions performed by the surgeon is the most predictive element of a successful outcome; patent litigation is governed by the same rule; the more case a judge has decided, the better his judgment will be.

There is therefore a great fear that an inexperienced court may decide over the validity of a Unitary Patent; this could happen in the proposed system if the alleged infringer operates mainly in a Member State where the courts have little or no experience of patent litigation; in such a case, the patent holder will have no choice but to sue him before the inexperienced court of his place of business; and this court will be empowered to revoke the patent for the territory of all the Member States part to the Unitary Patent system.

Such a hazard was not present in previous propositions, where only the Member States with extensive experience in patent litigation could be permitted to set up a local division of the unified court.

There is absolutely no doubt that, if such risk is not made impossible by the treaty, the patent holders will play outside the proposed system (rather than filing Unitary Patent applications, they will file national patent applications, even if the cost at the time of filing is higher, because they will be reluctant to put all their eggs in an unsafe, unpredictable basket).

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6 Proposal for a Regulation of the Council and the European Parliament implementing enhanced cooperation in the area of the creation of unitary patent protection Proposition de règlement du Parlement européen et du Conseil mettant en œuvre la coopération renforcée dans le domaine de la création d'une protection par brevet unitaire (document 11328/11, 23 June 2011).

Draft agreement on a Unified Patent Court and draft Statute (document 13751/11, 2 September 2011).

The second concern is about the requisite that each panel of the local division shall comprise, in addition to two local judges, a third judge from another EU country; many players in our field believe that this will be very cumbersome; having in mind that around 90% of the patent cases are domestic (meaning that there is no other parallel case pending on the same patent, hence no risk of conflicting decisions), is it necessary that the very experienced Dutch, English, French or German courts comprise a judge from another country (not always with the same level of experience)?

The patent litigators in Europe would prefer that it remains possible to sue before national courts when a remedy is sought for the territory of a single country; this should be possible at least during a transition period long enough to allow the new system to prove that it is better than the current state of the art; after all, this is exactly what has been done for the patent filing system itself; the European Patent has gained the confidence of users because it has proved to be better that national systems, not because it was compulsory.

The third concern of the patent users is that the new system should not allow too many recourses, notably to the ECJ which is not the best court to have the final word about each and every patent infringement case in Europe; this means not only that the ECJ should not be a third instance court (cassation court) for patent cases; it also means that the ECJ should not have to rule on matters related to patent law which do not directly involve the EU legal order.

The patent community unanimous believes that the ECJ should not decide on matters like novelty, inventive step and infringement; these are areas where hands-on experience of patent litigation is vital.

If I may tease you, I would say that practitioners do believe that predictability is more important than justice ("*Justice must not only be done, it should be predictable*").

For this reason, we would prefer that patent law issues which do not affect EU public order be finally decided by the court of appeal of the proposed jurisdiction.

These are my main comments on the current proposals.

I would be delighted to discuss this with you now.