Special Column

The new Unitary Patent for Europe: a short overview

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After many years of negotiation, last December the European Parliament approved a package of legislation to create an EU Unitary Patent. It was anticipated that it would come into effect in January 2014, but this timetable has slipped and autumn 2015 now seems like the earliest realistic start date. Once implemented, the new regime will provide a single patent, referred to as the "Unitary Patent". It will have uniform effect in most of the 28 EU member states (it's not yet clear how many countries will participate; currently Spain and Poland are refusing to ratify the legislation), and will provide a potentially very valuable asset.

The Unitary Patent will be prosecuted centrally by the European Patent Office, and a new Unified European Patent Court, with the power to grant pan-European injunctions, will be created to enforce the Unitary Patent. If a Unitary Patent is invalidated, it will no longer have any effect in any of the participating countries. The new legislation will not change substantive patent law. Due to a reduced requirement for translations, it is hoped that it will become cheaper to obtain pan-European patent protection. Supporters of the Unitary Patent also believe that patent litigation in Europe will become simpler, more cost-effective, and remove the possibility of inconsistent decisions on the same patent in different national courts.

A "European Patent" exists currently, which is obtained through the European Patent Office, and which can designate some or all of the 38 countries which have signed the European Patent Convention. However, the name is misleading, because on grant, an application for a "European Patent" transforms into a bundle of national patent rights which are renewed, enforced and invalidated separately on a national basis. If a patent holder wants damages or an injunction stopping infringement in a number of countries, it has to start legal proceedings in each country,requiring different local counsel. After the Unitary Patent comes into effect, European Patents will continue to be available for the 10 or more countries who have signed the European Patent Convention but cannot (or will not) participate in the Unitary Patent. For those countries which have ratified the Unitary Patent, patentees can choose whether to file a Unitary Patent or a series of national patents. Careful thought needs to be given to patent filing strategies for Europe.

Implementation of the Unitary Patent is likely to happen, but is not yet a done deal. The legal instrument creating the Unified European Patent Court cannot come into effect until four months after it has been ratified by thirteen countries, including the UK, France and Germany. The UK is very unlikely to ratify until April 2015, at the earliest. The Spanish, who along with the Italians have objected to the language regime for the Unitary Patent, have challenged the legality of the new regime, and it will probably be 2015 before the EU Court of Justice decides this case.

Some companies, including Ericsson and Nokia, have argued that the new system will not deliver the anticipated advantages. The proposed filing and renewal costs have still not been revealed, so it is not yet known whether broad European patent protection will become cheaper. Concerns have been raised that the proposed patent litigation system contains flaws which will lead to complexity and forum shopping. Nonetheless, the attraction of being able to assert a patent across Europe in a single court action is likely to lead to non-European companies revisiting their patent filing strategies, increasing the size of their patent portfolio in Europe, and becoming involved in patent litigation in Europe much more frequently.

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