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Jeg kontakter jer på vegne af Advokatrådet som formænd for Retsudvalget, Erhvervsudvalget og Europaudvalget.

Anledningen er helt kort, at det polske formandskab søger at bringe forslaget om et EU patent/patentdomstol til politisk afgørelse den 20. december 2011.

Advokatrådet støtter processen frem mod skabelsen af et EU patent/patentdomstol. Det eksisterende forslag er imidlertid behæftet med meget væsentlige mangler. Jeg vedhæfter et dugfrisk position paper og pressemeddelelse (nedenfor) fra CCBE, som er den europæiske advokatorganisation. Som I kan se, advarer CCBE meget kraftigt imod, at det eksisterende forslag fremmes til beslutningstagning.

Der er i CCBE konsensus om alle kritikpunkterne, og vi kunne fylde jeres indbakke med yderligere eksempler på, at aktører på området i kraftige vendinger advarer mod det eksisterende forslag.

Helt generelt er det eksisterende forslag karakteriseret ved, at det i meget vidt omfang ensidigt varetager patenthavernes interesser. Dette sker eksempelvis ved, at patenthaverne frit kan vælge, hvor en sag rent geografisk anlægges. Dette vil blive misbrugt til at anlægge sager, hvor den potentielle krænker har svært ved at forsvare sig selv på grund af sprog, økonomi eller geografisk afstand. En patenthaver kan ud fra taktiske hensyn eksempelvis vælge at anlægge en sag mod en dansk virksomhed i Grækenland. Dommen vil få virkning også for Danmark, og dommen vil altså kunne lukke den danske virksomhed.

Situationen er særligt alvorlig for Danmark. Over 90 % af alle patenter med virkning i Danmark ejes af udlændinge, og en dansk virksomhed - ikke mindst SME - vil derfor typisk optræde som potentiel krænker i en retssag. Forslaget indebærer en betydelig svækkelse af danske virksomheders retssikkerhed med risiko for tab af danske arbejdspladser. Det bemærkes i denne sammenhæng, at patentsager ikke blot vedrører avancerede lægemidler, men også simpel mekanik. Antalsmæssigt domineres de danske patent-retssale for indeværende af sidstnævnte kategori.

Jeg ved, at Dansk Erhverv deler vores bekymring.

Advokatrådet har selvsagt etableret kontakt til Justitsministeriet og Patent- og Varemærkestyrelsen. Det er imidlertid vores forståelse, at der i EU-systemet er sat så betydeligt politisk moment på sagen, at en opbremsning - uanset hvor rationelt indlysende den måtte synes - er vanskelig. Vi tillader os derfor at rette denne direkte henvendelse til jer for i videst muligt omfang at sikre national politisk opmærksomhed på spørgsmålet.

Det giver sig selv, at vi er til rådighed for drøftelser, hvis I måtte ønske det.

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THE EUROPEAN UNION PATENT JURISDICTION

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The European Union Patent Jurisdiction

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE Working Group on Patents, which is composed of experts from a number of Member States, is following the discussions taking place at Council level concerning the proposal for the European Union Patent Court and the Unitary Patent with its language regime.

The CCBE supports the work towards establishing a pan-European patent court. The CCBE, however, believes that the current Draft Agreement on a Unified Patent Court will not create a system which meets basic requirements for legal security. It is apparent that the proposed Court system will not meet the goals of being accessible and affordable, especially for SME's. The CCBE finds that the proposed system, as the proposal stands, will increase legal uncertainty and increase cost.

The CCBE is concerned that speed is now an overriding purpose carrying with it the risk that the result will be a system which users will refuse to accept. It is the CCBE's view that the project aiming at a European Union Patent Court, which has been discussed during four decades, is now being rushed into a premature, unworkable and uncertain outcome. A number of major users of the European Patent system, who are clients of member of the CCBE Working Group on Patents, are so concerned that they intend to escape the proposed package by filing national patent applications instead of making applications to the EPO - a massive retrograde step.

The CCBE strongly calls for a slowdown of the political decision-making process with a view to facilitating serious consideration to be given to, in particular, the below-mentioned issues:

1. Revision of the Agreement will require unanimity

Article 58d paves in very specific situation for a flexible revision of the Agreement. The general rule remains, however, that any revision requires unanimity. Such strict procedure implies that it will be very difficult to amend the agreement. So much more, it is extremely important that the agreement is thoroughly drafted and well balanced in the first place. At present, this is not the case.

2. The jurisdiction of the Court of Justice (COJ)

The proposed regulation for Unitary Patents comprises Article 6 to 8 that set out central substantive provisions on patent law. The consequence is that these particular substantive provisions - but not any other substantive provision - will be referable to the COJ for preliminary rulings. A system which provides for referrals of substantive patent law to the COJ (rather than leaving them for the determination by the new Court of Appeal, through the provisions of the draft Agreement) will be too costly, cause too much delay, will result in great uncertainty, will not have the confidence of industry, and will not work.

