



JÖNKÖPING INTERNATIONAL
BUSINESS SCHOOL
JÖNKÖPING UNIVERSITY

European patent with unitary effect

Reduction of the high costs relating to patents valid throughout the EU?

Bachelor's thesis within Commercial and Tax Law (Intellectual Property Law)

Author: Helena Olsson

Tutor: Edward Humphreys

Jönköping 19 May 2011

Bachelor's Thesis in Commercial and Civil Law (Intellectual Property Law)

Title: European patent with unitary effect
Author: Helena Olsson
Tutor: Edward Humphreys
Date: 2011-05-19
Subject terms: Patents, Unitary patent protection, Community Patent Convention, European Patent Convention, Mutual recognition, Translations arrangements.

Abstract

In Europe there are two patent systems national patents under national law and a European patent system under the European patent convention, neither based on European Union legislation. The problems with the two systems are the high costs for obtaining and maintaining patents. The systems are also complex since there is no or little harmonization between the Member States' legislation relating to patents.

Since the early 1970s the Commission has been trying to introduce a Community patent which would have equal effect throughout the territories of the Member States. However, there has been no success and because of that twelve Member States initiated enhanced cooperation in the area of the creation of unitary patent protection. In March 2011, enhanced cooperation was authorized by the Council and the Commission submitted two separate Regulation proposals regarding enhanced cooperation and translations arrangements.

The proposed Regulations are an attempt by the Member States to make the patent system easier to access, to lower the costs for obtaining and maintaining the patent and making the system legally secure. The proposed Regulations are also a means to improve the situation on the internal market and increase the competition level, by giving the patent a unitary character.

If the EU patent fails there is an alternative solution to the problem with high costs; mutual recognition of national patents. This would mean no translation costs and costs for application and renewal of patents would be lowered, compared to the existing systems. However, if the EU patent becomes reality it is the most suitable solution to the problem with high costs as it also solves a lot of the complexity of the existing systems.

Table of contents

1	Introduction	4
1.1	Background	4
1.2	Purpose and limitation.....	5
1.3	Method and material.....	6
2	Patents in Europe	9
2.1	Why patent protection?	9
2.2	National patents	10
2.2.1	General provisions.....	10
2.2.2	Problems from an EU perspective	12
2.3	The European Patent Convention, EPC.....	14
2.3.1	The EPC and the EPO.....	14
2.3.2	The European patent under the EPC.....	15
2.4	Comparison national patents and European patents.....	19
3	The Community patent.....	22
3.1	Background	22
3.2	The CPC and the EPO	22
3.3	The Community patent under the CPC	23
3.3.1	Application and language	23
3.3.2	Costs and fees.....	24
3.3.3	Problems from an EU perspective	25
3.3.4	Agreement relating to community patent in 1989.....	26
3.4	Comparison European patents and Community patents.....	26
4	The proposals regarding unitary patent protection	28
4.1	Translation arrangements	28
4.1.1	Background	28
4.1.2	Early proposals.....	29
4.1.3	Proposals after the Lisbon Treaty came into effect.....	30
4.1.4	The translation arrangements Regulation.....	31
4.2	The unitary patent protection.....	33
4.2.1	Early proposals.....	33
4.2.2	Enhanced cooperation.....	34
4.2.3	The EU patent Regulation	34
4.3	Would an EU patent be an improvement?.....	38
5	Alternative solution – mutual recognition of patents	42
6	Conclusion.....	46
6.1	Is the EU patent a suitable solution?	46
6.1.1	The question.....	46
6.1.2	National and European Patents.....	46
6.1.3	The Community patent that never happened.....	48
6.1.4	Unitary patent protection and the EU patent.....	49
6.1.5	The answer.....	51
6.2	Another suitable arrangement?	52
6.2.1	The question.....	52
6.2.2	Mutual recognition of national patents	53

6.2.3 The answer.....	53
List of references.....	55

Abbreviations

CoJ	-	European Court of Justice
CPC	-	Community Patent Convention
EC	-	European Community
EEC	-	European Economic Community
EPC	-	European Patent Convention
EPO	-	European Patent Office
EU	-	European Union
EU patent	-	European patent with unitary effect
PCT	-	Patent Cooperation Treaty
TEU	-	Treaty on European Union
TFEU	-	Treaty on the functioning of the European Union

1 Introduction

1.1 Background

Technical progress is something that cannot be taken for granted and as a result of this, states tempt persons, especially companies, to be creative by offering financial profits and prestige to those who come up with new ideas and inventions, by supplying a patent system.¹ In Europe there are two different patent systems; a national patent system under national law and a European patent system under the European Patent Convention, EPC².

The EPC is not a European Union, EU, system; it is a system that applies to thirty-eight countries in Europe. The European patent is a collection of national patents. Each patent is only valid in one country and every patent is dealt with under national law.

Due to the lack of an EU system, the single market for patents in the EU is still incomplete. Since the late 1970s there have been plans on introducing a European patent with unitary effect, EU patent, which would be valid in all Member States. As of today these plans have not been made real, but they are advanced and on the verge of becoming reality. Twenty-five of the twenty-seven Member States participate in the enhanced cooperation creating unitary patent protection in the EU.³

The high costs and the complexity of the system with patent protection are viewed as problems since they make the system less accessible, especially with regard to small and medium-sized companies.⁴ These companies have identified the high costs for obtaining patents as a major obstacle with the patent system and have requested a “significant” reduction in costs of patents for a future unitary patent system.⁵ The high costs also have serious consequences for the competitiveness of the EU in relation to the USA and Japan; the EU fall behind in terms of patent activity.⁶ Recent studies show that a European patent

¹ Domeij, Bengt, *Patenträtt*, Iustus Förlag, Uppsala, page 14.

² Convention on the grant of European patents (European Patent Convention) of 5 October 1973.

³ COM (2011)215/3 Proposal for a European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, COM (2011)215/3, page 3, paragraph 1.1.

⁴ COM (2011)215/3, page 4.

⁵ Council Decision 2011/176/EU on 10 Mars 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, page 5.

⁶ COM (2007)165 final: Communication from the Commission to the European Parliament and the Council – Enhancing the patent system in Europe, page 2.

is ten times more expensive than a US patent today.⁷ Compared to a Japanese patent the European patent is thirteen times more expensive.⁸ This fact could be a contributing factor to why the EU as a whole has fewer patents activated than the USA and Japan, persons in the USA and Japan can afford patents while persons in the EU cannot.⁹

The questions are whether the EU patent will solve the problem of high costs relating to patents or not and why the solution has to be an EU patent? In what way will an EU patent system be different from the EPC system? Maybe there is another solution to the problem?

1.2 Purpose and limitation

The purpose of this bachelor's thesis is to examine whether an EU patent is a suitable arrangement to solve the issues relating to high costs with regard to patents valid throughout the EU. The focus is on why an EU patent has been chosen and how the rules relating to the EU patent are going to solve this problem.

An additional purpose is to describe an alternative solution of high costs with regard to patents. The solution that this bachelor's thesis is focusing on is mutual recognition of national patents. The principle of mutual recognition is commonly used in the EU and the purpose of this question is to find out if the principle could be used for patents as well as goods or judgments. This question is not going to be as thoroughly answered as the main purpose. The purpose of adding an alternative solution is to point out the fact that more than one possibility to solve this problem might exist and mutual recognition of national patents is a solution worth considering.

Since this bachelor's thesis deals with costs with regards to patents valid throughout the EU the focus is on how the costs would be reduced by the EU patent. This means that the systems for national patents and the European patent are examined, particularly with regard to costs. However, the costs for the litigation procedure are not included since the subject of this bachelor's thesis would be too extensive if those costs were to be included, in large due to the fact that all European patents are dealt with under the national legislation of every country where it is valid.

⁷ COM (2010)350 final: Proposal for a Council Regulation on the translation arrangements for the European Union patent, page 3.

⁸ COM (2007)165 final, page 2.

⁹ COM (2007)165 final, page 2.

The issue relating to the fact that there are differences between the Member States legislation is, however, going to be mentioned briefly. This is done to illustrate the differences between the European patent, the Community patent and the EU patent in terms of jurisdiction.

Since this bachelor's thesis deals with patents it would be natural to explain what kinds of inventions deserve patent protection and how rules regarding maintaining a patent differ between the Member States. However, this question is not relevant with regard to costs for a patent and cannot help answer the questions. But regarding the alternative solution the rules relating to what kinds of inventions deserve patent protection is going to be mentioned briefly to illustrate a possible problem with mutual recognition and also solutions to that problem.

To answer the question regarding an alternative solution, mutual recognition, the features of mutual recognition are going to be compared to the situation with patents. To do this other systems using mutual recognition must be studied. However, since this question is not fully answered, no system is studied or explained thoroughly.

1.3 Method and material

In order to find an answer to the purpose of this bachelor's thesis the existing patent systems in Europe must be studied. They are examined one at a time, starting with the national patent and then the European patent. The systems are compared to each other and then the European patent is compared to the proposal regarding an EU-patent. The focus of the comparison is on the potential improvements in terms of cost for a patent, especially costs with regard to translation arrangements. The comparison also entail the complexity of the systems to find out which system is most user-friendly. However, to get the whole picture the Community patent, which never came into effect, must be studied to see how the EU patent has been developed and altered since the late 1970s.

When it comes to answering the question of whether an alternative solution, mutual recognition, would be a suitable solution or not, the features of the principle of mutual recognition is studied and then compared to the system with patents. To find the features of the

principle of mutual recognition other systems in the EU that uses the principle are studied. These systems are the Brussels I- Regulation¹⁰ and the principle of free movement.

This bachelor's thesis has an EU orientated approach which means that mostly relevant EU legal sources are studied to reach conclusions regarding the purpose. The material studied is primary law¹¹ such as the Treaty on the European Union, TEU, and the Treaty on the Functioning of the European Union, TFEU. But also secondary law¹², such as Council directives and Council decisions, preparatory legal acts from the Commission and the Council and legal literature relevant for the subject matter is examined to answer the questions.

The preparatory legal acts which are studied are mostly proposals from the European Commission, the Commission, but also proposals from the European Council, the Council, and Communications from the Commission are studied to gather as much information as possible.

There are differences in the legislation regarding patents between the Member States, but since the scope of this bachelor's thesis would be too wide if all Member States national legislation would be studied the Swedish Patent Act¹³ is chosen to describe the rules relating to national patents. This is done to clarify the differences between the national patent system and the European patent system.

The EPC, as revised on 13 December 2007, are studied in order to determine how the situation is today and how an EU patent would improve the situation. This is done during the process of explaining the rules regarding the European patent but also during the process of comparing the European patent system to the EU patent system.

To clarify what the EU patent would entail, different proposals with regards to the EU patent will be examined, such as the Community Patent Convention, CPC¹⁴, and the recent

¹⁰ Council Regulation (EC) no 44/2001 on 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹¹ Hettne, Jörgen, EU-rättslig metod, Nordstedts Juridik, Stockholm, page 24.

¹² Hettne, Jörgen, EU-rättslig metod, Nordstedts Juridik, Stockholm, page 26.

¹³ Patentlag (1967:837).

¹⁴ 76/76/EEC: Convention for the European patent on the Common market.

proposal for a regulation regarding the EU patent.¹⁵ The starting point is the CPC, but when it comes to more recent proposals regarding the EU patent the starting point is the most recent proposal and by finding references in that proposal other, previous proposals are studied as well to complete the picture with regard to the EU patent. However, the explanations regarding the different proposals are in chronological order, starting with the oldest and ending with the most recent proposal.

Even though this bachelor's thesis deals with intellectual property law, some of the general EU rules must be explained since they sometimes interact with the intellectual property law. This is especially important with regard to the free movement of goods set out in the TEU and the rules regarding enhanced cooperation set out in both the TEU and the TFEU.

¹⁵ COM (2011) 215/3.

