

A new IP era in Europe?

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Towards the end of November 2010 the agenda of the EU Competitiveness Council featured a prominent item on its agenda. As a result of this meeting, it appears as if the introduction of the Community patent may finally become a reality, having accounted for more than 30 years of endless consultations among EU member states.

Reaching unanimity among the member states once again proved out of reach – Spain and Italy remain inveterate foes of the Community patent. However, there is now a solution available that does not require unanimity. The updated EU rules under the Lisbon Treaty reinforced the option of enhanced cooperation of at least nine member states, which is designed to overcome paralysis in the decision-making process. In light of the history of unsuccessful attempts to introduce a Community patent, it appears as if the enhanced cooperation provision was specifically designed for this purpose.

The EU Council finally intends to initiate enhanced cooperation and to complete the relevant EU legislation by mid-2011. Due to the necessary proceedings, it will take at least one year before the mixed treaty – among the EU and the European Patent Convention member states which decide to participate – will enter into force.

If this becomes a reality, there will be a new European patent granted by the European Patent Office, ultimately covering about 40 states, with more than half a billion people living within that economic area – and all without any translation requirements, other than that the claims be translated into the two other official languages. Furthermore, an EU Patents Court will deal with infringement and validity issues in centralised proceedings.

The introduction of the Community patent appears to be a win-win situation for all players in the IP game. All that remains to be resolved are some necessary, substantial improvements to the rules for the proposed court system.

There is a real risk that the simultaneous introduction of a new infringement court for the Community patent and the closure of the national infringement courts for existing national and well-established European patents will cause problems – the European patent community will be putting all its eggs in one basket. Deciding to abandon a code of practice that successfully takes into account 60 years' experiences without already having a substitute in place would be irresponsible, especially when the new system has not yet proven itself.

The European Union was successful in introducing the European patent as an alternative to – not a substitute for – national patents. Why should it not take this successful model as a template for the Patent Court as well?

However, there is still a theoretical chance that the Community patent may not come to pass. The European Court of Justice – which is in the process of preparing an expert opinion on the compatibility of a Community patent with EU law – may conceivably put a spanner in the works, although this is not expected. Theoretically, it could also prove impossible to find the nine EU member states needed to initiate the enhanced cooperation process, a situation which is even harder to imagine.

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