

# Finding a way through the EU patent litigation maze

Europe may claim to be a single market, but when it comes to patent litigation, this is certainly not the case. Five experts discuss the challenges that this fragmented reality presents

By **Joff Wild**

While the European Union is supposed to be a single market, when it comes to patent litigation, this is not the case. Patent owners must rather select the countries in which they wish to protect their rights. In situations where alleged infringement occurs in more than one country, there are also a number of strategic considerations to consider before deciding how to deal with the problem; not least of which is that different courts in different countries can reach very different conclusions when presented with the same kind of evidence. In short, patent litigation in Europe is a complicated affair.

In this roundtable, private practice litigators from the United Kingdom, Germany and Sweden – Chris Aikens and Richard Willoughby of Rouse in London; Gottfried Schüll of Cohausz & Florack in Düsseldorf; Jochen Bühling of Krieger Mes & Graf von der Groeben in Düsseldorf; and Håkan Borgenhäll of Advokatfirman Lindahl KB in Stockholm – consider the particular challenges of cross-border patent litigation in Europe and look ahead to the possible creation of an EU patent and patent court.

**In your experience, how common is multi-jurisdictional patent litigation in Europe?**

**Richard Willoughby:** Pretty common. In

particularly litigious sectors, such as life sciences and telecoms/electronics, it is the exception rather than the norm that disputes are limited to one European country. When a dispute arises in these sectors, not only are the products concerned multinational – in the sense that the same product may be on the market in several European countries and therefore multiple markets need protecting – but also the stakes are usually so high that tactical considerations mean that litigation in one country seldom suits both sides. Even if, for example, a patentee might be able to stop a problem by suing where a defendant manufactures or imports, a defendant may well retaliate with a counterclaim or national revocation action in another country. In our experience, these big-ticket disputes are multi-jurisdictional in the vast majority of cases. It's a generalisation, of course, but it is usually only the smaller disputes that stay limited to a single jurisdiction.

**Gottfried Schüll:** To answer this question, we have to take a close look at the boundary conditions. As Richard says, in pharmaceuticals, multi-jurisdictional litigation is very common. At least for blockbusters, the revenues easily justify the costs of litigation in many countries. However, in the automotive field, a patent infringed by a component supplier will very rarely be asserted in more than one country. This is because the automotive industry will not accept a modification of a car for a regional market. Accordingly, obtaining an injunction for one market is a knockout for all markets. The overwhelming majority of the more than 500 cases based on MPEG-2 essential patents have – very successfully – been filed only in Germany. Purely looking at the statistics available to us, less than 5% of patent litigation cases in the European Union are multi-jurisdictional. Therefore, it is all about



**Chris Aikens**  
Barrister  
Rouse, London  
[caikens@prights.com](mailto:caikens@prights.com)

Chris Aikens qualified as a barrister in 2005 and joined Rouse in October 2006 after undertaking a 12-month pupillage at specialist IP chambers 11 South Square. The recent focus of his work has been on disputes relating to biotechnology patents in the UK courts, in the EPO and in arbitrations. His work encompasses the broad spectrum of IP rights in a wide variety of industries.

optimising the litigation strategy in view of the business impact, either by concentrating on one venue or by including multiple jurisdictions.

**Håkan Borgenhäll:** Multi-jurisdictional patent litigation seems to be fairly common, but as Sweden is a small country, we are not involved in as many disputes as the larger jurisdictions. The number of patent cases relative to the size of Sweden is nevertheless rather high (approximately 20 to 25 per year), which suggests that Sweden is an attractive country for patent litigation. However, Swedish litigators do not usually coordinate such cross-border projects. It should also be mentioned that multi-jurisdictional patent litigation is not limited to Europe, but may also involve countries outside Europe.

**Jochen Bühling:** Over the past years we have seen a considerable amount of multi-jurisdictional patent litigation in Europe. Although, in comparison to the number of cases overall, multi-jurisdictional patent litigation may constitute only a small percentage, the absolute number is still significant. We see these cases mainly when parties are involved with international business in key industries, such as pharmaceuticals or electronics. Very often, litigation takes place in more than just two jurisdictions in Europe and other continents, mainly Asia and North America. Purely European multi-jurisdictional litigation also happens, but is even less common. It is nevertheless a standard option on which we advise clients regularly when they encounter infringement of their patents, and it should be seriously considered as an option for patentees.