2 Patents in Europe

2.1 Why patent protection?

Patents exist in order to make, in particular, companies strive for innovative solutions and technical progress. Patents are in other words a means by which society tries to produce new products and improved technical development.¹⁶ With regard to patents most notions have not changed since the first patent system was established. Some of these notions are such as patents being an incentive to innovation and that patents are a social contract between the patentee and the society. Other notions are that the patentee receives a monopoly on the market and that the monopoly should be given to the inventor and also the desire to balance interests between the patentee and the society.¹⁷

The social contract is based on the fact that the patentee receives a monopoly on the market in return for public disclosure of the invention. This is done for the sake of balancing the interest between the inventor, who wants credit for inventing something new, and the society, which wants to profit from the invention. The social contract also works as an incentive for others to come up with new ideas and thereby bring the society forward. In order to make the patent system work properly it is important that the patent and the monopoly it brings are given to the right person, the inventor.

Nevertheless, some features with regards to patents have changed and two of them are the time for how long a patent is granted and the notion of what constitutes a new invention.¹⁸ Patents are granted for a limited period of time, most often a maximum of 20 years, and an annual payment is required in order to keep the patents valid. During these years the holder of the patent only has a right to exclude others from using the invention as a patent does not grant the holder the right to use the invention.¹⁹ In other words a patent does not grant the patentee with any positive rights, instead the patent confers negative rights on the holder of the patent. Patents are also limited with regard to the territory in which they are valid. Usually a patent is valid in one state, a so-called national patent regulated by national law,

¹⁶ Domeij, Bengt, *Patenträtt*, Iustus Förlag, Uppsala, page 14.

¹⁷ MacQueen, Hector, *Contemporary Intellectual Property*, Oxford University Press, New York, page 373.

¹⁸ MacQueen, Hector, *Contemporary Intellectual Property*, Oxford University Press, New York page 373.

¹⁹ Decision by the Technical Boards of Appeal T 866/01 – 3.3.02 of 11 May 2005, page 75, paragraph. 9.7. “The patenting of an invention does not grant the patent holder a positive right to exploit the invention but rather the right to exclude others from exploitation during a limited period of time”. See also Domeij, Bengt, *Patenträtt*, Iustus Förlag, Uppsala, page 59.

but in Europe there is another form of patents regulated under the EPC called a European patent which can be valid in several contracting states of the EPC.

Ever since the early days of patents there has been a need to justify the system due to the fact that the existence of patents is not evidently in the public good, but for the patentee. If patents existed only for the public good the invention would be disclosed, the patentee would receive money for doing so and then anyone could use the invention. In other words, there would be no monopoly granted to the patentee. The fact that patents offer a monopoly on the market when the EU strive to open up the whole market within the EU is also a cause for justification. However, the legal requirement of a public disclosure of the invention in order to receive the monopoly on the market justifies the system.²⁰ The public disclosure can lead to more and improved competition since the competitors can focus their energy and money on coming up with new products that are similar to the patented product, but which have enough dissimilarities not to infringe the patent. This is only possible when the patented product has been disclosed. If there was no disclosure, no one would know how the patented product was developed. Without that information the competitors cannot make the changes to the features and functions which are necessary to avoid infringement.

To sum up, society has the choice of keeping the patent system or risk a halt in technological innovation and competitiveness and this might be one of the reasons why society has chosen patents. Now, there is nothing to say that innovation would definitely come to a halt but the risk of this happening has been enough to ensure that the states continue the use of patents as both a rewarding system and an incentive to come up with new ideas.

2.2 National patents

2.2.1 General provisions

Patents which are applied for and granted in one country are called national patents and usually these patents are administered by a national patent office.²¹ A national patent entails an exclusive right for the holder to use the invention protected by the patent professionally, but only in the country where the national patent is applied for.²² This means that the hold-

²⁰ MacQueen, Hector, *Contemporary Intellectual Property*, Oxford University Press, New York, page 377.

²¹ Patentlag (1967:837) Chapter 2 § 8 Section 1.

²² Patentlag (1967:837) Chapter 1 § 1.

er has a monopoly on the market but the monopoly is geographically restricted and the patent is only valid in one country. The exclusive right given to the holder of a national patent means that the patent holder can prevent anyone from making, offering, placing on the market or using an invention protected by the patent or import or store such an invention for such purposes.²³ There are, however, exemptions from this rule which relates to, inter alia, non-professional usage, experimental usage and usage of the invention after the point when the patentee placed the invention on the market.²⁴ The last exemption is called the principle of exhaustion of rights and originates from EU case law.²⁵

In order to determine whether the exclusive rights of the patent are infringed or not, the patent claims have to be studied, since they control the scope of the patent protection. However, to understand the claims the description would have to be studied as well.²⁶ The comparison to be made is only an objective comparison between the patent and the infringing product, no subjective comparison between the different products.²⁷

A national patent is granted for a maximum period of twenty years from the day of the submitting of the application. To keep the patent valid a renewal fee shall be paid for each fee year.²⁸ Each year since the application is a fee year and the renewal fee shall be paid the last day of the month during which the fee year begins. However, the first two renewal fees shall not be subject to payment until the fee for the third fee year is due for payment.²⁹ If the renewal fees are not paid in due time the patent will be considered to have lapsed at the beginning of the fee year for which the renewal fee has not been paid.³⁰

In order for the patentee to obtain the national patent in the first place the patentee has to pay an application fee, and for the application the patentee also has to pay an annual fee for

²³ Patentlag (1967:837) Chapter 1 § 3 Section 1 point 1.

²⁴ Patentlag (1967:837) Chapter 1 § 3 Section 2.

²⁵ See below, section 2.2.2, page 13.

²⁶ Patentlag (1967:837) Chapter 4 § 3 Section 9.

²⁷ Stockholms Tingsrätt Mål T 7-1323-96, 16 Mars 2000. See also Domeij, Bengt, Patenträtt, Iustus förlag, Uppsala, page 104.

²⁸ Patentlag (1967:837) Chapter 4 § 40.

²⁹ Patentlag (1967:837) Chapter 5 § 41 Section 1.

³⁰ Patentlag (1967:837) Chapter 7 § 51.

each year that begins before the application is finally settled.³¹ The application fee in Sweden is currently at 3000 Swedish crowns, SEK, the granting fee is at 1400 SEK and the renewal fees for twenty years is currently at 55 900 SEK. Only these three fees together is over 60 000 SEK and there are several additional fees that must be paid in order to obtain and maintain a patent. For example there are fees for patent claims, fees for each started page of the patent application when the patent is more than eight pages long, fees for new patent claims filed after the application and different fees for International Type Search (ITS). There are also fees relating to granted patents, to supplementary protection and to patent limitation.³²

2.2.2 Problems from an EU perspective

Since each country has its own national patent office there can be different costs in each country. If the costs are as high as in Sweden in all twenty-seven Member States the cost for patents throughout the EU would be around 1 620 000 SEK and that would only be for the application, granting and renewal fees. These high costs could make it difficult for companies to apply for, obtain and maintain national patents in several countries, especially since companies more often than not have several patents.

Since national patents are geographically limited to only be valid in the country where they are applied for, national patents are clashing with one of the fundamental freedoms established by the EU in the TFEU, the free movement of goods.³³ One of the essential functions of the EU is to create an internal market without borders which would promote scientific and technological advance.³⁴ The free movement of goods means that goods lawfully developed and placed on the market in one Member State shall be recognized and approved for in every other Member State by mutual recognition.³⁵

However, the national patents are dividing the internal market into twenty-seven small markets again. Goods from one Member State that are identical or similar to a product protected by a national patent in another Member State cannot be placed on the market in the other Member State without risking infringing the patent. This is due to the fact that

³¹ Patentlag (1967:837) Chapter 2 § 8 Section 5.

³² The webpage of the Swedish patent office, Patent och Registreringsverket, www.prv.se.

³³ TFEU Article 28.

³⁴ TEU Article 3.3.1.

³⁵ TFEU Article 28.1.

the holder of the patent has an exclusive right to professionally use the product and can thereby hinder everyone else from doing so.³⁶

The clash with the free movement of goods is a problem since it makes it difficult for companies, especially small companies, to compete on a market that is bigger than one country. This problem can give cause to a lower competition level within the EU and all of Europe. This outcome of the national patents geographical limitations are not accepted by the Court of Justice, CoJ³⁷, and it has stated that the use of an exclusive right granted by a patent to prevent imports are an exercise of rights not compatible with the provisions of the free movement of goods.³⁸ The patentee only has an exclusive right to manufacture products and to place them on the market *for the first time* and the right to oppose infringements.³⁹ Because of this, any derogations from the principle of free movement of goods is not justified where the product, protected by the national patent, was placed on the market by the patentee himself or with his consent.⁴⁰ However, a derogation from the free movement of goods may be justified where the protection is invoked against a product originating from a Member State where the product is not patentable and the product has been manufactured by a third party not having the consent of the patentee.⁴¹

Because of the geographical limitations of national patents someone can make and sell a product identical to the product protected by a national patent in another country without infringing the patent. As long as that product never is placed on the market in the country where the national patent is valid the manufacturer or user of that other product never risks infringing the patent.⁴² This could work in favor of Europe and the EU as a whole since there might be several different products which are identical or similar to each other. Several different, identical or similar, products on the market can create a high level of competition and that is something that the EU strives for. But since there is one country where there can only be this one product which is protected by a national patent, the geo-

³⁶ Patentlag (1967:837) Chapter 1 § 3 Section 1 point 1.

³⁷ The Court was previously called the Court of Justice for the European Communities, ECJ, but after the entry into force by the Lisbon Treaty on 13 December 2009 the name changed.

³⁸ Case 15-74 Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc [1974] ECR 1147.

³⁹ Case 15-74 Centrafarm v Sterling, paragraph 9.

⁴⁰ See Patentlag (1967:837) Chapter 1 § 3 Section 3 point 2.

⁴¹ Case 15-74 Centrafarm v Sterling, paragraph 11.

⁴² Domeij, Bengt, Patenträtt, Iustus förlag, Uppsala, page 95.

graphical limit is a hinder to competition within Europe and the EU, if the country where the patent is valid is a Member State.

The system with national patents has been considered insufficient by the Member States. In large due to the complexity of obtaining patents in more than one Member State and the high costs for obtaining and maintaining patents. The problems with the clash with the free movement of goods and the distortion of competition are also contributing factors. Because of these problems the Member States have worked together to improve the situation and lower the costs for obtaining patents and the first step in that direction was the EPC.

2.3 The European Patent Convention, EPC

2.3.1 The EPC and the EPO

The EPC was created in Munich on October 5, 1973 and was created as an attempt to harmonize the regulations regarding patents within Europe. The EPC is not an EU legislation act; it is an international convention which applies to countries in Europe, both EU Member States and other states. In 1973 there were fourteen countries⁴³ that were participating but today there are thirty-eight countries, including all twenty-seven Member States.⁴⁴

When the EPC was signed an organization called the European Patent Organization was established, with the task to grant European patents. This duty shall be carried out by the European Patent Office, EPO, supervised by the Administrative Council.⁴⁵ The EPO is based in Munich, Germany and shall have a branch in The Hague⁴⁶. The EPO is a granting body only; it cannot deal with infringement or enforcement questions. All questions involving litigation processes regarding the European patent are conferred to the national courts of the participating states.⁴⁷

⁴³ Törnroth, Lennart, Europapatent, Industriförbundets förlag, Stockholm, page 14.

⁴⁴ Commentary to the EPC Article 1, commentary 2. Albania, Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Denmark, Germany, Estonia, Spain, Finland, France, United Kingdom, Greece, Hungary, Croatia, Ireland, Iceland, Italy, Liechtenstein, Lithuania, Luxemburg, Latvia, Monaco, Former Yugoslav Republic of Macedonia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, San Marino, Turkey.

⁴⁵ EPC Article 4(3).

⁴⁶ EPC Article 6(2).

