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Europe and the Unitary Patent – Progress towards reshaping the European Patent landscape

by Bertie Radcliffe

It is surprising that the European Union has failed to create a Unitary Patent which would fully liberalise the flow of ideas as the single market facilitated the flow of capital and people. This is apparent when one considers that the Treaty on the Functioning of the European Union explicitly mandates the Council and the Parliament of the EU to “establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements”.¹ It is true that a European Patent has existed since 1973, but nomenclature should not be mistaken for reality. The European Patent Convention (EPC) in fact serves only to make the fragmentary nature of intellectual property law tolerable for those intent on seeking patent protection across the European Union. It does so outside of European Union mechanisms, which is made plain by the fact that several non-member states are signatories. More importantly, the EPC does not create anything which resembles a single patent title.

In light of this, recent attempts by the Commission and the Council of the EU to create a unitary patent are welcome. Recent patent disputes, both in Europe and across the Atlantic, have been hailed as a sign of inadequacies in the current system of patent application and protection. The size of settlements and legal fees has led commentators, lawmakers and members of the judiciary to question whether the current approach is desirable from the point of the consumer or even sustainable. In particular, certain groups of patents are maligned, whether they are software or business method patents, or those owned by so-called patent trolls.

The originators of the proposed European unitary patent, however, have shown little appetite for substantively altering existing patent rules with respect either to grounds for validity, infringement or compulsory licensing. Indeed, the only clauses which have substantive legal content have been deleted at the request of the British government. Instead, the changes implemented by the most recent version of the proposal for a unitary patent are administrative rather than legal. That is by no means to say that the changes proposed would have no impact on the way in which patents are created and litigated. On the contrary, the administrative system proposed by the European Council would bring about substantial changes in the European patent system.

¹ TFEU Article 118(1).

It is my opinion that these changes will bring about a distinct improvement in the way in which patents are issued and litigated. Simplification and harmonisation across the Union should result in lower costs for applicants and disputing parties, meaning that less wealth will be diverted from the productive activities undertaken by patent proprietors. This is neither to say that the patent package as it stands is flawless, nor that it represents the *ne plus ultra* in the field of patent protection and issuance reform. As I will demonstrate, the package has its failings. Many of these are minor and removable flies in the ointment of the reform proposals but, if anything, this makes their presence more frustrating. So too is there scope for more sweeping reforms of patent law that might build on the institutions and practises developed in accordance with this package.

The Current State of the Package

In April 2011, the European Commission made a proposal to create a European Patent with unitary effect using the ‘enhanced cooperation’ framework, the use of which is testament to the eagerness of the Commission to reform the present system. Despite initial disagreements over the location of the central division of the court system intended to deal with the new unitary patent, a compromise solution dividing the court into three has since met with approval. Thus, the Council and European Parliament were, by the end of June 2012 able to take position on the proposal and begin the process of having the necessary international agreements signed. In a recent press statement, the Commission indicated that it expected the first unitary patents to be granted in April 2014, promising “a one-stop shop for obtaining a patent having immediate effect in most parts of the EU’s territory, combined with a single specialised patent court ensuring the highest review standards”.²

Hopes of the Commission’s proposal being swiftly enacted were, however, dashed when MEPs reacted badly to the last-minute removal of articles 6 to 8 from the *Regulation*. The website of the European Parliament reported MEPs describing the actions of the Commission as a “striking break” and intimating that if the three clauses in question were deleted, the matter would be referred to the European Court of Justice as a ‘crash test’ case.³

The issue was discussed again 10 July by Legal Affairs Committee MEPs, but discussions relating to the deletion of the articles remain contentious. Bernhard Rapkay (S&D, DE), who is responsible for the draft legislation, told the Legal Affairs Committee that the change made by the Commission “infringes EU law ... [i]f you take that content out, there is nothing left to regulate”, concluding that the new form of the patent package “would not be effective at all”. Only one MEP, Sajjad Karim (ECR, UK) indicated support for the removal of the three articles, saying that they would have made the system “too slow”.⁴ The Committee decided in the same session that the patent package should be discussed again after the summer recess, possibly in September.

²<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/509>

³<http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48182/html/EU-patent-Parliament-postpones-vote-due-to-Council's-last-minute-change>

⁴<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIM-PRESS%2b20120709IPR48484%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

It looks, then, like further substantial delays might blight the implementation of the ‘patent package’. While it is likely that further compromise will be made on the proposed reforms, the negotiations which are set to begin in September may well be prolonged, and their likely outcome is unclear. Instead of guessing as to the likely shape of the patent package which is eventually agreed upon, I will evaluate the proposals made by the Commission before making the case for an alternative reformation of the European patent system.

