The Future of Patent Protection in Europe Reflections on the Green Paper and on possible future effects and consequences of it for Professional representatives

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1. Introduction

It is always challenging to think and talk about the future. This applies also to reflecting on the Green Paper as a platform for the design of a coherent patent protection structure in the Union (and beyond) for supporting innovation efforts to the benefit of civilisation.

This Green Paper is a consequence of an earlier one on Innovation where it was concluded that the conversion of excellent scientific knowledge in Europe to new products is lagging behind other developed regions in the world, especially in high tech sectors. It is thus very welcome to put the subject on the programme of this "business protection week" before a right and pertinent forum: scientists, innovation managers and their consultants.

Patent protection is an incentive to invest in the generation and exploitation of new and useful things. Patent attorneys have the key function to professionally link those who generate and use patents (i.e. the Innovators) to the Administrations who grant and enforce them, including judicial bodies. These Administrations are expected now to put forward simplified rules to effectively support harmonised protection for the future. This is not an easy task, the more since patent matters are complicated. The task will thus require a true sense of equity, of political wisdom and courage. It will also require genuine goodwill from the three interested circles: Innovators, Administrations and Representatives for looking with a long term vision beyond short term concerns.

Some weeks ago, the rector of the Europa-college in Bruges stressed 3 main challenges for the European Union: the expansion to Eastern Europe, the integration into the drive for globalisation and keeping track with the rapid evolution of science and technology. These three challenges affect typically our subject of today both from the points of view of substance and legal formalities as for time frames and costs.

The *epi*, from its important intermediary role and experience in the protection of technological innovation thus summarized its comment to the Green Paper with the statement that *any further development of patent systems in Europe should offer efficient protection measures both at the granting and enforcement stage, at reasonable cost and with reasoable speed so that protection is readily available and affordable for all types of applicants, including single inventors, R&D institutions, SME's and larger companies.*

2. A flexible patent protection system in Europe

"Europe" often refers to a complex heterogeneous entity; complex through its multitude of regional cultures, habits, languages, regulations, levels of development etc. Further, Europe is a diversified (often poorly standardised) market and subject to a turbulent transformation, i.a. due to its opening to Eastern Europe. This complicates the innovation process and requires more energy – but also opportunities – to tailor protection, in particular patent protection, to local market situations. To cope with that complex reality, and to preserve certain continuity, *epi* thus recommends for the future a flexible organisation for patent protection in Europe offering the choice between:

- national patents to be enforced before national courts under harmonised national laws and practice;
- European patents granted under the EPC (as a bundle of national patents in the designated States) and for which (at least) validity and infringement is centrally decided;
- a *"(E)UNION patent system"* with unitary character for the entire EU with (at least) validity and infringement centrally assessed and decided by an independent Court organisation. However, the conversion of a Union patent immediately after grant into a European patent should be possible.

I have preferred for my presentation to use the term "UNION"-patent system in view of clearly distinguishing i.a. from CPC '75 and CPC '89.

3. Accelerated harmonisation by the central organisation of assessment of validity and infringement

The central organisation for assessment and judgment by Courts at least on validity and infringement in the same procedure is considered very important and in fact *a top priority* since it offers the advantage of strongly harmonising the jurisprudence. In addition it has the IMPORTANT SIDE EFFECT that innovators with their attorneys can estimate preventively with more certainty on these issues to better orient in the future their offensive and defensive actions, to judge on the scope of protection, on gathering evidence, on injunctions etc. In particular it would facilitate a judgment on whether a certain

embodiment would infringe or, on the contrary circumvent a patent claim and what changes to the embodiment would permit to avoid infringement.

This is important since the Innovators' operational managers have to take well founded strategic decisions for protection, sometimes on short notice. They will only consider protection as added value when they get clear and understandable advise and messages from the professional consultants and thus more than a complex list of if-if's, due to poorly harmonised legal situations.

The number of cases where Innovators have to decide preventively is generally much higher than the number of litigations they have to deal with. The more cases are reviewed in this central organisation, the stronger it can result in a harmonisation effect. Submitting disputes already at an early stage to a central court system would thus probably stimulate harmonisation.

We should also keep in mind in this respect that, besides a possible future Union patent, we have already more than 400.000 granted European patents which - given eg. the example of the Epilady-cases – also deserve a better centralised court system of high quality. The courts could even be given the task to deal in an innovation friendly manner on questions of exhaustion besides validity and infringement. However, it would be interesting to estimate the overall workload, i.e. the number of cases per year to be handled by such court(s). It seems that all over Europe per year only about 100 new and different (i.e. non related) patent suits are filed in courts.

4. Representation in the future

4.1 The work of representatives and its context

What is actually the task of a qualified representative in patent matters? Some interesting considerations were developed on the subject and its context in "epi Information" nos. 2/1995 (p. 53–57), 3/1995 (p. 115–117) and 4/1995 (p. 142–146). They were issued at the occasion of giving our comments to the EPO Script no. 3 (1994) on the "Utilisation of Patent Protection in Europe". epi also issued recently a booklet entited *"Introduction to Patents in Europe"* as a contribution to the conclusion of this EPO script regarding insufficient patent awareness in Europe. The booklet is intended for broad distribution to users and potential users of the patent system. It describes in a digestible way what patents are, how they can be obtained and what you can do with them.