⁴⁷ See EPC Article 2(2) "The European patent shall... have the effect of and be subject to the same conditions as a national patent granted..."

In order to carry out the tasks appointed to the EPO by the EPC, different divisions have been established within the EPO which are a Receiving Section, Search Divisions, Examining Divisions, Opposition Divisions, a Legal Division, Boards of Appeal and an Enlarged Board of Appeal.⁴⁸ These divisions handle all tasks relating to European patents until the patents are granted.

The Receiving Section is responsible for initial examinations on filing and the formal requests of applications for European patents. The Search Divisions are responsible for drawing up European search reports. The Examining Divisions are responsible for examining the European patent applications. The Opposition Divisions are responsible for examining any opposition filed against the European patent application. The Legal Division is responsible for matters of law. All sections and divisions can appeal to the Boards of Appeal for examination. Finally, the Enlarged Board of Appeal is responsible for deciding points of law referred to it by the Boards of Appeal.⁴⁹

2.3.2 The European patent under the EPC

2.3.2.1 Application and language

A patent granted by the EPO is called a European patent. Despite the name, the European patent has, in every contracting state where it is granted, the same effect as and be subject to the same conditions as a national patent granted in that state.⁵⁰ In other words, the European patent is a collection of national patents granted by one body instead of several bodies in different countries.

In order to apply for a European patent the patentee has to be an individual, a company or any other body of persons, but they do not have to be a resident of a convention state, it is enough that the patentee wants a patent in a convention state.⁵¹ However, the right to a European patent resulting from the application should go to the inventor, or someone the inventor has transferred the patent to.⁵² So even though practically anyone in the world can apply for a patent, the right to the patent rightfully belongs to the inventor.

⁴⁸ EPC Article 15.

⁴⁹ EPC Article 16-22.

⁵⁰ EPC Article 2(2).

⁵¹ EPC Article 58.

⁵² EPC Article 60(1).

When the EPC first came into effect, the patentee had to designate the contracting states where protection of the invention was desired, but when the EPC was revised in 2007 the application procedure was simplified. Today all contracting states that are parties to the EPC at the time of filing will be deemed to have been designated by the patentee. However, a patentee can withdraw a designation of any contracting state at any time up to the grant of the patent.⁵³ This means that a European patent still can be granted for only two countries if that is the request of the patentee.

The application to the EPO shall be filed in one of the official languages of the EPO, which are English, French and German.⁵⁴ The official language which is chosen will be the language of all proceedings in proceedings before the EPO regarding the application or the granted patent.⁵⁵ There is however an exemption from the rule stating that applications shall be in English, French or German. The exemption states that an application can be filed in another language as long as the application is translated into one of the official languages.⁵⁶ This means that an application can be made faster and easier, but a translation is still required which takes time and can cost a lot of money.

If the EPO grants a European patent the specifications of the patent shall be published in the language of the proceedings before the EPO and the claims shall be translated into the EPOs two other official languages.⁵⁷ A European patent which is granted is valid for a maximum of twenty years.⁵⁸

2.3.2.2 Costs and fees

The costs for a European patent are divided into several different fees. There is for example a filing fee, a search fee, a designation fee, an examination fee, a fee for grant including publication of the specifications of the European patent, claims fees for the sixteenth claim and each subsequent claim and renewal fees, for the application, which progresses for every

⁵³ EPC Article 79.

⁵⁴EPC Article 14(1).

⁵⁵ EPC Article 14(3).

⁵⁶ EPC Article 14(2) and Article 14(4).

⁵⁷ EPC Article 14(6).

⁵⁸ EPC Article 63(1).

year.⁵⁹ As of today the combined costs for the filing fee, the fee for grant and the renewal fees for twenty years are € 21 225⁶⁰.

The requirement that all applications must be filed in English, French or German means that a Swedish inventor has to translate the application into one of these languages before an application can be made, which may take a long time and cost a lot of money seeing how a patent easily can run up to twenty pages.⁶¹ Even if the application is filed in Swedish according to the exemption in Article 14 (2) of the EPC the patentee has to translate the application, the only difference is that if the translation is done after the filing of the application the procedure starts quicker.

A European patent granted by the EPO has full effect in the designated countries as if the patents were granted by the national patent offices in each country.⁶² In order for the European patent to be effective, however, it has to be validated in every contracting state where the protection is sought. The validation is done to confirm that there really is a European patent. Within three months after the EPO published the decision to grant the European patent the patentee should submit documents and fees to the national patent offices. The documents that need to be submitted are; the patent claims translated into an official language of that country, a translation of the title of the patent into the same language, the patent application number and the patentees name and address. Besides these documents a fee for publication of the patent claims must be submitted to the national patent office.⁶³ Because of the validation procedure the costs of applying for a European patent can be high.⁶⁴ According to the Commission the overall costs of validation of an average European patent reaches € 12 500 if validated in 13 countries and over € 32 000 if validated throughout the EU.⁶⁵

⁵⁹ For all fees see Schedule of fees and expenses of the EPO (applicable as from 1 April 2010) Supplement 1 to OJ EPO 3/2010.

⁶⁰ 100 SEK =€ 10, 74 € 1 = 8, 7847 SEK on 18 May 2011 at FOREX BANK, € 21 225=186 455, 2575 SEK.

⁶¹ MacQueen, Hector, Contemporary Intellectual Property, Oxford University Press, New York, page 383.

⁶² EPC Article 2(2). See MacQueen, Hector, Contemporary Intellectual Property, Oxford University Press, New York, page 381.

⁶³ See for example Patentlag (1967:837) 11.82 and the Swedish patent office webpage, www.prv.se.

⁶⁴ EPC art. 65. See COM (2011)215/3, page 3.

⁶⁵ COM (2011)215/3, page 3.

After grant, renewal fees have to be paid by the patent holder each year in each country where the European patent is valid in accordance with Article 2 (2) of the EPC. The European patent shall be subject to the same conditions as a national patent granted in that country, which means that the holder has to keep track of several different legislations from different countries to make sure that the payments are done on time. If the renewal fee is not paid on time the European patent will lapse in the country where payment was not done.⁶⁶ The level of the renewal fees shows a great deal of diversity, the renewal fees in Sweden are 55 900⁶⁷ SEK (approximately € 6365), in Malta the renewal fees are € 3161 and in Germany € 13 170.⁶⁸

There are also differences in the time period in which the payment can be made. In some countries the payment can be done sometime during the twelve months before the due date, for example in Germany and Luxemburg. In other states the payments cannot be done earlier than six months before the due date, for example in Sweden. Some countries even have their earliest day of payment four, three or two months before the due date of payment.⁶⁹ The means of payment can also differ between the countries; the different methods are in cash, by bank transfer, postal money order or cheque. Some of the countries do not have the opportunity to offer bank transfers and a few countries even require an appointment with a national professional for the payment of the renewal fees.⁷⁰ This makes the system with the European patent complex since it is a number of different requirements that the patentee have to observe to be able to maintain the European patent.

2.3.2.3 Jurisdiction

Since the European patent is a collection of national patents all infringements shall be dealt with by national law in respective state.⁷¹ There is no European court that can deal with patent infringement, as of yet⁷², and there is no harmonization with regards to litigations procedures. A result of this is that it can lead to the situation where a patent might be held va-

⁶⁶ See for example Patentlag (1967:837) Chpiter 11 § 86 and Chapter 7 § 51.

⁶⁷ See above, section 2.2.1, page 12.

⁶⁸ SEC (2011) 482/2, page 19.

⁶⁹ SEC (2011) 482/2, page 19-20.

⁷⁰ SEC (2011) 482/2, page 20.

⁷¹ EPC Article 64(3).

⁷² See COM (2003)828 final: Proposal for a Council Decision establishing the Community Patent Court and concerning the appeals before the Court of First Instance.

lid in one contracting state and thus infringed, but held invalid in another contracting state and thereby not infringed even though both situations relate to the very same invention.⁷³ This is a big problem since it makes it difficult to predict the outcome of a conflict with regard to the European patent.

2.3.2.4 Problems from an EU perspective

Regarding the free movement of goods the European patent has not improved the situation much. Even though the patent may be valid in several different countries in Europe and the EU, there is no mutual recognition between all Member States. The only time there would be mutual recognition of a patented product is if the patentee has a European patent which is valid in all twenty-seven Member States.⁷⁴ If that is the case the product can be imported to each and every Member State from any other Member State and it will not be an infringement of the patent.⁷⁵ However, if there are some Member States which have not been designated, a product imported from one of these Member States to another Member State where the patent is valid would risk infringing the patent.

Regarding the problem that persons not being the inventor or even the holder of the patent can use, make or sell the product in one of the countries that has not been designated the situation is the same as with national patents. Since a European patent only is valid in the countries designated in the application, and the same rules apply to this patent as a national patent, there will be no infringement of the patent if someone in a non-designated country are using, making or selling the invention.⁷⁶

2.4 Comparison national patents and European patents

The European patent was created in order to improve the system with patents and in some ways it is an improvement compared to the national patents. However, it is still not the perfect solution to the problem with high costs for patents valid throughout the EU.

By offering the European patent the patent system has been simplified when it comes to the process of obtaining patents in more than one country at the same time. By establishing the EPO through the EPC the contracting states have made it easier for the patentees to

⁷³ MacQueen, Hector, *Contemporary Intellectual Property*, Oxford University Press, New York, page 382.

⁷⁴ Approximately only 1000 patent applications designate all twenty-seven Member States. See SEC (2011) 842/2, table 3, page 21.

⁷⁵ Case 15-74 *Centrafarm v Sterling*, paragraph 11.

⁷⁶ See for comparison the *Patentlag (1967:837)* Chapter 1 § 3 Section 1 point 1.

apply for patents. Instead of applying for one patent in every country where the patentee seeks protection as with national patents, the patentee can apply directly to the EPO and designate several countries in the application.

Since the European patent is a collection of national patents having the same effect as and be subject to the same conditions as any national patent granted in each country, which can be up to thirty-eight different countries, the system is still complex with regard to granted patents. This is due to the fact that the states respective patent legislation can be significantly different. The renewal fees differ quite much between the states and also the period in which the renewal fees have to be paid. This is a problem for the patentees which make it challenging to maintain the European patent in several states.

When it comes to the costs for applying for a patent the European patent has been a great improvement. However, the patentee needs to designate three countries or more for the European patent to be cheaper than the national patents. If a patentee applies for a European patent and designates all Member States instead of applying for national patents in all Member States, the costs will be lowered by approximately 1 400 000 SEK.⁷⁷ But the only costs included in this comparison are the application fees, the fees for grant and the renewal fees for the application. But since the EPO require translations of the patents and most of the contracting states require validations of the European patent the costs for obtaining the patent are still high.

A problem with the European patent is that the patent does not have an autonomous character but are governed by the different national legislation of the different states. This creates uncertainty when it comes to predicting the outcome of a conflict regarding a European patent. In one state the conflict can result in an infringement situation whereas the conflict results in no infringement in another state regarding the very same invention. A patentee involved in a conflict regarding the European patent often needs to seek legal help, which might be very expensive, especially if the help is needed in several countries, regarding the same patent and the same conflict.

When it comes to the free movement of goods there is still the problem that not all Member States are designated, which make it impossible to keep up the free movement of goods. A patented product which has not been placed on the market by the holder of the

⁷⁷ See and compare above, section 2.2.2, page 13 and section 2.3.2.2 page 17.

patent cannot be imported into the country where there is a European patent from a country where there is no European patent. This is due to the fact that the European patent is governed by national legislation and the same conditions shall apply to the European patent as to the national patent. The European patent has, however, improved the situation by making it easier to apply for patents in several states. The fact that it is possible makes it more likely that several states will be designated, and between the Member States which are designated the patented product can be imported and exported without risking infringing the patent.