#### **What types of challenge does it present to litigants?**

**GS:** The main challenge for litigants is obviously the lack of harmonisation in EU member states. This manifests itself in three main ways: the speed of the proceedings, their cost and the prospects of success. In some jurisdictions the first instance court will issue decisions as early as within six months. For others, five to even 10 years is common. The costs may vary by a factor of 10 and the prospects of success for the patent owner are spread between 2% and 40%. Additionally, there are still cross-effects in between jurisdictions. Hence, identifying the best venues in Europe is the key element of a successful litigation strategy.

**HB:** The most important task is to coordinate the different proceedings in each country. I

have seen instances where certain arguments have been relevant in one venue, but then used against the client in another. The most successful pan-European projects in which I have been involved are those where the client can realise and respect the local differences while giving clear instructions in order to maintain consistent argumentation of the case. Another challenge is the costs of conducting litigation in several countries.

**JB:** There are several challenges for litigants, which mainly depend on their role as plaintiffs or defendants. Different jurisdictions require a different approach, depending on the particular issues of the respective legal system. Very often, multi-jurisdictional litigation is conducted in civil law and common law countries in parallel. While this offers potential synergies, it also raises issues which may be contradictory. This relates not only to matters of substantive law, but also – and perhaps even more so – to procedural rules which must be observed when initiating litigation.

Other issues are cost and language. For some plaintiffs, this may be an obstacle when considering litigation. They equally affect defendants in their ability to react to litigation into which they have been forced.

In any event, effective coordination and management of the litigation is absolutely essential. In most cases, it is wise to outsource this to a law firm in one of the jurisdictions which is also involved in the litigation, rather than keeping it internally in the company. One of the reasons for this are questions of attorney-client privilege, which play a greater role in common law jurisdictions than in civil law countries.

**RW:** The major one is coordination: fighting a case on several fronts requires a consistency of approach, or at least a full understanding of what is being said in other countries, as well as an astute tactical approach. While courts do make allowances for differences in approach from country to country (because some arguments suit some jurisdictions better than others), inconsistent arguments or evidence will eventually come back to bite you. The challenge, therefore, is to manage all of this, bearing in mind differences in procedure, speed, culture, legal system, law, rules of evidence and, of course, language. While some may have the resources to manage this internally, that generally isn't the case – so for litigants, this is usually a resource issue. Fighting on several fronts also rather obviously has significant cost implications, so budgeting can be a challenge.

**If you are confronted with the potential for this type of litigation as a plaintiff, how should you approach it?**

**HB:** First of all, one should not forget the option of finding a settlement which makes commercial sense for the client. If that is not feasible or if the dispute is such that a satisfactory out-of-court solution is not realistic, the available options in the various countries involved must be carefully considered, taking into account whether your client is plaintiff in an infringement or in a revocation action. Such preparations are complex and normally require the involvement of local counsel. If time permits, initially commencing litigation in one country as a pilot case should be considered.