Provisions of the ‘Patent Package’

Before the likely impact of the ‘patent package’ is assessed, it is necessary briefly to outline its key and most operative provisions as presented in the *Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection* (Brussels, 13.4.2011 COM(2011) 215 final) and the *Draft agreement on a Unified Patent Court and draft Statute* (Brussels, 11 November 2011, 16741/11).

The *Regulation* essentially provides an alternative to the system of patents under the European Patent Convention. In the existing EPC framework, applications for patents are made to the European Patent Office specifying in which of the signatory states the applicant wishes to obtain patent protection. If the application is deemed acceptable, the EPO then issues a bundle of national patents which are severally but not jointly defensible. That is, if a patent proprietor believed that his patent was being infringed, he would be obliged to bring actions in each of the states in which the EPO granted him patent protection.

In contrast to this, the *Regulation* proposes a system which adopts the machinery of the EPO and the EPC to a certain extent, but crucially enables applications for a European Patent with unitary effect. This ‘unitary effect’ not only reduces the linguistic issues associated with the EPC patent model and replaces many patents with one, but also means that the patent “may only be limited, licensed, transferred, revoked or lapse in respect of all the participating Member States” (Art. 3(2)).

In addition to the *Regulation*, the particulars of which are outlined above, the ‘patent package’ as it currently stands proposes the creation of a new system of courts to be called the Unified Patent Court, accompanied by three committees for administration, budgeting and advising the Court.

The proposed Unified Patent Court is to be established as a court common to the contracting member states thus subject to the same obligations under Union Law as any national court of the contracting member states⁵. Moreover, the Court is to be a tiered system comprised of a Court of First Instance and a Court of Appeal.⁶ The Court of First Instance is to be comprised of a central division, as well as local and regional Divisions.⁷ Local divisions (to a maximum of three) will be created by request in each contracting member state, and contracting member states may group together to create a regional division if they so wish.⁸ The

⁵ Art. 1, UPC Draft Agreement

⁶ Art. 4(1)

⁷ Art. 5(1)

⁸ Art. 5(2),(5)

locationcentral division was the focus of a great deal of controversy, and negotiations have recently resulted in its division between London, Paris and Munich. Cases decided by the Court of First Instance can be appealed on points of law and fact, provided that certain procedural criteria are met.⁹ In addition to the institutions outlined above, the *Draft Agreement* also effects the creation of several ancillary bodies. These include a Mediation and Arbitration Centre¹⁰ and a training programme for both legally and technically qualified judges.¹¹

Analysis of the ‘Patent Package’

With the rough structure of the proposal to create a European patent with unitary effect and a Unified Patent Court in mind, it is now possible to begin with an evaluation of the package.

Perhaps the most prudent place to start such an evaluation is with articles 6-8 of the *Regulation*, since it is their deletion that currently threatens to derail the entire project. These articles constitute the only engagement on the part of the proposed *Regulation* with substantive patent law. In many respects, this is a striking and confusing fact in and of itself because Articles 6-8 deal only with (6) the right of proprietors to prevent direct use of their invention, (7) the indirect use of the invention and (8) relate the limitation of the effects of the European patent with unitary effect. That is, the patent law which is contained in the *Regulation* makes no mention of the criteria by which a patent should be judged valid or invalid, nor does it limit the rights of the patent holder by legislating for the existence of compulsory licenses.

While the first of these two omissions may be forgiven on the grounds that the *Regulation* devolves the question of patent validity to the EPC, the second ought to be cause for some concern. Professor Matthias Lamping of the Max Plank Institute, in an article condemning the *Regulation* as potentially illegal, writes that “[it] merely unifies the creation of protection and the acts of infringement, while there is a huge deficit with regard to the functional balance of the system. This gives the impression that the patent is an exclusive right without limiting contours.”¹² If this reading of the situation is correct, the omission is a serious problem for any proposed patent system and the Commission’s decision only to include Articles defining patent infringement is puzzling in the extreme.