3 The Community patent

3.1 Background

Since 1959 the Member States of the then European Economic Community, EEC, have been trying to create a unitary patent system, a Community patent, for the entire EC in order to accomplish greater integration on the common market. The rationale behind this attempt was the fundamental tension that patents can create on the market. The major problem for the Member States was how to prevent the exercise of national patents monopolies from distorting the competition level by dividing the internal market into several small markets.⁷⁸ The first proposal regarding a unitary patent convention was published in 1962, but due to different opinions regarding the question of whether non-Member States would be allowed to sign on to the convention or not the work came to a halt.⁷⁹

The next attempt to introduce a Community patent, the CPC, was done parallel to the work with establishing the EPC and the original thought was that the two conventions should come in effect at the same time.⁸⁰ By establishing a joint European patent office the differences in terms of competition between the countries of Western Europe would be evened out. The difference was caused by the fact that some of the countries had a more developed patent system than other countries.⁸¹

The Community patent changed name to the EU patent on 1 December 2009 when the Lisbon Treaty came into effect, due to the change of terms. This is the reason why both the Community patent and the EU patent are described below, even though they essentially are the same thing.

3.2 The CPC and the EPO

On 15 December 1975 the CPC was signed in Luxemburg, however, it never came into effect. According to the preambles the contracting states were anxious to eliminate the distortion of competition which may result from the national protection rights' territorial aspects.⁸² This was due in particular to the fact that one of the fundamental objectives of the

⁷⁸ MacQueen, Hector, *Contemporary Intellectual Property*, Oxford University Press, New York, page 383.

⁷⁹ Törnroth, Lennart, *Europapatent*, Industriförbundets förlag, Stockholm, page 11-12.

⁸⁰ Törnroth, Lennart, *Europapatent*, Industriförbundets förlag, Stockholm, page 43.

⁸¹ Törnroth, Lennart, *Europapatent*, Industriförbundets förlag, Stockholm, page 13.

⁸² CPC Preamble (2).

Treaty establishing the European Economic Community is the abolition of obstacles to the free movement of goods. With regard to patent protection the best way to achieve the fundamental objective was considered to be the creation of a Community patent.⁸³ The CPC would not affect the contracting states' right to grant national patents.⁸⁴ This means that with the CPC there would be three different patent systems in Europe, the Community patent, the European patent and the national patents of every contracting state.

The EPO would be the granting body for the Community patent as well as the European patent. However, special departments, common to the Member States, would be set up within the EPO to perform the duties given to them by the CPC. These departments would be a Patent Administration Division, Revocation Division and Revocation Boards.⁸⁵

The Patent Administration Division would be responsible for all acts of the EPO relating to Community patents. It would in particular be responsible for decisions in respect of entries in the register of Community patents. The Revocation Division would be responsible for the examination of requests for the limitations of or applications for revocation of the Community patent. Finally, the Revocation Board would be responsible for the examinations of appeals from the decisions of the Patent Administration Division and the Revocation Divisions. The Revocation Boards would also be responsible for expressing an opinion on the extent of protection of a Community patent.⁸⁶

3.3 The Community patent under the CPC

3.3.1 Application and language

The Community patent should have had equal effect throughout the territories to which the CPC applies. Moreover, the Community patent would only have been granted, transferred, revoked or allowed to lapse in the whole of those territories.⁸⁷ The Community patent should have had an autonomous character which means that it should only be subject to the CPC and the EPC, not to any national law in the contracting states.⁸⁸ The fact that

⁸³ CPC Preamble (3) and (4).

⁸⁴ CPC Article 6.

⁸⁵ CPC Article 7.

⁸⁶ CPC Article 8, 9 and 10.

⁸⁷ CPC Article 2.2.

⁸⁸ CPC Article 2.3.

the Community patent shall be governed by the CPC and the EPC means that the same application procedure which applies to European patents would apply to the Community patents as well.⁸⁹ The only difference would be that the patentee by designating one contracting state designates all contracting states automatically.⁹⁰ However, after the EPC was revised in 2007 this feature now applies to the European patent.

The official languages of the special departments under the CPC should be the same as for the EPO as a whole; English, French and German. The official language in which the Community patent is published would be the language used in all proceedings before the special departments concerning the Community patent.⁹¹ According to Article 14 of the CPC the same language regime that applies to the European patent under Article 14 of the EPC should apply to the Community patent. This means that an application could be filed in any official language of the contracting states, but a translation into one of the three official languages of the EPO would be requested.⁹²

One difference regarding the Community patent is, however, that any new specifications regarding a Community patent following limitation or revocation proceedings would have had to be published in the official language of the proceedings. These specifications shall also include a translation of the amended claims into one official language of all contracting states which do not have the language of the proceedings as an official language.⁹³ These requirements for translation of all documents into one of the official languages of the EPO and of amended claims into the official languages of all contracting states means that translations costs would be high for a Community patent, just as for the European patent.

3.3.2 Costs and fees

According to Article 26 of the CPC there should be rules regarding fees which shall determine in particular the amounts to be paid and the ways in which they are to be paid. There would, however, among other fees, be a renewal fee with respect of the Community patent which should be paid to the EPO. These renewal fees would be due for payment in the years following the mention of the grant of the Community patent in accordance with Ar-

⁸⁹ See above, section 2.3.2.1, page 15-16.

⁹⁰ CPC Article 3.

⁹¹ CPC Article 14.3.

⁹² CPC Articles 14.2 and 14.4.

⁹³ CPC Article 14.6.

article 86 (4) of the EPC. This is a difference compared to the European patent, since there would be no renewal fee for the Community patent application but only the Community patent.⁹⁴ Since the CPC never came into effect it has been impossible to come up with any figures relating to the costs of obtaining and maintain a Community patent. However, since there would not have been any validation procedures required by the contracting states the costs would most likely be lower for a Community patent than for a European patent.⁹⁵

3.3.3 Problems from an EU perspective

With regard to the free movement of goods the Community patent would be an improvement since the patent would be valid throughout the territories of the Member States, at this point all Member States had signed the CPC.⁹⁶ This would mean that after the grant of the Community patent, the product protected by the patent could be moved between the Member States without there ever being an infringement situation. However, the patentee has the same rights regarding a Community patent as a European patent and a national patent. This means that no one is allowed to make, offer, place the product on the market or import or store the product for these purposes without the consent of the patentee.⁹⁷ When the product protected by the Community patent has been placed on the market in one of the contracting states by the patentee or with the consent of the patentee, the patentee can no longer prevent other parties from using the product.⁹⁸ This rule is in conformity with the ruling of the CoJ in 1974, regarding the principle of exhaustion of rights, and ensures that the Community patent is not clashing with the free movement of goods.⁹⁹

Since the Community patent would be of an autonomous character there would not be any difficulties in predicting the outcome of a conflict regarding a community patent. This follows naturally since the rules regulating the community patent would be the same in all contracting states, the rules of the EPC and the CPC. This would be a great improvement compared to the European patent and the national patents.

⁹⁴ CPC Article 49.1.

⁹⁵ CPC Article 2.3.

⁹⁶ CPC Article 97.1.

⁹⁷ CPC Article 29(A).

⁹⁸ CPC Article 32.

⁹⁹ Case 15-74 Centrafarm v Sterling [1974] ECR 1147.

3.3.4 Agreement relating to community patent in 1989

The CPC never came into effect and in 1989¹⁰⁰ there was a new attempt to introduce the Community patent. In all essentials the amended Convention is identical to the CPC; there are only minor differences not relevant for this bachelor's thesis, such as changes with regard to the financial obligations and benefits of the contracting states.¹⁰¹ With regard to the character of the Community patent, the official languages which are used, the renewal fees, and the effects of the Community patent nothing has changed. For the convention of 1989 to enter into force twelve signatory states would have to ratify the convention.¹⁰² However, that never happened which resulted in the situation in Europe today, with national patents and a European patent but no Community patent. During the last decade the Commission has been trying hard to introduce the Community patent again, but up until now it has failed due to different opinions between the Member States.

3.4 Comparison European patents and Community patents

One of the main differences between the European patent and the Community patent is the character of the Community patent. With regard to the European patent the borders are still there since the patent is divided into national patents in the post-grant phase, but since the Community patent would have equal effect throughout the territories of the Member States, there would be no borders within the internal market. This would help ensure that no patents were clashing with the free movement of goods.

Another characteristic of the Community patent that would be different from the European patent is the autonomous character the Community patent would have. The community patent would not be subject to any national law, only the EPC and the CPC. In comparison to the European patent this is an improvement in two ways. It is easier for the patentee to maintain the patent since the system would not be as complex, not as many different rules and legislations to keep track of. Thanks to the combination of the equal effect and the autonomous character of the Community patent there would no longer be necessary to go through several litigation procedures relating to the same patent. One ruling from one court would be enough, which also would make it a lot easier to predict the outcome of a conflict regarding a Community patent.

¹⁰⁰ See 89/695/EEC: Agreement relating to Community patents.

¹⁰¹ Compare CPC 1975 Article 24 to the CPC 1989 Article 20.

¹⁰² 89/695/EEC: Agreement relating to Community patents, Article 10.

Even though there are no exact figures regarding the costs for a Community patent it is easy to assume, and likely, that the costs would be lower for the Community patent than for the European patent. This is due to the fact that there would be no need for validation processes or translations into every official language of the EEC. However, the costs would still be high due to the fact that the same translations requirements by the EPO applies to the community patent as well as the European patent.

4 The proposals regarding unitary patent protection

4.1 Translation arrangements

4.1.1 Background

One of the main reasons why the Member States have not been able to agree on a proposal for a Community patent is the questions regarding translation arrangements. The system of today is an expensive system and the major part of the high costs is translation costs, required both by the EPO and the Member States. According to the Commission almost 70 per cent of the total costs for a European patent validated in thirteen Member States are translation costs.¹⁰³

The procedure of validation of a patent has been explained¹⁰⁴ and even though the system is still being used, the contracting states of the EPC tried, in 2000, to lower the translation costs by the so-called London Agreement¹⁰⁵. The London Agreement is a voluntary system and therefore there are differences in the Member States translation regulations.¹⁰⁶ The Agreement came into effect in 2008 when France signed the Agreement and if the designated states in an application for a European patent have signed the Agreement, costs could be reduced by 45 per cent.¹⁰⁷ However, only ten Member States have signed the London Agreement and only four of them have agreed to abstain from demanding translations of the patent and these are the Member States having an official language in common with the EPO.¹⁰⁸ The other six Member States have a right to demand translations of the patent claims to their respective official language.¹⁰⁹ Some of these six Member States even demand a translation of the patent description into English if the European patent has been published in French or German. Seventeen Member States have not ratified the London Agreement and they still demand translations of the entire patent into their official languages. This is one of the reasons why the system is expensive and inefficient. However,

¹⁰³ COM (2010)350, page 2.

¹⁰⁴ See above, section 2.3.2.2, page 17.

¹⁰⁵ Agreement on the application of Article 65 of the Convention on the grant of European Patents.

¹⁰⁶ COM (2010)350, page 2.

¹⁰⁷ MacQueen, Hector, *Contemporary Intellectual Property*, Oxford University Press, New York, page 386.

¹⁰⁸ London Agreement Article 1.1.

¹⁰⁹ London Agreement Article 1.3.

the high costs for patents in Europe could be much lower with a Community patent having cost-effective, legally-secure and simplified translation arrangements.¹¹⁰

4.1.2 Early proposals

In 2000, the Commission adopted a proposal, the purpose of which was to create a unitary Community patent which would be available to all users of the patent system, in terms of translation costs. The idea was that after grant of the Community patent by the EPO in one of its official languages, the Community patent would be published in this language together with a translation of the claims into the other two official languages of the EPO.¹¹¹ But no decision could be reached and in 2003 the Council adopted a common political approach on the Community patent, which included a rule stating that patent holders would have to translate the claims into one official language of the every Member State, this arrangement was, however, rejected by the users of the patent system for being too costly.¹¹² After this the Council concluded that due to translation issues it was impossible to reach a political agreement on the proposed Regulation on the Community patent.¹¹³

In 2007, discussions continued since the Commission refused to give up the idea about a Community patent. In 2008, a revised proposal regarding a Community patent was presented which was based on the proposal from 2000 with a few new features. One of the new features was that anyone applying for a Community patent could apply in any official language of the EU. Another new feature was that the costs for translating the application into one of the three official languages of the EPO would be reimbursed by the system. This rule would only apply to the applicants not having a language in common with the EPO.¹¹⁴ A machine translation system would ensure that translations of the Community patents into all official languages of the EU were done, for the provision of patent infor-

¹¹⁰ COM (2010)350, page 2.