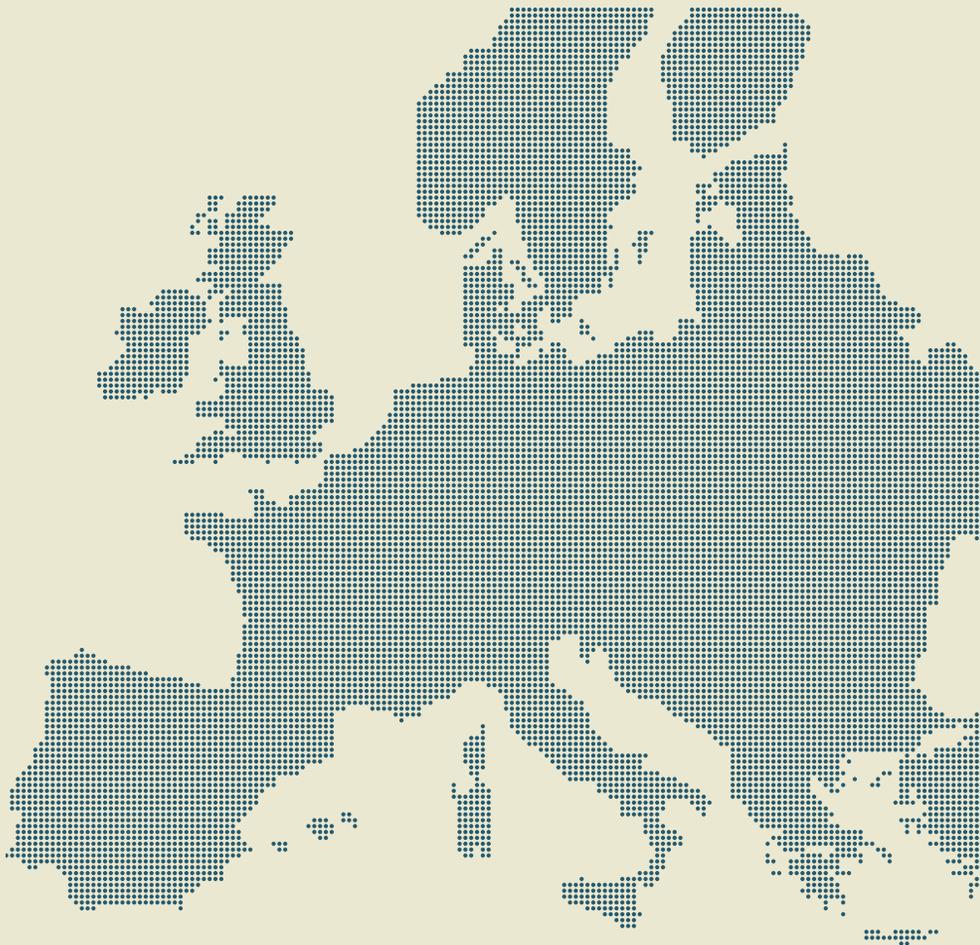
**JB:** The first task is clearly to define the goal of the litigation. It makes a great difference if the plaintiff's aim is to stop a competitor from further infringement or if the main goal is to force the defendant into further negotiations about a settlement, cross-licences or the like. This should be followed by an

identification of those jurisdictions which are an option for litigation – that is, in general, the place where the defendant is domiciled or where infringement has occurred. The plaintiff will then have to look at the facts and the evidence it can produce for the infringement. If there is a lack of evidence, some jurisdictions may provide for better opportunities to fill this gap than others.

The strengths and weaknesses in each jurisdiction must be weighed carefully, as these differences could well lead to different results in each jurisdiction.

Timing and budget are also crucial. Although one might wish to put as much pressure as possible on a defendant, it must also be considered that there are limits as to what can be managed without losing some of the positive effects of multi-jurisdictional litigation. A focus on the strongest jurisdictions is therefore crucial.

**RW:** I agree that it is important to be clear what you want to achieve so that this drives your strategy. Keeping focused on the business perspective is crucial, especially as the case





**Håkan Borgenhäll**  
Partner  
Advokatfirman Lindahl KB,  
Stockholm  
[hakan.borgenhall@lindahl.se](mailto:hakan.borgenhall@lindahl.se)

Håkan Borgenhäll became the head of the Lindahl IP group in Stockholm after the recent merger between RydinCarlsten and Lindahl. Since 1987 he has served international and domestic clients in business law matters, with an emphasis on IP law. He has practised extensively, and conducted litigation, in all IP areas and related fields. He has been a member of the Swedish Bar Association since 1990 and is also active in several international IP organisations. He is the vice president of the Swedish Group of the AIPLA.

becomes more involved and adversarial. Moreover, if going to outside counsel for coordination and strategy, choose your lead firm carefully. It will need to help advise on strategy, choice of forum and arguments, and to coordinate the various cases. They need to be experienced in this role and be sensitive to, and have a working knowledge of, the different systems in the different countries. The patent litigation world in Europe has grown closer over the last decade or so, which has helped to make this an easier process culturally; but keeping everyone on side and focused on the strategy is a crucial part of the role. You should also make use of the time advantage you have over an unsuspecting defendant: you should use that time to determine strategy, collate as much evidence as you can and plan to address what counterclaims and strategy the defendant might throw at you. Doing all of this helps to keep you one step ahead of the other side.

