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European Patent Court: under attack from friendly fire?

COHAUSZ & FLORACK - European Union
Gottfried Schüll

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The negotiations over the regulations for a European patent with unitary effect and the convention for establishing a European Patent Court have reportedly been concluded. The European Parliament still has to approve the regulations, but such approval is thought to be a certainty. It is believed that the Legal Committee of the European Parliament intends to complete both the regulations and the convention before the Danish EU Council presidency ends at the end of June 2012.

The European unitary patent is thus just around the corner, and innovative companies are waiting for a unitary patent at reduced costs. The European Patent Court promises to become the most efficient patent court worldwide, based on a new, specific code of procedure. The court's multinational panels will also include technical judges, similar to the German *Bundespatentgericht*. Following a transitional period, the new court will replace all existing national courts as far as the “old“ European patents are concerned: from the first day of use, European unitary patents can be enforced only at the European Patent Court.

Most applicants are expected to shift to the new system and a new EU IP era will begin. Accordingly, future European patent filing strategies should be obvious – but are they?

If the European Patent Court does with certainty become the most efficient patent court worldwide, the answer is yes. But if there is a risk of failing to achieve this goal, and this risk can hardly be ignored, then the exclusive competence of the court to hear European and European unitary patents will become problematic, and filing strategies will become complex.

Innovators are unlikely to put their full R&D investments at risk based on the promise that the court, with a new code of procedures and a considerable number of new judges, will be their only option. If they file European unitary patents, there is no way back. If the court does not work properly, the European Union will be without effective patent protection. In addition, there is no way to achieve parallel national protection in the European Union, as national rights will become void as soon as a European unitary patent is granted.

There is little doubt that it will take a decade for the European Patent Court to gain sufficient standing. In the meantime, innovators need another option – that is, courts which already have proven their merit. Some national court systems provide such fallback positions, but these will be unavailable in cases where European unitary patents are filed, as the new court will have exclusive jurisdiction for such patents. Thus, no reasonable company will file European unitary patents until the new court is tried and tested.

Of course, the new court may prove its ability based on the enforcement of old-style European patents. But a fallback position is still necessary. This can be achieved by filing a European patents excluding the countries that provide fallback positions, and making national filings in those countries. There is also a possibility to opt out of the new court's jurisdiction over "old" European patents within five years. So it might be that some applicants later file national patents for some countries and European patents for the others for another five years, or longer. Alternatively, they can wait for brave applicants to take a risk and file European unitary patents.

For further information please contact:

Gottfried Schüll
COHAUSZ & FLORACK
www.cohausz-florack.de
Email: gschuell@cohausz-florack.de
Tel: +49 211 90 49 00

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