A more plausible explanation of the inclusion of an incomplete description of patent rights in the *Regulation* is that it was considered necessary to include some substantive legal articles in order to satisfy the conditions of Art. 118 of TFEU. This Article reads as follows:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide

⁹ Arts. 45-48,

¹⁰ Art. 17

¹¹ Art. 14(1)

¹²Lamping, Matthias, Enhanced Cooperation - A Proper Approach to Market Integration in the Field of Unitary Patent Protection? (October 20, 2011). *International Review of Intellectual Property and Competition Law*, No. 8, 2011

uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

It is important to note that this Article does not mean that a unitary patent can only be created by an EU-wide right governed by EU law.¹³ According to Professor Sir Robin Jacob, fears that the deletion of clauses 6-8 will make the *Regulation* illegal are misguided:

All that is necessary for the proposed *Regulation* is that the basis of a unitary EU right is created. Art. 118 does not require that all the grounds for the existence of the right (validity) and its legal extent must be governed by EU law... Putting it another way, creation of the unitary patent requires no more than that a patent having a unitary nature complies with Art. 118. All questions of validity, scope of protection and definition of infringement are not necessarily part of EU law. They perhaps could be – though there could be conflict with the independent international Treaty which is the EPC, but that is another matter.¹⁴

If it is accepted that Articles 6-8 are not necessary in order for the *Regulation* to be considered lawful, then the debate over their inclusion devolves to a question of whether or not they are desirable. The chief charge levelled against the articles is that by making Arts. 6-8 part of EU law, the question as to whether a product or process constituted an infringement under Arts. 6 and 7, or was exempted by Art. 8 could be referred to the CJEU. This would have two significantly detrimental effects on the litigation of patent disputes. The first is that substantial delays and costs could be occasioned by the potential division of relevant cases in to two parts, one question dealt with by the local or regional division of the UPC and the other by the CJEU. The second is that referrals to the CJEU would undermine the entire point of having a highly specialised patent court system in the form of the UPC. The combination, in the words of Sir Robin Jacob, “would be disastrous”.¹⁵ While it may be the case that a combination of the application of the *acteclair* doctrine and prudent rulings by the CJEU could reduce the damage caused by these Articles, if they are unnecessary in the first place, then there is no conceivable reason for the deficiencies they create to be tolerated.

Another problem with the patent package is created by the very unitary nature of the proposed patent which is supposed to be its distinctive advantage. Since rulings made by the Court of First Instance, regardless of the location of the particular division, relating to a patent’s validity and the nature or fact of its infringement will affect a unitary patent across all CMSs forum shopping could legitimately be expected.

It may be true that Art. 15a of the *Agreement* places some restrictions on where actions may be brought, but these are such that a considerable amount of choice is left to the parties as to the eventual location of the trial. 15a(1)b, for instance, reads as follows:

The local division hosted by the Contracting Member State where the defendant or, in the case of multiple defendants, one of the defendants has his residence, or principal place of

¹³P.2, Prof. Sir Robin Jacob, <http://www.eplawpatentblog.com/2011/November/Robin%20Jacob%20Opinion%20re%20Arts.pdf>

¹⁴ Ibid.

¹⁵ Ibid.

business, or in the absence of residence or principal place of business, place of business, or the regional division in which this Contracting Member State participates.

Plainly, in a situation where there are enough transnational patent disputes to warrant the creation of a patent with unitary effect, many defendants may well be able to choose between a number of local or regional divisions.

In a meeting of the House of Commons European Scrutiny Committee, potential benefits associated with forum shopping were identified. Baroness Wilcox, agreeing with two witnesses commented that “genuine competition on a fair basis can lead to efficiency and improvements”. Favourable parallels with the competition between the UK High Court and the Patents County Court were also made.¹⁶ Unfortunately, this assessment of the opportunities for forum shopping created by the proposed patent package seems to be based on a faulty premise. Rather than choosing what they see as the best or most qualified division, it is surely the case that defendants will choose the division which they feel is the most likely deliver a favourable result.

Moreover, it is highly likely that the problems associated with forum shopping will have a disproportionately negative impact on small and medium sized enterprises (SMEs). If, for instance, an SME which primarily operated in Eastern and Central Europe brought an action against a large multinational corporation which it considered to be infringing its unitary patent, the defendant could then choose for the case to be heard in a UK local division, requiring the SME to seek legal representation in a wholly unfamiliar and costly location. Indeed, any number of scenarios could be put forward in which SMEs were placed at a considerable disadvantage in comparison to larger entities by forum shopping. When one of the purposes of the proposed patent package was to ease the burdens of SMEs, this failing of the *Regulation* can hardly be ignored.