The complex reality of patents in Europe brings us to the core challenge for the patent attorneys to assure high quality work. Patent granting and enforcement procedures require technically skilled people who are also knowledgeable in the relevant legal matters. As such, epi represents the first and single profession with a qualification at European level and which meets these requirements. Therefore, *epi* is of the opinion that European patent attorneys have the best expertise and qualification to play a key role in advising and representing patent proprietors and third parties before all instances including judicial authorities. Indeed, epi members are known to have high quality standards and must now pass a difficult examination for entry onto the List of Official Representatives.

4.2 The free movement of professional services for patents in the EU

Everybody will recognise and understand that the free movement of services in the Union is a concern of the Commission. I think we make progress in this area as far as patent attorneys are concerned. Firstly, some issues have already been clarified regarding requirements for domicile and address of service per country. The Green Paper points to the need under national laws to employ local representatives, either from the time of filing national patents or at the grant and transfer stage of a European patent to the national Offices. The European Court of Justice (EJC) considered that such rules, requiring a representative to be qualified and domiciled in the State concerned, appear acceptable under European law for work going beyond routine administrative matters such as eg. the payment of renewal fees (*Säger v. Dennemeyer*).

Secondly, the *EC Directive 89/48* facilitates the free movement by imposing the recognition throughout the EU of professional qualifications gained in a certain Member State. However each Member State can require a complementary adaptation period and/or aptitude test, but limited to what is necessary under the ECJ-Gebhard-judgment. The form of that test has however not yet been finally determined by all States.

In any event, with the institution of *a Union-wide patent system* only one representative for the whole Union would be needed to deal with filing and prosecuting Union patents up to grant. This may of course seriously affect the position of the patent attorney profession.

4.3 Distribution of patent attorneys throughout Europe; epi efforts to further develop patent expertise in Europe.

So what is at stake here if we want to give the whole Union equal chances to develop? Some ten years from now very few of the first generation of European patent attorneys will still be active in the profession. In the countries with a long tradition in patent search and examination the flywheel for renewing expertise is turning quite smoothly. They take traditionally the largest part of substantive prosecution work, oppositions and appeals.

This is not the case for a number of countries at the periphery of the Union, in particular for Southern and in the future for Eastern Europe. So far the patent attorneys in these countries have to rely heavily on European translation work. They are anxious that, if this work would be lost (in the short term) there would be a serious danger of the patent profession disappearing from those countries. This would be bad for innovation and employment in these countries since there will always be good

reasons for employing local representatives, such as proximity with advise to the local Innovators; to administration officers for urgent matters, better command of the national language etc.

However, before patentable inventions can be made in Europe's periphery, one needs useful R&D results as assets and thus a critical mass of R&D investments for conversion of the results into new products. The focus of EC support is going there first, I suppose in the framework of its Innovation Action Plan and to refrain underemployment. Supporting awareness campaigns and training for protection work in Europe's periphery should be part of the EC's infrastructure for R&D support. Putting that training effort in the right framework for higher education of other aspects of modern economy and adapt it to local needs is thereby highly recommended. The booklet of *epi* mentioned before may be helpul here. It is the intention to translate it into all languages of the Union.

Another challenge for *epi* is its support in the training for the European qualifying examination and the set up of a continuing education program. A Professional Qualification Committee (PQC) within *epi* is responsible therefor. It plans to coordinate it with other professional training programmes. We are eagerly looking for expanding the courses to a future Union patent system, i. a. to reserve representation rights beyond the EPO and beyond strictly patent matters. Expanding training in the management of patent portfolios and licensing, in the conducting of oral proceedings, in EC competition law and in conducting litigation is under consideration.

5. Summary and Conclusions

As a conclusion we cannot forego the fact that any patent system has to support meaningful innovation for the future with specific attention for economics. An efficient patent system will thus have to be cost-effective, flexible, as simple as possible, and offer legal certainty. Any interested circle besides the Innovators should keep that in mind.

Legal certainty on enforcement is probably the first priority. Indeed, patents are granted now quite easily so that the number of applications rises. This may generate an overkilling protection effect, à fortiori with patent friendly judges at the enforcement side. The added value of patents could suffer therefrom. Certainty on validity and scope of protection has thus to be harmonised.

Another European reality relates to the R&D-gap between the centre and the periphery of the Union. Working to that is a long term task with the help of the EC. It will certainly take one generation because it will need an education process and the build up of expertise in numerous areas in that periphery, including industrial property protection. The set-up of a well organised and credible Union-patent system and accompanying competence and expertise, also within the EC is considered part of that.

epi members are aware if having a pivot function as interested party in the whole process between the Innovators and the Administrations. As said before, they would welcome a Union patent system and they are prepared to take their part of the task to make it happen.

Gaining experience and expertise to systematically support R&D and setting up training networks for protection everywhere in Europe may offer us a lead to promote futher harmonisation on a global basis. Refining TRIPS in the future and following up the PLT-initiatives of WIPO belong to the challenges.

Being backed by a harmonised European patent system, in particular by a EUNION patent would help to close the gap for more and better protected new products.

I would conclude: Let's go for it NOW !