¹¹¹ COM (2010)350, page 2.

¹¹² COM (2010)790 final: Proposal for a Council Decision authorizing enhanced cooperation in the area of the creation of unitary patent protection, page 2. See Common political approach on the Community patent, pt. 2.3, Council document 6874/03.

¹¹³ COM (2010)790, page 2-3.

¹¹⁴ Council document 9465/08, page 18, Article 24a.

mation only with no legal effect.¹¹⁵ This proposal were discussed and debated in the Council in 2008 and 2009 but no agreement on the translation arrangements was reached.¹¹⁶

4.1.3 Proposals after the Lisbon Treaty came into effect

After the entry into force of the Lisbon Treaty¹¹⁷ on 1 December 2009 the translation arrangements remained out of scope for these Council conclusions due to the change of the legal basis for creation of the Community patent. The entry into force of the Lisbon Treaty is also the reason why the name of the Community patent changed into the EU-patent.¹¹⁸ According to Article 118(1) of the Treaty on the Functioning of the European Union, TFEU, measures to create European intellectual property rights should be established by the European Parliament, the Parliament, and the Council under ordinary legislative procedure. However, according to Article 118(2) of the TFEU, a special legislative procedure by the Council acting unanimously, after consulting the Parliament, is set out to establish language arrangements with regards to European intellectual property rights.¹¹⁹ This change means that any translation arrangements have to be established by a different, separate Regulation than the Regulation regarding the European intellectual property rights, in this case the EU patent.

Because of this change, in 2010, the Commission adopted a proposal for a Council Regulation on the translation arrangements for the European Union patent¹²⁰ which was accompanied by an Impact Assessment regarding the financial consequences of four different, possible translations arrangements. The possible translation arrangements were:

- 1) an EU patent exclusively in English,
- 2) an EU patent which is published in one of the official languages of the EPO with the claims translated into the two other languages,
- 3) an EU patent which is published in one of the official languages of the EPO but where the claims are translated into the four most popular languages in the EU and

¹¹⁵ Council document 9465/08, page 19, Article 24b.

¹¹⁶ COM (2010)790, page 3.

¹¹⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed on 13 December 2009.

¹¹⁸ COM (2010)790, page 3.

¹¹⁹ COM (2010)790, page 3.

¹²⁰ COM (2010)350.

- 4) an EU patent which is published in one of the official languages of the EPO but where the claims are translated into every official language within the EU.

After careful analysis the Commission came to the conclusion that the preferable solution would be alternative number two since that alternative maintains the well functioning system of the EPO and the translation costs would be kept at a minimum.¹²¹ Since the EPO will be the granting body of EU patents it will be most efficient to keep their established system instead of trying to introduce a new system. The preferable option is the same translation arrangement as the one set out in the revised proposal for the Community patent Regulation in 2008, and it will be simplified and result in the highest costs savings for the users of the system while ensuring legal certainty.¹²² It also allows the widest flexibility for the patentees, if option one would have been chosen the flexibility for the patentees would be lost but it would be easier since only one translation would be required.

4.1.4 The translation arrangements Regulation

On 13 March 2011, the Commission adopted a proposal for a Council Regulation¹²³ with regard to translation arrangements for the EU-patent. This proposal was accompanied by an Impact Assessment¹²⁴ which pointed out the high costs related to translation and publication of European patents as one of the main problems with the system today. The analysis resulted in that the Commission decided to propose regulations regarding enhanced cooperation based on the proposal of 2010.¹²⁵

According to the proposal with regard to translation arrangements, an EU patent application filed in accordance with Article 14(2) of the EPC and published in accordance with Article 14(6) of the EPC will be valid and no more translations will be required.¹²⁶ This means that when a submitted application, in any language, has been translated into one of the official languages of the EPO and the specifications of an EU patent are published in one official language of the EPO and the claims of the EU patent are translated into the

¹²¹ COM (2010)350, page 5.

¹²² COM (2010)790, page 3-4.

¹²³ COM (2011)216/3 Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

¹²⁴ SEC (2011) 482/2 Commission staff working paper, Impact Assessment.

¹²⁵ COM (2011)216/3, page 5.

¹²⁶ COM (2011)216/3, Proposal translation arrangements Article 3.

other two official languages the EU patent will have unitary effect throughout the territories of the participating Member States. This solution gives patentees wide flexibility in terms of choosing which language to translate the patent into. If one is really advanced in the English language one could write or translate the patent oneself and only pay another party to translate the claims into French and German or vice versa. However, since these translation costs still can be really high the proposal also keep the system proposed in the revised proposal for a Community patent Regulation in 2008. This system meant that the translation costs would be reimbursed by the system to the patentees not having a language in common with the EPO.¹²⁷

In order to promote availability of patent information and dissemination of technological knowledge in the EU, machine translations of all EU patent applications and specifications into all official languages of the EU shall be available as soon as possible. These machine translations are being developed by the EPO and they are an important tool to improve access to patent information. These machine translations would, however, have no legal effect, but only be a means of gathering information.¹²⁸ Before this system is available a request for unitary patent protection shall be accompanied by a full translation of the patent specifications in English if the proceedings before the EPO are done in French or German. If the language of the proceedings before the EPO is English the request for unitary patent protection should be accompanied by a full translation into any of the official languages of the EU. This transitional period shall lapse, at the latest, twelve years from the date of application of the proposed EU patent.¹²⁹

This system will ensure that the translation costs are kept to a minimum which are a necessity for all patentees and for the EUs' chance of competing with the USA and Japan in terms of patent shares on the market. Without these cost savings for patentees the EU would keep falling behind in terms of patent activity since the patentees will have trouble affording the patents.

¹²⁷ COM (2011)216/3, Proposal translation arrangements Article 5.

¹²⁸ COM (2011)216/3, Proposal translation arrangements Preamble (10).

¹²⁹ COM (2011)216/3, Proposal translation arrangements Preamble (11).

4.2 The unitary patent protection

4.2.1 Early proposals

Since the CPC there have been several attempts from the Commission to introduce a Community patent in Europe to create a single market for patents. In 2000, the Commission adopted a proposal for a Council Regulation on the Community patent¹³⁰ which aimed at creating a patent that would be attractive to the users of the patent system in Europe by proposing simplified and cost-effective translation arrangements.¹³¹ The Commission proposed that the patent would have effect in the entire territories of the EU but even though the proposal was discussed thoroughly in the meetings of the Council, it failed to reach the unanimity required and in 2001 it was concluded that despite all efforts it was not possible to reach an agreement.¹³²

In 2007, the Commission once again confirmed its commitment to the creation of a Community patent by a Communication¹³³ which re-launched the discussions in the Council. In 2008, a revised proposal for a Community patent Regulation¹³⁴ was presented which was based on the proposal from 2000 but with a few new elements with regard to translation arrangements¹³⁵. In December 2009, the Council adopted conclusions on an enhanced patent system for Europe.¹³⁶ Since the translation arrangements could not be agreed on during 2010, twelve Member States¹³⁷ addressed formal requests to the Commission and indicated that they wished to establish enhanced cooperation in the area of the creation of unitary patent protection between themselves.¹³⁸ Because of these requests the Commission adopted a proposal to the Council about authorizing enhanced cooperation.¹³⁹

¹³⁰ COM (2000)412 final: Proposal for a Council Regulation on the Community patent.

¹³¹ COM (2010)790, page 2.

¹³² COM (2010)790, page 2.

¹³³ COM (2007)165.

¹³⁴ Concil Document 9465/08.

¹³⁵ See above section 4.1.2, page 29.

¹³⁶ COM (2010)790, page 2.

¹³⁷ The Member States are Denmark, Estonia, Finland, France, Germany, Lithuania, Luxemburg, the Netherlands, Poland, Slovenia, Sweden and the United Kingdom. See COM (2010)790, page 4.

¹³⁸ COM (2010)790, page 4.

¹³⁹ COM (2010)790.

4.2.2 Enhanced cooperation

Enhanced cooperation is regulated by the TEU¹⁴⁰ and the TFEU¹⁴¹. The cooperation can be established between, at least nine, Member States within the framework of the EUs' non-exclusive competences. However, enhanced cooperation can only be established as a last resort after it has been concluded that the objectives of the cooperation cannot be attained within a reasonable period of time by the EU as a whole. Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. Nor shall it distort competition between the Member States or give cause to barriers or discrimination in trade. The legal basis for creating a European intellectual property right is stated in Article 118 TFEU and it makes specific references to the establishment and functioning of the internal market, which according to Article 4 TEU is one of the EUs non-exclusive competences. This means that as long as more than nine Member States are onboard with the enhanced cooperation, the Council can adopt a decision authorizing enhanced cooperation regarding an EU-patent. The proposal for a Council Decision authorizing enhanced cooperation in the area of the creation of unitary patent effect is based on the procedures described in Article 329(1) TFEU.

4.2.3 The EU patent Regulation

4.2.3.1 General provisions

The proposal regarding the EU patent was adopted by the Council after obtaining the consent from the Parliament on 10 Mars 2011. Following the adoption of the proposal thirteen Member States¹⁴², other than the original twelve, also declared a wish to join the enhanced cooperation. Today Spain and Italy are the only Member States not joining the cooperation regarding the EU patent. The recent proposal for a regulation implementing the enhanced cooperation in the area of the creation of unitary patent protection is authorized by a Council Decision¹⁴³.

Since the EPO is the body which grants European patents the participating Member States shall give the EPO some administrative tasks relating to the unitary effect of the EU pa-

¹⁴⁰ TEU Article 20.

¹⁴¹ TFEU Articles 326-334.

¹⁴² The Member States are Belgium, Austria, Ireland, Portugal, Malta, Bulgaria, Romania, the Czech Republic, Slovakia, Hungary, Latvia, Greece and Cyprus.

¹⁴³ Council Decision 2011/176/EU.

tent. These tasks shall in particular be the administration of the requests for unitary patent protection, the registration of unitary patent protection, the collection of and redistribution of renewal fees, the publication of translations for information purposes and the administration of the compensation scheme for patentees filing European patents in a language other than the official languages of the EPO.¹⁴⁴

In contrast to other proposals by the Commission the present proposal builds on the existing system of European patents. This means that the EU patent is not actually a new patent, the novelty of the system is the unitary effect that the European patents granted by the EPO can benefit from.¹⁴⁵ The unitary patent protection will be optional and co-exists with national patents and European patents without unitary effect. Within a month after the publication of the mention of grant of a European patent the patentee can submit a request to the EPO asking for registration of unitary effect.¹⁴⁶ However, European patents that were granted with different claims for different participating Member States will not benefit from unitary effect protection.¹⁴⁷

4.2.3.2 Costs and fees

The patentee has to pay one common annual renewal fee for the EU patent. The Renewal fees shall be progressive throughout the term of the patent protection and they shall be sufficient enough to cover all costs associated with the grant of the European patent and the administration of the unitary patent protection. The renewal fee shall also, together with the fees paid to the EPO during the pre-grant phase, be sufficient enough to ensure a balanced budget of the European Patent Organisation.¹⁴⁸ The fees to be paid to the EPO during the pre-grant phase shall be the same as for a European patent.¹⁴⁹ This is the case since the EU patent will be a European patent during the pre-grant phase; it is not until after grant the European patent will be given unitary effect and thereby be an EU patent. With regard to the level of the renewal fee it shall be fixed with the aim to ease innovation and fostering the competitiveness of the businesses in the EU. The level of the renewal fees

¹⁴⁴ COM (2011)215/3, Proposal enhanced cooperation Preamble (15).

