



## EUROPE MOVES A STEP CLOSER TO A UNIFIED PATENT SYSTEM

Political agreement was reached at the June 2012 European Council meeting on what had been termed as the last remaining issue on Europe's new patent system—the location of the Central Division for the Unified Patent Court. The new patent system (which is to provide a unitary patent as well as a unified patent court) is undoubtedly now closer to becoming a reality than ever before in its history since the 1975 draft of a "Community Patent." Still, much of the detail of how the new system will operate remains to be decided, and several hurdles remain to be overcome.

The Council agreed that the Central Division for the Unified Patent Court will be formally based in Paris, with London and Munich both hosting branches. The London branch will handle patents relating to patent classes A and C (i.e., chemistry, pharmaceuticals and life sciences). The Munich branch will handle patents relating to patent class F (i.e., mechanical engineering, lighting and heating). Paris will handle other technologies, most notably electronics.

All three locations will prove to be important in the new system, and with IP litigation teams in each of these cities as well as its prosecution teams in Munich and Frankfurt, Jones Day is well placed to support clients when the new system does come into force. The overall idea is that the Central Division is to host validity challenges and declarations of noninfringement while infringement actions are to be brought in local or regional courts (which are expected to include courts in Munich, London and Paris as well as most likely in Düsseldorf and Mannheim). The unitary patent will be granted by the EPO, still based in Munich.

The Council suggested that Art. 6–8 in the draft legislation (relating to substantive patent law) be deleted. This would remove the competence of the ECJ over substantive questions of patent infringement. Many practitioners have argued for this. However, the suggestion as well as all other amendments introduced by the Council have immediately been challenged on the basis that they were not

covered by the consensus reached in December 2011; the European Commission had previously regarded these provisions as a necessity. A consenting vote of Parliament scheduled for July 4, 2012 has been postponed, so the question remains as to whether the current momentum of the Unified Patent System can be kept. Klaus-Heiner Lehne, Chair of the European Parliament's Legal Affairs, sees the deletion of Art. 6–8 as a “crash test” scenario at the European Court of Justice. After a final heated debate on July 10, 2012, it became clear that the European Parliament will not take up the matter again before September. This will give the Legal Affairs Committee room to explore further on the potential deletion of Art. 6–8.

The Council also refined, at a high level, some issues about the bifurcation between local/regional courts and the central division. Specifically, where the defendant is a non-EU company, it will be possible to bring infringement actions before the Central Division. Also where a revocation action is already pending, a patentee will be able to bring infringement proceedings before the Central Division. However, there will be no possibility for a defendant domiciled in the EU to transfer an infringement case to the Central Division. Without further detail, it is difficult to predict how these provisions will work in practice or how they may affect strategies for litigating patents in Europe, especially when many of the larger patent cases involve a non-EU parent and its local EU subsidiary. Patent practitioners criticized that any influence that the defendant may have on the choice of forum would be a violation of the common sense in civil procedure laws of the member states. Again, it remains to be seen what the final, approved wording will be.

While the progress is welcome, the prospect of a truly unified patent system across the whole of the EU is not yet in sight. The planned unitary patent is based on a so-called enhanced cooperation allowing EU member states to proceed without unanimity. This was needed because Italy and Spain objected to the proposal and refused to participate due to the exclusion of the Spanish and Italian languages. Furthermore, Spain and Italy are now challenging the jurisdictional basis under which the rest of the EU is progressing. Unless there is a change of heart by Spain and Italy, at best parallel litigation will remain in the EU, and if their challenge succeeds, it is possible that whole project could once again stall.

The Council is hoping that the new system will be up and running by April 2014, although this may prove to be optimistic. While too many of the details are still undecided for businesses to be able to make practical preparations on whether and how to use the new system, our lawyers in Düsseldorf, Frankfurt, Munich, London and Paris will issue guidance as to how best to approach the new system as soon as the details are decided.

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