3. Rules of procedure

The Rules of Procedure are critical to the proper functioning of the Court. Without knowledge of the Rules of Procedure it is not possible to evaluate how the system will work. For the time being only an unofficial draft for Rules of Procedure exists. The CCBE believes that there must be full clarity about the content of these rules before any signing of the Court Agreement. It is both unwise and unacceptable that Rules of Procedure will be adopted after the Court Agreement comes into effect. Moreover, the Rules of Procedure is of such importance that it should be under parliamentary control,

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which is actually required under the constitution of some Member States. The CCBE recommends that the Rules of Procedure should be carefully prepared, in consultation with the relevant stakeholders, prior to any signing of the Court Agreement.

4. Role of local and central Division and Forum shopping

The roles of the local and central divisions need to be more clearly specified and balanced. The current proposals appear to invite forum shopping.

The patent proprietors are in reality free to choose where to litigate. Patent proprietors may choose any venue of (potential) infringement. Alternatively, the home venue of any one of the defendants may be chosen (article 15a (1)). This freedom also applies in situations where the potential infringer has initiated a non-infringement action. Such action will be stayed on a later infringement action initiated by the patent proprietor (article 15a(5)). The potential infringer has no ultimate right that the case is pleaded on and that all documents are translated to the potential infringer's own language (article 29 et seq.).

As far as SME's are concerned, the proposed forum shopping option will most likely be used by patent proprietors to tactically choose foreign venues where the potential infringer due to costs, language or geographical distance, finds it most burdensome to defend itself.

5. Funding of the Court

The cost uncertainties are significant. One cornerstone behind the Court project is to provide a cost efficient system for the users. It is for the time being highly speculative what the costs will be for the parties involved in a patent litigation with the Court. Figures that have been presented are on such levels that SME's (and others) will likely end up with higher costs than in single national proceedings. It is noted that the losing party must normally reimburse the winning party's litigation costs, including court fees (art 42). The financial risk for SME's to litigate in the proposed Court is therefore significant and probably in many cases not acceptable. The CCBE considers that the question of costs must be thoroughly investigated and analysed further.

6. Languages

The scope and validity of patents depends critically on the precise language used as understood by the technically qualified reader. The Advocate General has pointed out in the statement of his position on 2 July 2010 that the language regime is delicate and *"unacceptable with regard to the observance of the rights of defense"*. It was questioned whether the proposed regime will comply with the *"fundamental principle of Union law."* The language regime is in principle still the same in the latest draft Agreement and the Advocate General's remarks are therefore still relevant. The fact that the Agreement is not an EU regulation may from a formal standpoint imply that fundamental principles of Union law could be overseen. However, the CCBE is of the opinion that such an approach to this extremely important question is unacceptable. The CCBE has not found any legal analysis in this regard and is of the opinion that this issue must be investigated and analysed further.

7. National litigation of European Patents.

After a relative short transition period the parties have no choice but to litigate not only Unitary Patents but also European Patents with the Unified Patent Court. With respect to small local patent litigation, typically involving SME's, it should be investigated whether SME's would like to litigate in the Unified Patent Court, which seems to be more complex not least because of the proposed burdensome language arrangements. Until the Unified Patent Court has been established as both an accessible and affordable alternative for patent disputes it should be an option for the parties to litigate European Patents in national Courts. The CCBE is of the opinion that the transition rules in Article 58 are not sufficient.

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8. Ratification

There are many important decisions to be decided with regard to ratification (and it is not sure whether Italy and Spain will join the system).

- The CCBE observes that it is not possible to withdraw from the system following ratification.
- What will be the territorial scope of decisions if only 9 countries have ratified the agreement?
- Will those decisions be applied to each country as and when it ratifies?
- What will happen to the remaining 16 countries if they do not ratify?
- How will the pool of judges be composed if only 9 countries have ratified?

9. Other significant points of concern include:

- Selection and training of judges
The selection and training of judges is critical to the success of the Court yet these issues are largely undefined.
- Compulsory licensing regime
The compulsory license regime is omitted from the proposal. This is a key area. Many issues are raised due to the absence of details in this regard, for example, would it be possible for a local division or the national court to grant a compulsory license for the whole territory?
- Supplementary Protection Certificate
The draft Agreement will apply to SPC's (Supplementary Protection Certificate) but the draft does not contain detailed provisions relating to SPC's.
- Accessory liability
Provisions relating to the liability of a third party for an infringement committed (i.e. accessory liability) are absent.
- Legal privilege
There are insufficient provisions on legal privilege.
- Disputes over ownership
There are no provisions regarding disputes over ownership.
- Representation
The proposal would allow direct representation by patent attorneys. It seems not to have been appreciated that disputes involving patents are often not limited to technical matters or purely patent law matters, but involve many other areas of law in which a patent attorney will have no training or experience. For patent litigation, there is a need to possess a broad legal education including many substantive and procedural legal issues which in general are not possessed by patent attorneys, either by training or experience.

10. Conclusion

The CCBE believes that the proposed design of the system contradicts the objective of having an accessible and affordable system, especially for SME's. Until the Unified Patent Court has been established as being both an accessible and affordable alternative for patent disputes the CCBE believes that the use of the national systems will be reinforced. The CCBE strongly calls for a slowdown of the political decision-making process with a view to giving serious consideration to, in particular, the above-mentioned issues.

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The CCBE will be happy to meet in order to elaborate on the concerns expressed in this paper, as the CCBE members have the benefit of insight of the views and needs of both those who hold a patent and those who challenge a patent.

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