¹⁴⁵ COM (2011)215/3, Proposal enhanced cooperation Preamble (5).

¹⁴⁶ COM (2011)215/3, page 4.

¹⁴⁷ COM (2011)215/3, Proposal enhanced cooperation Article 3.1.

¹⁴⁸ COM (2011)215/3, Proposal enhanced cooperation Article 15.1.

¹⁴⁹ COM (2011)215/3, Proposal enhanced cooperation Article 2(b), Article 3.1 and Preamble (9).

shall also reflect the size of the market covered by the EU patent and be similar to the national renewal fees of an average European patent.¹⁵⁰ The renewal fees shall be paid to the European Patent Organisation.¹⁵¹ If the renewal fee is not paid on due time the EU patent shall lapse and no longer be valid.¹⁵²

4.2.3.3 Why unitary patent protection?

The reason why the Member States are trying to introduce an EU patent is because one of the fundamental purposes of the EU is to establish an internal market which shall promote scientific and technological advance.¹⁵³ In order to attain these objectives the EU shall create legal conditions which will enable e.g. companies to manufacture and distribute products across national borders.

Uniform patent protection within the internal market should be one of the legal instruments that the companies could profit from.¹⁵⁴ To have unitary patent protection in the form of an EU patent would help improve scientific and technological advance by making the patent system easier to access, less costly and legally secure.¹⁵⁵ With unitary patent protection there would be fewer translations needed which would mean less translation costs and the patent would be protected throughout the territories of the participating Member States. An EU patent would also help improving the functioning of the internal market since there would be no clash between the patent system and the free movement of goods. The idea behind the EU patent is that it shall eliminate costs and complexity for companies seeking patent protection throughout the internal market. The unitary patent protection system shall be available for patentees from both participating Member States and other states.¹⁵⁶

The creation of the unitary patent protection will be achieved by giving European patents unitary effect after they have been granted, not during the application procedure. The main feature of the EU patent will be the unitary character of it, that it provides unitary protec-

¹⁵⁰ COM (2011)215/3, Proposal enhanced cooperation Article 15.2.

¹⁵¹ COM (2011)215/3, Proposal enhanced cooperation Preamble (16) & (18).

¹⁵² COM (2011)215/3, Proposal enhanced cooperation Article 14.2.

¹⁵³ TEU Article 3.3, first and last sentences.

¹⁵⁴ COM (2011)215/3, Proposal enhanced cooperation Preamble (1).

¹⁵⁵ COM (2011)215/3, Proposal enhanced cooperation Preamble (2).

¹⁵⁶ COM (2011)215/3, Proposal enhanced cooperation Preamble (2).

tion and has full effect throughout the territories of the participating Member States.¹⁵⁷ Because of the unitary character of the EU patent it will only be granted, licensed, transferred, revoked or lapse in the whole of the territories of the participating Member States.¹⁵⁸ Since the EU patent would be based on the European patent the EU patent would not have an autonomous character, as the Community patent would have had. Unlike the Community patent which would only be subject to the EPC and the CPC, the EU patent will be subject to two Regulations, the Regulation regarding enhanced cooperation and the Regulation regarding the translation arrangements. By matters not covered by these two Regulations the EPC and national law will be applicable.¹⁵⁹

4.2.3.4 Rights of the unitary patent protection

The holder of an EU patent shall have the right to prevent a third party from making, offering, using or placing on the market a product which is protected by the EU patent. Nor shall third parties be allowed to import or storing such products for these purposes.¹⁶⁰ This right shall only apply to the territories of the participating Member States and there are a number of limitations to this right.¹⁶¹ Even though someone is the holder of an EU patent third parties are allowed to use a patented product for e.g. private use, non-commercial use and experimental use without the possibility for the patent holder to stop them.¹⁶²

The rights an EU patent confer to the holder of the patent do not cover acts concerning the patented product occurring within the territories of the participating Member States after the point when the holder of the patent in question has placed the product on the market. This is in accordance with case law of the CoJ and the principle of exhaustion of rights.¹⁶³ After this point a third party can use, make or sell the product unless there are legitimate reasons for the holder of the patent to prevent further commercialization of the product in question.¹⁶⁴

¹⁵⁷ COM (2011)215/3, Proposal enhanced cooperation Preamble (7).

¹⁵⁸ COM (2011)215/3, Proposal enhanced cooperation Article 3.

¹⁵⁹ COM (2011)215/3, Proposal enhanced cooperation Preamble (9).

¹⁶⁰ COM (2011)215/3, Proposal enhanced cooperation Article 6.

¹⁶¹ COM (2011)215/3, Proposal enhanced cooperation Preamble (10).

¹⁶² COM (2011)215/3, Proposal enhanced cooperation, Article 8.

¹⁶³ See above section 2.2.2, page 13.

¹⁶⁴ COM (2011)215/3, Proposal enhanced cooperation, Article 9.

4.2.3.5 Problems from an EU point of view

With regard to the free movement of goods the unitary patent protection will ensure that the internal borders between the participating Member States disappear, creating a big internal market. This is a fact since there will be no geographical limitations to the unitary patent protection, except that of the territories of the participating Member States.¹⁶⁵ The fact that the borders disappear means that there are going to be one patent that is valid throughout the entire territories of the participating Member States. This is what the Commission has been trying to establish over the last decades. To have a functioning patent system which do not distort competition or partitioning the internal market is a dream come true for most Member States.

When there is only one patent valid with regard to the same product there will be no problem to move the product between the participating Member States. To be able to move the product between the participating Member States means that there is no longer going to be a clash between the patent and the free movement of goods. This fact is going to improve the functioning of the internal market and make it easier for companies to compete on a bigger market than they can do without the unitary protection.

The EU patent will not be of autonomous character, it shall be subject to the provisions of the Regulation of the Parliament and the Council implementing enhanced cooperation in the area of creation of unitary patent protection, the Council Regulation implementing the enhanced cooperation in the area of the creation of a unitary patent protection with regard to the applicable translation arrangements, the EPC and national law including rules of private international law.¹⁶⁶ This fact can make it difficult to predict the outcome of a conflict regarding an EU patent. Depending on which national law is being used the outcome could differ, even though the conflict is regarding the same product and the same problem.

4.3 Would an EU patent be an improvement?

The European patent was an improvement with regard to national patents when it was established in 1973 since the system made it easier to obtain patents in several states. But the system continued to be complex since the European patent became several national patents after it was granted. This meant that the patentee had to keep track of several different na-

¹⁶⁵ COM (2011)215/3, Proposal enhanced cooperation Article 3.2.

¹⁶⁶ COM (2011)215/3, Proposal enhanced cooperation Preamble (9).

tional legislations to be able to maintain the patents. This problem would be overcome by the EU patent system since the European patent will be given unitary effect instead of being divided into several national patents, in the post-grant phase. There would only be one patent and only one common renewal fee to be paid to the European Patent Organisation instead of a renewal fee in each and every country. The EU patent will also have full effect throughout the entire territories of the participating Member States, creating one big, internal market.

The fact that the EU patent will have equal effect throughout the territories of the participating Member States means that there will no longer be a conflict between patents and the free movement of goods, with regards to the product that is protected by the EU patent. This will open up the market and create a bigger market for the company holding the patent, which will help raise the competition level on the internal market. With regard to the non-participating Member States there will continue to be a conflict between the patent and the free movement of goods, but only from the non-participating Member States point of view. Since the system with unitary patent protection would be available to patentees from both Member States and other states, with no regard to nationality, establishment or place of business, there would be free movement of the goods protected by the EU patent. However, the free movement would only exist from the non-participating states to the participating Member States, not the other way around.¹⁶⁷ The Member States not participating in the enhanced cooperation will have no obligation to acknowledge an EU patent since the European patent do not have a unitary effect in those countries.

The EPO will be the granting body for the EU patent which means that the same procedure would be applicable to the EU patent as to the European patent, which would make the transition easy for the patentees. The only new thing is that the patentees will have to submit a request to the EPO asking for the registration of unitary patent protection. If no such request is submitted within one month after the publication of the mention of the grant of the European patent, no unitary patent protection will be given to the European patent and it will be divided into national patents.

The fact that the same system will be used also means that the same translation problems remain. All EU patents applications will have to be translated into English, French or German, which can cost a lot of money for the patentees not having one of these languag-

¹⁶⁷ COM (2011)215/3, Proposal enhanced cooperation Preamble (2).

es as their official language. However, the fact that the system will reimburse the patentees' costs, at least up to a ceiling specified by the Commission, is a significant step to a system which is more user-friendly. The new system which will reimburse the patentees ensures that there will be no discrimination based on nationality. Unintended as it may be the choice of English, French and German as official languages might be discriminating against those patentees not having one of these languages as their own official language. Applying for patent protection throughout the EU is less costly for patentees having the same language as the EPO, since they would not have to pay for any translation of the description. The only translation costs occurring for patentees having a language in common with the EPO would be those for the claims into the other two languages.

The new system with a machine translation system that will translate the patents into all official languages in the EU is a welcome feature since it will allow everyone a chance to properly understand the patents but without costing the patentee a fortune. There would, however, be a long transitional period of time before this system is developed and functional and up until this point there will still be translation requirements. These requirements are not as strict as the rules relating to European patents and depending on which official language the patentee chooses as the language of the proceedings there will be different translation requirements. If the language used in the proceedings is English the patentee is free to translate the patent into any official language of the EU. If the language chosen in the proceedings before the EPO is French or German the patentee has to translate the patent into English. These rules are an improvement compared to the rules regarding a European patent where translations into all three official languages are required, one language for the whole patent and two languages for the claims.

With regard to the predictability of the outcome of a conflict regarding an EU patent there are no significant improvement compared to the European patent. Compared to the Community patent the Community patent seems more appropriate since it would have had an autonomous character, meaning that the same rules would apply to the problem with no regard to the country where the conflict arises. This would have been a suitable feature of the EU patent as well since it is going to have a unitary character and have equal effect in all participating Member States. When the exact same patent is valid in all Member States it would be natural if it was governed by the same rules in all Member States. In all fairness, the rules applicable to the EU patent will probably make it easier to predict the outcome of a conflict than the rules relating to the European patent since the rules which applies to the

EU patent are defined in the proposed Regulation. But still, the most suitable solution would have been to give the EU patent an autonomous character.

5 Alternative solution – mutual recognition of patents

One alternative to solve the problem with high costs regarding patents would be to have mutual recognition for national patents between the Member States. The principle of mutual recognition is an EU means to ensure that the different principles of free movement are upheld.

When it comes to the product which the patent protects there is mutual recognition through the free movement of goods principle, as long as no other patent protects an identical product in another Member State.¹⁶⁸ As long as no other patent hinder the holder of a patent to place their product on the market, there will be mutual recognition to that product throughout the territories of the Member States. A product which is similar or identical to the product protected by the patent are, however, not recognized by mutual recognition since the patentee has the right to prevent others from using the product professionally.

Judgments from courts in different Member States also have mutual recognition according to Article 33(1) of the Brussels-I Regulation. In order to enforce a judgment from a Member State in another Member State the party wishing to enforce the judgment has to apply for a declaration of the judgments' enforceability, a procedure called the exequatur procedure. The exequatur procedure is an application to the court in the country where the party wants to enforce the judgment, asking for recognition of a judgment from another Member State.¹⁶⁹ There are, however, a proposal¹⁷⁰ for removing the exequatur procedure¹⁷¹ and thereby create a simpler, less costly and more automatic circulation of judgments between the Member States.¹⁷² Seeing how the Commission is striving to remove other complicated systems that put up borders within the EU, why not do the same with patents?