Moreover, the problems associated with forum shopping are greatly exacerbated by the *Agreement* on the UPC which leaves open the possibility of case bifurcation. The relevant Article of the *Agreement* reads as follows:

15(2) A counterclaim for revocation (Article 15(1)(c1)) can be brought in the case of an action for infringement (Article 15(1)(a)). The local or regional division concerned shall, after having heard the parties, have the discretion either to:

- (a) proceed with both the infringement action and with the counterclaim for revocation and request the President of the Court of First Instance to allocate from the Pool of Judges a technically qualified judge with qualifications and experience in the field of technology concerned;
- (b) refer the counterclaim for decision to the central division and suspend or proceed with the infringement proceedings; or
- (c) with agreement of the parties, refer the case for decision to the central division.

¹⁶<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/1799/179906.htm>

This passage essentially means that in cases where the defendant files a counter-claim to the effect that the patent which they are accused of infringing is not valid, the court can choose whether or not to divide the case in two, dealing infringement and validity separately. What is more, (b) above enables the court to continue with infringement proceedings while referring the question of the validity of the patent to the Central Division.

The apparent reason for this option is an attempt to accommodate the traditional practices of the contracting member states in the field of patent lawsuits. While the current UK system, for instance, deals with validity and infringement together, it is the custom of German courts to deal with them separately.

Unfortunately, while this accommodation may be high-minded, it has negative ramifications. Giving evidence before the House of Commons European Scrutiny Committee, Henry Carr QC explained what could happen if this clause is left unchanged:

[S]ay that you are a small company; you trade on the internet. You can be sued anywhere and an injunction will apply across the whole of Europe. You are sued in wherever—Greece, an injunction is granted on the basis that you fall within the claims of the patent and three and a half years later the Central Division says, "Oh, by the way, that patent was invalid", at which point you are out of business. It is a real, practical problem.¹⁷

Even in an instance in which the two branches of such a case were synchronised, the effects of this provision will still be negative. The primary reason for this is the likely increase in complexity and its corollary, cost. For small businesses either defending themselves against accusations of infringing patents or defending their patents against infringement, dealing with business-threatening legal actions in two different countries at once can hardly be an appealing prospect.

It is even possible, under the structure proposed by the *Agreement* and the *Regulation*, for a patent case to be bifurcated twice. In the event that Arts. 6-8 were included and the package was enacted, Sir Robin Jacob envisages the following scenario:

A case could even be broken into three parts: bifurcation by a regional court between [(i)] validity and [(ii)] infringement and further bifurcation of the issue of infringement between [(ii.a)] scope of protection and whether the defendant's product or process fell within that scope and [(ii.b)] whether the defendant's acts fell within Arts. 6 or 7 or were exempted under Art. 8. [(ii.b)] could go to the CJEU whilst [(ii.a)] remained with the regional court and [(i)] went to the central division.¹⁸

To say that such a situation would be undesirable would be to significantly understate the matter. Again, when the reduction of legal costs is one of the prime objectives of the patent package, it is disappointing to find that the *Agreement* and the *Regulation* tripping themselves up in pursuit of this worthwhile goal.

¹⁷<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/1799/179906.htm>

¹⁸<http://www.eplawpatentblog.com/2011/November/Robin%20Jacob%20Opinion%20re%20Arts.pdf>

Importantly, the negative impact of the types of forum shopping which have been outlined above can, with relative ease, be ameliorated where it cannot be removed entirely. In the first instance, safeguards preventing spiralling costs for SMEs who are engaged in defending or enforcing a patent could be put in place. Such safeguards might include giving consideration to the relative sizes of the parties when the location of a case is being decided. When the defendant's revenue is a large multiple of the plaintiff's, or operates in every territory compared to the plaintiff's limited operational scope, there is clearly a case for concessions to be made to the smaller party. Provisions for the dispensation of legal aid to natural persons are already outlined in the *Agreement*. In light of this, it would surely not be unreasonable to add the kind of safeguards briefly outlined above to the monetary concessions which are proposed for the benefit of materially disadvantaged players.

With respect to the issue of bifurcation, it is disappointing that the drafters of the *Agreement* did not include the type of safeguards which are found in the German patent system which is accommodated by Art. 15(2). In the German system, the frequency of the problems identified by Henry Carr QC is reduced by analysis of the likelihood that a patent will be considered invalid. In first instance courts, if the court believes that there is an 80% or higher chance of a patent being found invalid, the infringement proceedings are stayed. In higher regional courts the threshold is 50%. It may be the case that the German Judges who preside over cases which are likely to be bifurcated decide to adhere to these standards regardless of their omission. Nevertheless, if a high level of consistency and the elimination of regional vagaries is one of the aims of the patent package, making such thresholds explicit would be preferable to leaving the question to the discretion of judges.

