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EUROPEAN PATENT HARMONIZATION MAY BE NEAR - WILL IT REALLY HAPPEN?

As many patent holders know, a new round of financing for the company may be needed if one decides to pursue patent protection in Europe. While there is a central European Patent Office (EPO) that can streamline the prosecution of a patent application in Europe, once the patent grants it must be validated and issued in each country within the European Union (EU) that is a party to the European Patent Convention (EPC). This validation and issuance often requires translations and processing, as well as additional attorney's fees. All of this leads to a European patent costing 11 times its United States counterpart (this estimate was produced for validation in 13 countries).¹

While acquisition of a patent in Europe is expensive, the cost of enforcing that patent can be astronomical because of litigation in multiple countries involving different civil legal systems with the concomitant need for separate counsel in each country. Since many systems have a substantially reduced discovery processes relative to the United States, litigation in any one country is typically less expensive than the corresponding US patent litigation, but the overall cost can rival the US cost. The Commission report estimates that the new Patent Court would save companies E289 million a year, which at current exchange rates amounts to approximately \$424 million.

On December 4, 2009 the Council of the EU held a meeting of the EU and announced that "conclusions on an enhanced patent system in Europe . . . [were] unanimously adopted."² The Council went on to say the agreement "covers major elements to bring about a single EU patent and establish a new patent court in the EU." Internal Market³ and Services Commissioner Charlie McCreevy of the EU was quoted as saying: "I welcome this political breakthrough as a very strong signal from the Council that the EU is committed to achieve a true single market for patents. A number of issues remain to be resolved and we undertake to work closely with the Council and the Parliament towards achieving a final package that will meet the trust and confidence of users." The member countries agree that the new Patent Court should "facilitate European innovation and foster competitiveness."⁴

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¹ (Europa, Press Release, click [here](#)).
² Id.
³ Id.
⁴ Id.

The new Patent Court would be staffed by both technically skilled and legally skilled judicial and service personnel. In contrast, the European Patent Organization, the current granting agency for a European Patent that can be validated in each member country, is staffed with highly skilled practitioners. The major improvement provided by the Patent Court will be a single place for patent litigation and a single place for appeal of patent cases. It appears that in order to create buy in among member countries, there will be a phase-in period in which litigation can occur in member countries or at the specialized Patent Court.

While this will be a large improvement for patent holders over the current system in Europe, the big question is when this will occur. The Council has requested a legal opinion, but it is not clear when this is expected or what effect it will have. While it appears that there is "political" agreement and agreement exists for things such as renewal fees and cooperation and partnerships between patent offices, there are significant open questions. What will the Official language be? What will the court and substantive law look like? For example, it does not appear that agreement has been reached for the translation arrangements. Disagreement over the "official" language of the EU and the EPC (there are 23 official languages in the EU) has caused agreements to become derailed in the past. This is not a good harbinger as patent translation is one of the most problematic and costly issues within the current system and it carries a significant amount of nationalistic baggage. In an attempt to prevent translation problems from derailing the agreement for the single patent court, it appears that the Council will set up a separate "Regulation" to deal with the translation issue. While we are closer than we were, it should be remembered that the benefits of a Patent Court have been actively debated for over 40 years, and specific efforts to create a Patent Court began in 2000. Until the appropriate treaties are actually amended and the regulations put in place, innovators will still have to contend with the expensive and cumbersome patent system(s) in the EU.

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