This solution would offer a patent system which is rather cheap and easy to understand for the patentee. The patentee would have to send an application to the national patent office, which would do a search to see if the application is infringing any existing patents, the

¹⁶⁸ TFEU Article 3.

¹⁶⁹ Brussels-I Regulation Articles 38-39.

¹⁷⁰ COM (2010)748 final: Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁷¹ COM (2010)748, page 4.

¹⁷² COM (2010)748, page 5.

same procedure as today, and after publication the patentee could enforce the patent in another Member State by sending a copy of the patent to the national patent office in the other Member State. The other Member State may want to have a translation of the patent in order to see if the patent would infringe an already existing patent, but this problem could be solved by a requirement stating that every patent must be in English.

Today English is a language which is recognized worldwide and almost everyone is familiar with the language. The EPO already use English as one of its official languages, together with French and German. In the recent proposal regarding the translation arrangements for EU-patent English is pointed out as the language customary used in the field of technological research and publications.¹⁷³ English continues to grow and spread over the world, it is the third most spoken language in the world today whereas German is the tenth most spoken language in the world, out of ten languages, and French did not even make the list.¹⁷⁴

If this solution were to be reality there would be no costs for translations; the patent is already written in English and the only costs would be those to obtain the patent in the original Member State and the costs for renewal of the patent. However, there would probably still be some patentees who could not write the patent themselves and almost all of them would still need professional help of an attorney to get it right. But since English is a language customary used in this field of development it would be one of the best ways to ensure that the system would be available for as many as possible, at the lowest cost possible.

A problem with this solution would be that the national patent offices in the Member States have different standards as to what constitutes a patentable invention, which potentially could lower the standards of the patents granted in the EU. A problem related to this is that patentees could “shop around” to find a patent office which would be most willing grant the patent.¹⁷⁵ If this was the case there could be many patents in the EU protecting products not deserving protection, which probably would be negative for the competition in the EU. The prices on these products would probably be low to make consumers buy them and this would force companies with good products to lower their prices as well. At a first glance this might seem as a good thing, low prices for the consumers, but when the

¹⁷³ COM (2011)216/3, Proposal translation arrangements Preamble (11).

¹⁷⁴ Rosenberg, Matt, Most popular Languages, About.com guide.

¹⁷⁵ FFII Press release, European Parliament rejects mutual patent recognition in the EU.

reason for why the prices are low, is low quality there is a chance that the competition level will decline. Compared to the USA and Japan the EU will fall behind even more if the EU cannot offer quality products at reasonable prices, even if low prices are good for the competition the companies need to make a profit to be able to develop new products. In order to prevent this from being a problem, the Council could adopt a Regulation or a Directive which would lay down the minimum standards a patent in the EU would have to fulfill and all national patent offices would be bound by this. All trade marks in the EU are governed in this way, by a Directive 2008/95/EC¹⁷⁶ so why not patents?

There are no full harmonization regarding trade marks through this Directive because that did not seem necessary, it is limited to the national provisions of law which most directly are likely to interfere with the functioning of the internal market in the EU.¹⁷⁷ There are, however, a requirement that the rules relating to the conditions for obtaining and maintaining the trade mark are identical in all Member States to be able to attain the objects of the Directive.¹⁷⁸ To ensure that the principle of free movement of goods and services is upheld all registered trade marks shall enjoy the same legal protection in all Member States, but it does not hinder Member States from granting extensive protection to some trade marks.¹⁷⁹

These rules could be treated in the same way with regard to patents; there is no need to completely harmonize the national laws but only to ensure that the lowest standard of patents are high so that the competition level on the internal market will be high. However, the rules regarding how to obtain a patent and to maintain a patent should be identical in all Member States since the objective with applying the principle of mutual recognition to patents would not be attained without this requirement. The whole point of the Directive would be to make sure that rules regarding the pre-grant phase are identical in all Member States. Even though these rules should be identical, there is nothing to hinder the Member States from granting extensive protection to national patents. The objective of the Regulation or Directive would be to ensure a high, lowest level, of protection not the highest level of protection.

¹⁷⁶ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States related to trade marks.

¹⁷⁷ Directive 2008/95/EC Preamble (4).

¹⁷⁸ Directive 2008/95/EC Preamble (8).

¹⁷⁹ Directive 2008/95/EC Preamble (10).

However, there is no big support for mutual recognition today¹⁸⁰, which may be the effect of the translation aspect together with the different standards of the different national patent offices. Every Member State believe their language to be the most important language and they do not want to give their language up and use another language. No Member State wants a product of low standard originating from another Member State circulating on their territory, competing with and maybe destroying quality products originating from their state.

But despite of this, mutual recognition of national patent could be a way to increase the patent activity in the EU. The money that could be saved by using mutual recognition and only one language, meaning no other translations, could be put into new development and new technology. Even though the Parliament has rejected the idea of mutual recognition of national patents once before it can always change its mind and approve of mutual recognition in the future. It took the Commission almost fifty years to introduce an EU patent on the common market. But because the Commission did not give up the EU patent might be reality tomorrow. In order for that to happen to mutual recognition of national patents, someone would have to do thorough research and come up with a system that would work, both for the Member States and the patentees.

¹⁸⁰ COM (2007)165, page 3.

6 Conclusion

6.1 Is the EU patent a suitable solution?

6.1.1 The question

The purpose of this bachelor's thesis was to find out whether or not the EU patent would be a suitable arrangement to solve the problem with high costs for obtaining and maintaining patents which would be valid throughout the territories of the EU. To answer this question the existing patent systems within Europe have been studied to find out how the system with an EU patent would improve the situation for the patentees. None of the existing systems are an EU system; they are a national system and a European system.

6.1.2 National and European Patents

The first system that was studied was the system of national patents, which are patents that are only valid in one country. To obtain a national patent the patentee has to apply for a patent at the national patent office in that country. If the patentee wants to have the same product patented in two or more countries, the patentee has to apply for a patent in each and every country where the protection is sought. This is a very complex system since there are many differences between different countries' legislation regarding patents. Almost all countries have different languages and because of this it takes a lot of time to be able to understand all different legislation.

Another problem with the national patent system is that the borders between the Member States are put back in place, creating twenty-seven small markets instead of one internal market that the EU is striving to establish. The national patents are by their construction clashing with the principle of free movement of goods, since they give the holder of a patent a right to hinder everyone else from using that product. The patentee has an exclusive right to use that product on the market in the country where the patent is valid.

The system is also expensive since each country requires different fees of the patentee in order to grant the patent and for maintaining it. A national patent in Sweden can cost over 60 000 SEK, and that is only for the application, the granting and the renewal fees. Some countries in Europe have lower costs than Sweden and some countries have even higher costs than Sweden. To maintain this system as the only system in Europe would slowly diminish the competition level in Europe and it would make people reluctant to seek patent protection. That would be a problem since that could lead to a halt in innovation and tech-

nical development due to the fact that patents have the function of an incentive to come up with new ideas. It could also lead to a situation where people continue to develop new products, but they keep their research a secret and never inform an outsider of how the product was developed. This could be both a positive and a negative feature regarding competition. The positive side is that there would still be many different products on the market and probably a lot of them would be similar creating a lower price which is good for the consumers. The negative side is that no one will know how to develop an identical product, meaning that it can be very difficult for anyone to develop a product which is an improvement compared to the first product. This could lead to a halt in development and the technical progress could decline and maybe even stop.

Because of this development the Member States of the EEC created another patent system under the EPC, to lower the costs and make the system less complicated. The EPC did make the situation better by removing the requirement that the patentees had to apply for a patent in each country. Instead the patentee can apply directly at the EPO and designate the countries where the protection is sought in the application. This solution reduced the costs for applying for a patent and made the application process much easier. However, since there are many different official languages in Europe, translations are needed to make sure that everyone understands the patents. Because of this, three languages, English, French and German was chosen to be the official languages of the EPO and thus every patent application must be translated into one of these languages. It is a better solution than demanding translations into all official languages of Europe, but it is an expensive procedure. To ensure maximum understanding of the patent the claims then have to be translated into the other two official languages of the EPO.

As if the costs for translation are not enough, the countries in Europe have a right to require validation of the patent that seeks protection in their territories. This is due to the fact that the European patent granted by the EPO is a collection of national patents. The validation is a form of confirmation that the patent really is a European patent and it includes a translation of the patent claims into the official language of the country in where the protection is sought. This means more costs for translation and together with the costs for translation of the patent application these costs have been the source for several discussions between the Member States.

Another problem with the European patent is that since it is a collection of national patents there is no unitary or autonomous character to the patent. The lack of unitary character means that the patent is divided and there are a lot of patents to keep track of and it is complicated to maintain all patents. Maintenance is complicated due to the fact that the European patent are not of an autonomous character which means that all national legislation regarding patents in the different countries are applicable to the European patent. This means that a conflict regarding a European patent can be judged differently in two countries which makes it difficult to predict the outcome of a conflict, even though it regard the same patent and the same question. The lack of an autonomous or unitary character also means that there can be several litigation processes regarding the exact same conflict in several different Member States. These are procedures which can be very expensive, but this is not a question which is too answered within this bachelor's thesis.

As with the national patents the European patent is clashing with the free movement of goods since the borders between the Member States still exists. As with the national patents, the patentee has a right to prevent others from using the product which is protected by the patent, but only on the market in the country where the patent is valid. This creates twenty-seven small markets instead of the one big market which would be preferable within the EU.

6.1.3 The Community patent that never happened

At the same time as the EPC was established, another convention called the CPC was developed but never came into effect. The CPC would create a Community patent which would be valid throughout the territories of the EEC. The main feature of the Community patent would be its autonomous character. The Community patent would not be subject to any national legislation. The Community patent would only be subject to the EPC and the CPC, which means that all Community patents would be subject to the same legislation, regardless of which country it was granted in. This fact would make it a lot easier to predict the outcome of a conflict regarding a Community patent, especially when compared to the European patent where the outcome can differ depending on what legislation is used.

Another difference with the Community patent compared to the European patent would be the fact that the Community patent would not be divided into national patents in the post-grant phase as the European patent. The Community patent would instead have equal effect throughout the territories of the Member States. This would ensure that the Com-

munity patent would not be clashing with the free movement of goods. By giving the Community patent equal effect throughout the territory of the EEC the patented product could be moved from one Member State to another and the patentee would not be able to hinder it. This is a fact since there would only be one market, the internal market, and no borders between the Member States. When something is placed on a market by the patent holder there is no stopping others from using that product, which is the rule both for national patents through national legislation and for European patents through the EPC. This would be the case for the Community patent as well. When the product, which is protected by the Community patent, is placed on the internal market there is no stopping it from being used by others than the patent holder.

If the CPC had come into effect at the same time as the EPC there would perhaps have been a better development of the patent activity today, since it would have been easier to maintain the patent after it had been granted. Even though the European patent made it easier to apply for a patent and less costly to do so, the complexity of the system post-grant remained. The complexity of the system with the European patent is due to the fact that the patent is divided into national patents keeping the national legislation applicable. Keeping track of several different legislations makes it difficult for the patentees to maintain the patents after they have been granted. This is due to the fact that rules regarding patents can be very different from Member state to Member State. This is especially important when it comes to the payment of the renewal fees which have to be done every year. But since different states have a different timetable set up regarding payment, the payments can be due at different points in time each year. If the patentee has a European patent valid in ten Member States there could be ten different due dates for payment of the renewal fee. It would be much easier if all Member States had their payment date on the same date, or if the patentee could pay a common fee to the EPO which would then distribute it between the Member States. This is also the solution provided for in the EU patent Regulation.

6.1.4 Unitary patent protection and the EU patent

After the CPC did not come into effect several other proposals has been made by the Commission trying to introduce a Community patent, but all have failed. Because of this, in December 2010, twelve Member States requested permission to establish enhanced cooperation between them in the creation of unitary patent protection. In March 2011, the Commission adopted a proposal for a Regulation regarding enhanced cooperation based on a Council decision regarding the same subject. The Regulation regarding enhanced co-

operation is really two Regulations since translation arrangements need to be established in a separate Regulation after the entry into force of the Lisbon Treaty in December 2009.