**GS:** The first priority is to clarify the relevance of the country-specific markets for the business at stake. Second, interdependencies between these markets must be analysed. As a plaintiff, there is usually no way around Germany in view of its market size, as well as its fast, cost-effective and pro-patentee courts. The Netherlands – with its big ports, which at the least make it a transit country, and its fast and pro-patentee tradition – is an important venue, too. The defendant's option of blocking the preferred venues through the so-called torpedo strategy – that is, the filing of blocking lawsuits in countries with ineffective jurisdiction – must be considered when communicating with the potential defendant prior to the filing of a patent litigation action.

#### **What are the main considerations for defendants to focus on?**

**JB:** In the beginning, the defendant will be in a position where it has to react. Unless it is willing to give up one or more of the cases in certain jurisdictions, it will have to prepare a universal defence. Obviously, the various jurisdictions will give it different options. It is therefore very important to consider the procedural aspects of the litigation. They may sometimes offer more help than issues of substantive law.

In order to become equal with the plaintiff, one must look at the options for counterclaims and counteractions, or even consider striking back in other jurisdictions which the plaintiff did not choose and which may be more favourable for the defendant.

The validity of the patents is an important factor and must almost always be addressed in infringement litigation. Again, the different

jurisdictions will treat this issue differently. To identify the options and to make best use of them should be the main consideration.

Also, the defendant's timing and budget must be taken into account in deciding how best to steer the litigation.

**RW:** Broadly speaking, defendants will fall into one of two categories: those that see it coming and those taken by surprise. In the former case, there is obviously scope to be proactive: getting a team in place, taking defensive measures such as filing caveats with German courts to head off ex parte injunctions, considering a pre-emptive validity strike in the United Kingdom and/or elsewhere, and gathering prior art and evidence. All of these steps may be wise ones to take. In the latter case, speed of reaction is key. A defendant may be sued in one jurisdiction – probably Germany – where time to trial can be quite quick and a preliminary injunction even faster. A reaction to that needs to be swift if a second action in another country is going to be able to influence the German court in any way. In either case, getting the team right and together quickly has the same considerations as for a plaintiff, but perhaps with more urgency.

**GS:** If the defendant has a well-stocked war chest, it may – as part of a strategy of psychological warfare – consider filing a case in the United Kingdom in view of the speedy proceedings and the tendency to revoke patents. In Germany, an invalidation action must be filed as soon as possible. This is because Germany has a split court system for patent litigation and patent invalidation.

**HB:** The considerations vary depending on whether the client is defendant in an infringement or revocation action. In an infringement case a revocation action should always be considered. In countries where the prosecution file is of relevance, statements made by the applicant during the prosecution may be decisive for the interpretation of the patent claims. A review of the file in such cases should therefore always be made. In a revocation action, amendment of the patent claims could be considered and, if appropriate preparations were made in a timely fashion, an amendment might have already been made prior to initiating a legal action for infringement. Such an amendment is possible at, for example, the European Patent Office (EPO) in order to dress up the patent before legal action.

#### **When evaluating the jurisdictions in which to litigate, what are the options?**

**Chris Aikens:** There are a number of factors

to consider. First, which are the most important markets? One will tend to litigate only in jurisdictions in which infringements are currently taking place or are likely to in the future. Places of manufacture, importation and significant sales are obvious candidates. Second, how important is it to obtain a quick result? For example, judgments on infringement in Germany can be quite swift, although other countries are not far behind, if at all. Third, are there elements of the procedure in specific jurisdictions that you would like to take advantage of or avoid? Disclosure and cross-examination of witnesses are pillars of English procedure, but are less common in the civil law jurisdictions; while in France, Belgium and Italy it is relatively easy to obtain an order for seizure or descriptive seizure of infringing goods. Separating infringement and validity, as in Germany, can be good for patentees, but less good for defendants. Fourth, quality: some jurisdictions have more expert lawyers and judges than others. One might think that this is always a good thing, but it isn't necessarily so, depending on your case, and can affect forum choice.

**GS:** Due to the large variation in litigation practice not only among the EU countries, but also among the available venues in each country, the first option is to identify the best regional venues to strengthen the client's position and improve the litigation strategy. Key factors – speed, cost effectiveness and prospects of success – are supplemented by other options such as border seizure (especially in countries with big ports) or the availability of legal instruments to preserve evidence for patent infringement, such as are found in France or Germany. It should also be considered that, according to EU law, patent infringement can also be pursued when a patented process is implemented outside the venue country or even outside the European Union.