This is not to say that the inclusion of such mandates in the *Agreement* would negate the problems associated with case bifurcation. The popularity of the current German system ought not be mistaken for evidence that bifurcating patent cases is the most prudent manner of dealing with patent litigation. This misconception has been raised explicitly by the IP Federation, whose spokesman, in response to the patent package, wrote that,

In the Federation's view, the reason that so many infringement actions are brought in Germany is that not only is the German market important and the Court system there efficient in having cases heard promptly, but German infringement Courts favour patentees by not considering validity.¹⁹

Moreover, the Federation, which represents the views of UK industry in both intellectual property policy and practice matters within the EU, the UK and internationally, cites concerns that bifurcation may result in companies relocating outside the territories of the contracting member states, just as some have left Germany for the same reason:

In the Federation's view the answer is that the bifurcated system results in invalid monopolies being asserted successfully. This is self-evidently something which the Commission should not support. It has all manner of adverse consequences for European business. One recent example can be seen in the recent decision of Microsoft to relocate its distribution centres out of Germany and into the Netherlands, expressly because of its fears of the German Courts'

¹⁹ James Hayles, IP Federation policy paper 13/12, p3

approach. If we then look forwards to a time when any division of the UPC may grant pan-European injunctions without an examination of the defence of invalidity, we foresee a major distorting and deleterious effect on investment and growth in Europe.²⁰

While on the subject of costs, it will be useful to consider the proposals for meeting the costs of establishing and running the new institutions which are created by the patent package. Both the court system and the patent application and registration systems propose to operate with balanced budgets and to finance themselves from the receipt of court fees and application and renewal fees respectively. This is a worthy goal: since the continued existence of the institutions necessary for the granting and protecting of patents is clearly in the interest of current and prospective patent proprietors, it is only right that the cost for such a system should be met by those who are its beneficiaries. To put it another way, making the system self-financing ought to ensure that only those who value a patent at or above its true cost will seek them.

Unfortunately, although the stated general aims of the two components of the patent package with respect to financing are encouraging, the specifics are less so. Article 18(1) of the UPC, for instance, proposes appropriating funds from the contracting member states “at least in the transitional period as referred to in Art. 58”, and 18(2) lists the sources of the Courts income as “court fees and other revenues”. All things being equal, it seems reasonable to expect that the most expensive phase of the court’s existence will be this ‘transitional period’, in which much training and investment will be required. For the Court to relieve itself of the financial commitments entailed by its own establishment seems directly to contradict its intention of self-financing. It is true that some of the costs incurred in the ‘transitional period’ will be due to a demand shortfall which will end after the UPC achieves a monopoly position. There is perhaps a case for this shortfall to be met by an external funding arrangement involving the contracting member states and/or the European Union. This shortfall, however, seems in no way to justify demands for contracting member states to establish the UPC with respect to its facilities when the Agreement expresses its intention to be of “unlimited duration”.²¹

It may be trite to bemoan policies which encourage the misallocation of resources, but as far as patents are concerned, this is an especially pressing concern. If the cost of litigating patent is subsidised by the contracting member states, the only logical outcome can be an increase in patent litigation. This is precisely the outcome that the UPC is supposed to prevent. No amount of rhetoric about ‘fair access to justice’²² ought to blind us to this fact. The *UPC Agreement* contains within it a not unassailable provision for dispensing legal aid (Art. 44(1)-(3)). Surely the most reasonable way to deal with concerns about access to justice is by using this mechanism to dispense aid on a case-by-case basis: blanket subsidies funded by national governments are clearly inappropriate, yet the *Agreement* proposes both.

It may be objected that since the economy in general and national governments which derive their revenue from taxation benefit from the dissemination of ideas and improvements in

²⁰ Ibid, p4

²¹ Art. 58c

²² Art. 18(3)

technology which are encouraged by the patent system, it is only right or fair that they bare some of the cost. I shall therefore make a brief case against such a line of argument.

It is difficult to think of any profit-making economic activity that does not in some way benefit economies in general and, by extension, the governments which oversee them. Every profitable business, from shipbuilding to sandwich making, generates wealth and increases the tax revenues of government in the process. Many businesses require substantial initial capital investment. The precise nature of this investment varies from case to case: it may be the acquisition of necessary machinery or refitting a high-street shop. In the case of a business model centred on intellectual property, it takes the form of the fees and legal costs associated with a patent application.