The Regulation regarding the enhanced cooperation is establishing an EU patent, which is a European patent with unitary effect. This patent will have equal effect throughout the territories of the participating Member States, which are all Member States except Italy and Spain. This unitary character of the EU patent will ensure that there will be no clash between the EU patent and the free movement of goods, since there will only be one market for the EU patent without any borders between the participating Member States. The patentee will have the same right to hinder anyone from using the product protected by the patent as with a national patent and the European patent, but since the EU patent will have equal effect in all Member States the product can be moved between the Member States without the patentees' permission. When the patentee has placed the product on the Market in one of the participating Member States, the product is put on the entire market of the participating Member States.

The procedure for obtaining an EU patent will be the same as for obtaining a European patent, an application to the EPO. The same fees for obtaining a European patent will apply for obtaining an EU patent as well since the EU patent will be a European patent up until it is granted and the patentee requests the unitary effect. The only difference will be that if the patentee submits a request asking for unitary patent protection the European patent will be an EU patent effective in all participating Member States instead of being divided into several national patents. The procedure for maintaining the EU patent will, however, be a little different. Instead of paying renewal fees in all Member States where the patent is valid it will be enough to pay one annual common renewal fee to the European Patent Organisation which will make it a lot easier for the patentee. With the EU patent patentees no longer have to keep track of several different due dates for the payments. Instead they can put the energy that previously was put on this on something more productive, like developing new products.

One problem with the EU patent is that it will not have the autonomous character which the Community patent would have had; instead the EU patent will be subject to the two Regulations regarding it. However, matters not covered by these two Regulations will be governed by the EPC and national law including rules of private international law. This can potentially be something that makes it a bit difficult to predict the outcome of a conflict re-

garding an EU patent. But since many questions are regulated in the regulations and in the EPC, the possibility to predict the outcome will probably be improved compared to the other two systems.

With regard to the proposed Regulation regarding translation arrangements there are a few differences compared to the EPC. The EPO will still have three official languages, English, French and German but the translation system is a little different. As with the European patent the language which is chosen for the patent application shall be the language for all proceedings before the EPO. However, if the chosen language is English, the patentee shall submit a full translation of the specification of the patent into any official language of the participating Member States. If the chosen language is French or German the patentee shall submit a full translation of the specifications of the patent into English. This system will ensure that all EU patents are made available in English which is the language customary in the field of technology research and publications. The system also gives the patentees a wider range of freedom to choose which language the translation shall be in. This is, however, only going to be the situation during a transitional period of time of maximum twelve years while a system of high quality machine translations is developed by the Commission. When this system has been established the only translation that is required by the patentee is the translations set down in the EPC, the specifications into one of the official languages and the claims into French and German. These translation costs are going to be reimbursed by the system to the patentees not having an official language in common with the EPO. This means that the translation costs for an EU patent will be much lower than for a European patent.

6.1.5 The answer

The answer to the purpose is that, for the time being, the EU patent is a suitable arrangement to solve the problem with high costs relating to obtaining and maintaining patents which should be valid throughout the territory of the EU. This is due to the reduction of the translation costs the EU patent system will ensure by establishing a machine translation system, which means that no validation process will be necessary. This will save a lot of money for the patentees, which they can invest in new research or development of an already existing product, increasing the competition level in Europe. Also the fact that patentees not having a language in common with the EPO will be reimbursed by the system is a feature in favor of the EU patent. This provision removes all possible discrimination based on nationality that could be the case with the European patents. The system of today is

cheaper for those patentees who have a language in common with the EPO since they only need to pay for a translation of the claims into the other two official languages of the EPO. But now that the patentees will be reimbursed by the system and there will be a machine translation system ensuring that all patents are published in all official languages of the EU the possible discrimination issues have been removed.

The fact that the costs for obtaining and maintaining an EU patent will be lowered will ensure that more patentees can afford the system and thereby use it. The costs for maintain the patent will be lowered by introducing one common renewal fee that the patentee shall pay to the European Patent Organisation. This fee might be high, but since it will only be one fee the patentees will not have to keep track of several different national legislation and different due dates for payment of the renewal fees. These features together will make sure that the costs for maintaining the patent are reduced by the EU patent. Another feature which makes the EU patent a suitable arrangement is the unitary effect it will give the patent, removing the borders between the Member States a feature that hopefully will increase the competition level.

The one thing regarding an EU patent which can give cause to some problems is the lack of an autonomous character. With an autonomous character the EU patent would have been the ultimate solution since it would be cost effective, it would be easy to access and it would also be completely legally secure. Without the autonomous character the EU patent still is cost effective and easy to access but the system is not as legally secure as it could have been. This is due to the fact that without an autonomous character it may be difficult to predict the outcome of conflicts regarding the EU patent, just as it is a problem with regard to the European patent. There are, however, some restrictions as to what legislation are applicable on the EU patent which hopefully will ensure that the outcome of conflicts are more easily predictable with the EU patent than with the European patent. However, this is a question only time can answer and if the system is considered insufficient it can always be improved later.

6.2 Another suitable arrangement?

6.2.1 The question

The additional purpose of this bachelor's thesis was to study the principle of mutual recognition to see whether or not this principle could be applicable to national patents of the Member States. To answer this some of the features of the principle of mutual recognition

have been studied and then the features of the principle have been applied to the system of patents.

6.2.2 Mutual recognition of national patents

The principle of mutual recognition is a means of ensuring that trade and information flows freely on the internal market and it is used with the free movement principles and also with the Brussels-I Regulation to ensure that judgments from all Member States can be enforced in other Member States. The functioning of the principle of mutual recognition is to ensure that something that is legal and approved of in one Member State shall be recognized in all other Member States as legal and approved. This shall relate to all things from diplomas to goods and services.

If the principle of mutual recognition were to be applied on national patents the patentees could save money on translation costs. But to ensure that there would be no need of translations all Member States would have to share a common language for patents, otherwise people from different Member States with different languages could not understand each others patents. Since English is a language customary used in this area, English would be a suitable solution to the problem. However, there are always going to be some people who cannot speak the language and will need help to translate the patent, whichever language were chosen. But most people that learn a second language learn English these days, ensuring that as many as possible can write their patents themselves creating a less costly system.

The patentees could also save money on application costs since they would only have to apply for a patent at their national patent office. Since the application fee at the EPO is about three times higher than for example the Swedish patent office there would be significant cost savings for the patentees which they could use for research or to develop more products which would be good both for the companies and for the competition level in the EU.

6.2.3 The answer

The answer to the question is that the principle of mutual recognition could be used with the national patent system to lower the costs and making the system more easily accessible. However, this is only a very rough proposal and for it to be a possible solution more research needs to be done, including a more thoroughly estimate of the costs savings and a careful analysis regarding how the translation arrangements would be made. These studies could show that the principle of mutual recognition is not suitable for national patents, but

until such studies have been done the principle of mutual recognition remains an alternative solution to the EU patent.

By ensuring that the Member States have the same minimum standards for what invention deserves to be protected by a patent, the standards for patents in Europe will be high. Since there would not be any high costs for translation or validation of the patents more patentees could afford patents and even save money to be able to develop even further. These are all features which would be a plus for the competition level within Europe and the internal market in particular, but it would also ensure that the EU could compete with the big markets in terms of patent activity.

However, if the EU patent is approved of and the Regulations come into effect the mutual recognition solution will be unnecessary. The EU patent will solve the problems which the mutual recognition solution is targeting, such as a reduction of the translation costs and there would be no more validation costs. By establishing the machine translation system the EU patent will ensure that everyone living in a Member State can access and understand the patents. The solution to write all patents in English cannot achieve that goal, despite the fact that English would be the most suitable choice if mutual recognition of patents is to be considered. Out of these two solutions the EU patent is probably the more suitable one, but until the final decision has been made the principle of mutual recognition of national patents remains a suitable alternative solution.

List of references

International Law

Legislation

Conventions

Convention on the grant of European patents (European Patent Convention) of 5 October 1973

76/76/EEC: Convention for the European patent for the Common Market

EU- law

Legislation

Treaties

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed on 13 December 2009

Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union (2010/C 83/1)

Regulations

Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Directives

Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States related to trade marks (codified version)

Agreements

89/695/EEC: Agreement relating to community patents

Agreement on the application of Article 65 of the Convention on the grant of European Patents (The London Agreement)

Council Decisions

Council Decision 2011/176/EU on 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection

Council Documents

Council Document 6874/03

Council Document 9465/08

Proposals

COM (2000)412 final: Proposal for a Council Regulation on the Community patent

COM (2003)828 final: Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance

COM (2010)350 final: Proposal for a Council Regulation on the translation arrangements for the European Union patent

COM (2010)748 final: Proposal for a Regulation of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

COM (2010)790 final: Proposal for a Council Decision authorizing enhanced cooperation in the area of the creation of unitary patent protection

COM (2011)215/3: Proposal for a regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of creating of unitary patent protection

COM (2011)216/3: Proposal for a Council Regulation implementing the enhanced cooperation in the area of the creation of a unitary patent protection with regard to the applicable translation arrangements

Communications from the Commission

COM (2007)165 final: Communication from the Commission to the European Parliament and the Council -Enhancing the patent system in Europe-

SEC (2011) 482/2 Commission staff working paper, Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and the Council implementing enhanced cooperation in the area of the creation of unitary patent protection and the Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of a unitary patent protection with regard to the applicable translation arrangements

Swedish Law

Patentlag (1967:837)

Legal literature

Domeij, Bengt, *Patenträtt svensk och internationell patenträtt, avtal om patent samt skyddet för växtsorter och företagshemligheter*, Iustus Förlag AB, Uppsala 2007

Hettne, Jörgen, Eriksson, Otken, Ida, *EU-rättslig metod Teori och genomslag i svensk rättstillämpning*, Nordstedts Juridik, Stockholm 2005

MacQueen, Hector, Waelde, Charlotte & Laurie, Graeme, Brown, Abbe, *Contemporary Intellectual Property Law and Policy, Second edition*, Oxford University Press, New York 2011

Törnroth, Lennart, *Europapatent: en redogörelse för den europeiska patentkonventionen, det planerade EG. patentet och det europeiska patentverket*, Industriförbundets förlag, Stockholm 1974

Case law

CoJ

Case 15-74 Judgment of the Court of 31 October 1974 Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc [1974] ECR 1147

Other Cases

Boards of Appeal of the European Patent Office Decision of 11 May 2005 T 866/01 -3.3.02

Swedish case law

Stockholms Tingsrätt Mål T 7-1323-96 on 16 Mars 2000

Internet

Schedule of fees and expenses of the EPO (applicable as from 1 April 2010) Supplement 1 to OJ EPO 3/2010 (20/4/11),

<http://www.epo.org/applying/forms-fees/fees.html>

Jenkins, Tom, Opinion economic and social committee on "Promoting innovation through patents Green Paper on the Community patent and the patent system in the Europe", OJEU, C 129, volume 41, notice no 98/C 129/04, 27/4/98 (22/4/11),

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:129:0008:0015:EN:PDF>

Rosenberg, Matt, Most popular languages 10 most popular spoken languages in the World, About.com Guide (3/5/11)

<http://geography.about.com/od/culturalgeography/a/10languages.htm>

FFII, European patent rejects mutual patent recognition in the EU, Strasburg, 15/4/06 (4/5/11)

<http://press.ffii.org/Press%20releases/European%20Parliament%20rejects%20mutual%20patent%20recognition%20in%20the%20EU>

Patent och Registreringsverket, Fees for national patent in Sweden, (9/5/11),

<http://www.prv.se/In-English/Patents/Fees-and-payment/National-applications-and-patents/>

Forex Bank (18/5/11)

<http://www.forex.se/en/Currency/Current-rates/>