**HB:** There are normally two or three jurisdictions that are of primary interest and those are Germany, the United Kingdom and the Netherlands – each for different reasons. Litigation in Germany is considered to be expeditious and inexpensive. The huge volume of patent litigation in Germany leads to the courts being experienced in the application of patent law, although some clients question the bifurcated system with infringement and revocation actions in different courts. The United Kingdom has a very sophisticated system with extensive possibilities to secure evidence that differ from those available in other European jurisdictions. On the other

hand, litigation in the United Kingdom is characterised by high costs.

Proceedings in the Netherlands are considered to be very quick and the country also has an interesting system with preliminary injunctions and at the same time rather low costs. France, Spain and Italy are, of course, of interest as well. Regarding Sweden, in spite of its size, it has a rather high number of patent disputes. According to comments from clients, the Swedish system is very attractive. Litigation there is sometimes said to steer a middle course between the cumbersome UK system and the efficient system in Germany. Clients have been very satisfied with the Swedish judicial arrangement, whereby the court has a separate chamber for patent litigation comprising technical experts in the relevant field acting as ad hoc judges together with legally trained judges. Experts appointed by the parties to give testimony are also examined in detail, which is appreciated by clients, who feel that the proceedings are thoroughly and impartially conducted.

**JB:** The patentee must evaluate carefully which jurisdictions it might want to choose, depending on its ultimate goal. The main option will always be to litigate where an infringement has occurred – in other words, where the defendant has used the patented invention. When the defendant also offers the infringing device on the Internet, this opens the door for the plaintiff to lots of jurisdictions; in fact, wherever it enjoys patent protection.

The choice will certainly comprise those jurisdictions where the courts are known to be patent friendly and where the best procedural options can be found. This must include a consideration of how validity issues are treated. In some jurisdictions – particularly Germany – the bifurcated system forces the defendant to go to another court (the Federal Patent Court) if it wants to challenge the validity of the patent. This is clearly an advantage for the plaintiff.

Another consideration may be the possibility to obtain cross-border decisions which have an effect in more than one country, although this has been limited significantly by the case law of the European Court of Justice (ECJ), despite the efforts of some jurisdictions to keep the option alive.

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**Turning now specifically to your own jurisdiction, what do you see as the key developments of the last 12 months?**

**GS:** The German law and case law relevant for patent litigation have been brought close to perfection. Patent litigation in Germany has a



**Jochen Bühling**  
Partner  
Krieger Mes & Graf von der  
Groeben, Düsseldorf  
[jochen.buehling@  
krieger-mes.de](mailto:jochen.buehling@krieger-mes.de)

Jochen Bühling was admitted to the bar in 1992. He specialises in IP matters of all kinds, focusing on patent and trademark law. Among other things, his practice comprises national and multinational (cross-border) litigation and counselling, including strategic and licensing issues and mediation. Dr Bühling represents clients from multinational industry, as well as small and medium-sized enterprises and individuals.



**Gottfried Schüll**  
Partner  
Cohausz & Florack, Düsseldorf  
gschuell@cohausz-florack.de

Gottfried Schüll is a prominent and highly regarded patent litigator. He has handled various high-profile cases for global clients, both as lead counsel and as part of an international team of legal counsel. The Düsseldorf Appeals Court has appointed him as an independent court expert. Based on his degree in physics from RWTH Aachen University, Mr Schüll handles cases related to various sophisticated technologies.

long tradition of more than 50 years, with case numbers as high as 1,000 per year. The key development over the last 12 months has been the implementation of a further improved code of procedure for invalidity actions.

**HB:** Sweden adheres very closely to EPO case law. Accordingly, the most important developments in Swedish patent law coincide with legal developments at the EPO. One should also mention that the Swedish government has been, and remains, very actively involved in the work related to the unitary patent and a European patent court system.

**JB:** There were two main developments in Germany. The first concerns the enforcement of patent rights. As a result of the EU Enforcement Directive, which was issued some years ago, Germany has introduced several provisions in its laws which add remedies for the patentee that were formerly unknown in German law. In particular, it is now possible for the patentee to have the defendant recall the infringing products from the market – something which puts an extra burden on the defendant from a marketing standpoint.

As Gottfried mentioned, there has been a significant change in the procedural rules regarding nullity actions. These are aimed at streamlining the proceedings and forcing the parties to present their arguments and motions at an earlier stage. Also, the role of the Supreme Court acting as the appeals court has changed, in that there are stricter limitations for the parties in what new material they can bring before the court during the appeal stage. The practical implications of these changes still remain to be seen.

**CA:** It is probably fair to say that the key developments of the last 12 months relate to patent disputes which will not be resolved until the latter half of 2011 or early 2012. In particular, there have been no less than six references to the ECJ seeking clarification of the law on supplementary protection certificates (SPCs). Moreover, the Supreme Court will rule on three key issues of patent law over the next 12 months: the law relating to industrial applicability; the effect on English proceedings of parallel opposition proceedings in the EPO; and whether the skilled person or team is the same for inventive step and sufficiency.

Although less relevant to larger companies, the Patents County Court has been given a new lease of life. A new judge, His Honour Judge Colin Birss QC, has been appointed and new procedural rules have been introduced. The result is a quicker, lower-cost and procedurally simpler forum in which to litigate patents.

Finally, Sir Robin Jacob – since 2003 the only specialist patent judge in the Court of Appeal – retired in March 2011 to become the Sir Hugh Laddie professor of intellectual property at University College London. He is to be replaced in the Court of Appeal by Sir David Kitchin.

### **To what extent can the courts in your jurisdiction be described as pro-patentee?**

**HB:** Patentees are satisfied with the Swedish system. They see it as being sufficiently sophisticated and robust in order to provide a fair and impartial litigation process. One reason for this is that all Swedish patent cases are tried at a separate chamber at the District Court of Stockholm and the Court of Appeal. Accordingly, the parties can assume that their cases will be heard by experienced regular judges, as well as technical judges appointed according to the specific technical field in suit. The fact that Swedish case law follows EPO practice makes revocation cases relatively predictable and also very easy to understand for foreign clients, which are normally very familiar with EPO jurisprudence. Clients also generally consider that Swedish patent litigation is favourable from a litigation cost perspective.

**JB:** In general, one can say that in Germany, there is strong support for patents and patentees, and that patent protection is considered a fundamental pillar of the economy and its development. When it comes to a specific case, there may be slight differences between the competent German courts. This becomes evident mostly when the infringement courts have to deal with the issue of staying the infringement case because of a pending nullity action against the patent in suit. While the courts exercise their own discretion to decide on a stay, case law has established guidelines which are mostly followed and which in general lead to a stay only if there is a great likelihood that the patent will be revoked in the nullity proceedings. This facilitates infringement cases and does not burden them with sometimes obviously unfounded invalidity attacks.

Lately, we have also seen a tendency of certain courts to be rather broad in claim construction. In particular, the consideration of the function of the elements of the invention may lead to a somewhat broader scope of protection, even under the literal meaning of the claims.

**CA:** In the last 15 years or so, there has been a perception that the English courts were much

more likely to revoke patents than uphold them. The statistics supported this perception, but often it was only the weaker patents that made it to the courts in the first place, meaning that the statistics distorted the reality. Recently, that perception has softened, such that it is no longer the case that the English courts can be accurately described as either pro or anti-patentee. What they are is thorough, meaning that strong patents should be upheld and weak ones exposed.

**GS:** Statistically, the court decisions of the first instance German courts follow the 40:40:20 rule: 40% of cases are decided in favour of the patentee, 40% of actions are rejected and 20% are stayed due to a high likelihood of patent revocation in the parallel invalidity proceedings. The German patent litigation courts rely on the decision to grant of the German Patent and Trademark Office or the EPO. They will stay the infringement action for the duration of the invalidity proceedings only in cases when the patent is identically anticipated in the prior art. Patent infringement is understood as a serious legal conflict and is treated accordingly by the German courts.

**Negotiations for an EU patent have been ongoing for many years now. How desirable is its introduction?**

**JB:** The introduction of the Community trademark and the Community design have shown that there is certainly a great desire among users to have a unitary right which covers the entire European Union. Depending on the details of the legal framework, the Community patent has great potential to be successful.

However, if the concept is burdened with obstacles which should be avoided, the interest which has been expressed by industry for many years may quickly fade. In particular, the language regime is crucial. As long as there is no satisfactory solution, users may decide to limit their protection to their main markets in the European Union by way of the traditional European patent. In the past, we have seen a shift away from a great degree of desire, which had been expressed by industry for a long time, to almost no desire, as a result of the concrete proposal presented by the European Commission.

The generally positive attitude towards an EU patent is very sensitive to the results of the negotiations at the political level.

**RW:** It's a good question: many are in favour, while quite a few wonder why we need it. The primary objective of a unitary patent is cost saving – it would provide patent protection via

a single grant procedure for the whole of the European Union, a bit like the current European patent, but without the costs of validation and renewal in multiple countries. Translation costs would also be minimised. In principle, that's an excellent idea. However, the risks for industry, at least to begin with, should not be underestimated, and there are many who think that effective protection for key EU markets can be obtained for some industries at a reasonable cost through the existing system, simply by selecting a few key countries. That has the advantage of avoiding the risk associated with a unitary patent whereby a patent that is crucial for, say, the very large German market is invalidated in a case in a smaller, less expert jurisdiction. Ultimately, industry probably at least wants the choice, but unless and until the enforcement system is clear and trusted, the unitary patent may not be attractive.

**GS:** There is mainly one reason to have doubts about the desirability of an EU patent. This is the question of whether its introduction will come along with a complete demolition of existing patent litigation structures. The present draft of the plans accepts co-existence and competition between the established European patent, which splits into national patents after grant, and the proposed EU or unitary patent, which provides protection for all member states. At the same time, competition between the old court system and a new one is not accepted. This puts all the eggs into one basket: the new EU patent litigation system that is planned to replace the established structures completely. Accordingly, and because of diverging interests of the EU member states in a working patent litigation system, patent litigants in the European Union will end up in an unpredictable situation.

**HB:** It is very desirable that we do get a unitary right in Europe, as the current costs to obtain a patent for the EU countries are very high compared to, for example, the United States. However, Europe obviously has a major problem with its multiplicity of languages, which always causes problems in the negotiations. For a small nation such as Sweden, there is no realistic solution other than to accept English as the global business language. If the larger member states could also take the same position, progress with the EU patent would obviously be much smoother.

**Given the ECJ's recent judgment concerning the legality of proposals for a single patent litigation system in the European Union, how likely is it that we**



**Richard Willoughby**  
Executive  
Rouse, London  
[rwilloughby@iprights.com](mailto:rwilloughby@iprights.com)

Richard Willoughby is a solicitor with 18 years' experience in IP dispute resolution. He joined Rouse in May 2010, prior to which he was a partner with a US-based firm specialising in international IP litigation. Mr Willoughby has coordinated litigation in England, Scotland, Ireland, continental Europe, the United States and Asia. His patent experience covers a wide range of technologies, including polymer chemistry, electronics, physics, molecular biology, pharmaceuticals and fast-moving consumer goods.

**will see any kind of EU patent or court in the foreseeable future?**

**RW:** The feeling is that the patent could be achieved relatively swiftly notwithstanding the language problem, because all states except Spain and Italy are pursuing enhanced cooperation. However, most also believe that introducing the EU patent without the court system in place is pointless and that the two must go hand in hand. On that issue, despite what many people believed when it came out, the ECJ's judgment isn't the final word and efforts are being made to find a solution. Proposals are being put forward to deal with the principal objection of the ECJ and it is likely that for these to work, they will have to exclude non-EU states. That is unfortunate, because a key aim of the litigation system was to improve harmonisation of decisions under European patents generally, and as there are a number of EPC states which are not in the European Union, that aim is somewhat undermined. Nevertheless, if most or all of the key EU states (from a patent litigation perspective) can participate in a central EU court, that will go a long way towards this. There's still a long way to go and there are many issues still to address, but both the patent and the court remain possible.

**GS:** It is hard to imagine that the remaining concerns will substantially detract from the political momentum gained over the last one or two years, including the decision to use enhanced cooperation to introduce the EU patent. Our best guess is that the first new EU patent will get filed and be granted within the next two or three years. Backing this up by a specific – and hopefully competitive – court system is mandatory.

**HB:** History teaches us that all such projects have failed so far and it must therefore be asked: what circumstances must change in order to make progress? I believe that there are some important factors which now make success more likely within a reasonable time. The most important aspect is the high costs required to obtain patents in the EU region. This, in combination with the fact that a centralised system in Europe (the EPO) has proved to work very well, could accelerate the project. The EPO must be considered a success; and with this as the starting point for the EU/unitary patent, the credibility of the system would be ensured. It is obvious that the EU countries are becoming much more open to making compromises in order to succeed. The European patent court is a greater challenge and the proposed court system raises a number of important issues. I am not optimistic as to

the chances of success within a foreseeable time.

**JB:** Other plans are now underway which may lead to a patent court by way of so-called enhanced cooperation, thus allowing some of the EU member states to take action and to continue this project. However, the details will be decisive as to whether it can be successful.

Member states will naturally compare the planned regime to their court system which they have in place today. If the new system does not lead to a significant improvement or if it does not at least reach the standard that they are used to now, the project will be deemed a failure.

A major problem is still the composition of the courts and the experience of the judges. The significant discrepancies in the number of cases between various jurisdictions make it difficult to find sufficiently experienced judges from all countries who could form the international panels. Other issues concern the language regime and also questions of evidence. There is a broad range of options, from the traditional continental system to full discovery, which we know from the United Kingdom. The big challenge will be to find an intermediate solution which is acceptable for all countries involved.

**How do you think the patent landscape will look in Europe in general, and in your jurisdiction specifically, in five years' time?**

**GS:** The pressure of innovations generated abroad will substantially increase in the near future. If the EU member states, or the European Union as a whole, cannot protect and reward innovations generated in their territories, they will lose their competitive capability. Accordingly, it is our hope that the European Union will recognise the chance to strengthen the protection of innovation instead of compromising on the existing levels. Realistically, things will perhaps not have changed at all within five years. In 10 years' time, we will see the effects of the EU patent and a unified EU patent litigation system. The quality of patent protection in Germany will most probably suffer serious harm due to the introduction of a new EU patent litigation court for European and EU patents. Applicants are beginning to avoid this situation by returning to the filing of national German patents for which the established litigation structures will remain.

**HB:** A unitary patent system will have been established to users' satisfaction, but Europe will still be struggling to find a credible

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*solution for the court system. Substantive patent law will continue to become more harmonised in Europe, mostly thanks to developments at the EPO. I believe that Sweden will continue its tradition of providing a sophisticated and robust judicial system for patent litigation. The global recession has not affected Sweden as much as many other countries and Swedish industry is prospering. This, in combination with the fact that Swedish labour is well educated and well paid, means that innovations are necessary and, in fact, are numerous. An efficient and robust patent system is therefore of the utmost importance, and this seems to be recognised by the Swedish government. I am therefore optimistic about developments in Europe, including in my home country.*

**JB:** Five years into the future is a long time to predict. On the other hand, we have seen that projects which have been taken up easily get lost over a few years. The main reason is the political discussions, which make it hard to predict further developments.

*It is obvious that the role of patents is increasing and many small and medium-sized enterprises have finally recognised the importance of IP protection for their core business. This will inevitably lead to a greater need for companies to be educated about, and be aware of, IP in general – in particular, what their competitors' positions are.*

*Despite the problems mentioned before, I believe that the efforts to come to some kind of an EU patent and a common patent litigation system will make considerable progress towards an acceptable solution. Some EU member states have a great interest in pursuing this project. Others may be more reluctant, but nevertheless seem to be willing to join in. Germany is in a comfortable position with its current system. Although it is generally supportive of the projects, it will adhere to a*

*new system only if this does not weaken current standards.*

**CA:** What we would like to be able to say is that in five years' time, Europe will have a unitary patent and European patents (including unitary patents) will be granted promptly by an efficient and effective EPO which consistently grants only those patents which are really novel and inventive. For those few patents which squeeze through the filter, there will be a speedy and effective opposition procedure, with all oppositions started within three months and completed within six months of grant of the patent. Further, a well-managed central EU patents court will be up and running, with a convenient central seat in Paris or perhaps Amsterdam, subject to no oversight by the ECJ, and providing a cheap, robust and speedy forum in which both infringement and revocation actions are determined, and in which all stakeholders have complete confidence. Finally, from the UK perspective, we would like to see patent filings by UK enterprises having overtaken those of German industry.

*Unfortunately, we do not think that any of this will have happened by then. Instead, the patent landscape in five years' time will be much the same as it is today. ■*