Though there may be more glamour in business which have their beginnings in a technological revelation, there seems to be no reason to set them from other entrepreneurial endeavours by subsidising their start-up costs with money taxed from other businesses who have not received such assistance. Low-cost airlines and internet retailers have augmented the general economy and tax receipts in the process, yet it would be bizarre to suggest that those industries receive government assistance. We ought not to think of patent-driven businesses in a different manner altogether.

The funding regime imagined in the *Regulation* is not without its flaws, too. The level of fees is to be set according to the following principles:

They shall be:

- (a) progressive throughout the term of the unitary patent protection, and
- (b) sufficient not only to cover all costs associated with the grant of the European patent and the administration of the unitary patent protection but also,
- (c) sufficient together with the fees to be paid to the European Patent Organisation during the pre-grant stage, to ensure a balanced budget of the European Patent Organisation.²³

Again, the overall aim is admirable, but the specifics seem misguided. The thinking behind (a) is quite clear: the drafters of the *Regulation* would like to discourage patent holders from renewing their patents and, in so doing, preventing a new generation of entrepreneurs and inventors from advancing technology and benefiting the economy. The logic, however, is hardly impeccable: if a patent is not worth renewing, then it is hardly likely to be doing much to prevent progress. Increasing the renewal fee by a given increment, furthermore, seems unlikely to move a significant number of patents out of the 'worth renewing' bracket. Indeed, the Impact Assessment which accompanies the *Regulation* produces an figure for the initial validation and translation of a European patent with unitary effect which is so low (EUR

²³ Art. 15

680)²⁴ that significant discouragement of patent renewal could only be achieved by geometrical increases in fees.

This low level of initial cost in applying for a patent is one of the chief benefits of the proposed system. On 29 June 2012 Commissioner Barnier hinted in a press-release that one of the motivating factors behind the patent package was fear that “Europe is falling behind the US and China in number of patents granted”.²⁵ If the cost of necessary translation and validation does in fact work out at less than EUR 700 for the entire territory of the contracting member states, then it seems likely that there will be more patents issued both to domestic European players and those coming from abroad. No doubt Commissioner Barnier hopes that promoting patent proliferation will result in a stronger science and technology driven economy, but it is surely implicit in his remarks that more good patents, rather than just more patents, are desired. With this in mind, it is worth considering whether it is appropriate to back-load the fee structure of the European patent with unitary effect. That is, to identify the likely outcome of having a ‘progressive’ fee system.

Given that the most costly and most important phase, both for the applicant and for the patent office, of a patent’s existence is the first, it seems counter-productive to set fees at a higher level for renewals than for applications. The least desirable outcome of a patent system would be one in which frivolous applications are made affordable, substantially delaying the approval of other applications by the increase in volume and potentially reducing the quality of the patent office’s work in the process. But by making the initial fee lower than subsequent fees, the *Regulation* almost seems to encourage half-hearted applications for patents by subsidising the initial price with funds levied by higher renewal fees. A flat or inflation-linked fee structure seems preferable.

Finally, it is worth pointing out the slightly paradoxical criteria for locating the individual courts of the UPC. That is, while the Court is designed as an international forum in which inherently international cases will be tried, the *Agreement* provides for the creation of courts on a nation-by-nation basis. These local divisions are then to be supplemented by regional division which are to be formed by two or more contracting member states. The reasoning behind the creation of parallel but distinct branches of the UPC system is, to say the least, murky. I would argue that it would be far more coherent for courts of first instance to be created on a purely regional basis, either using the *Agreement*’s procedure for contracting member states to come to agreements independently or by dividing the contracting member states into regions according to geography. The latter could be designed in a similar way to the US courts of appeals, in which the fifty states are divided in to eleven circuits such that no circuit contains only one state.²⁶ Either reform would result in a simpler and perhaps cheaper court system and minimise the impact of procedural differences between historic jurisdictions.

²⁴Commission 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, p32

²⁵<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/509>

²⁶ The 12th Circuit, which covers the District of Columbia does not, for obvious reasons, conform to this pattern.

Thus far, this report's analysis of the patent package has been wholly negative. It would neither be truthful to claim that the above constitutes a full enumeration of the problems legal and practical in the package, nor that it has no redeeming virtues. In fact, its virtues are multiple. Chiefly, the package will evidently reduce the costs associated with applying for and defending a patent across the territories of the contracting member states. The current validation and translation costs, not to mention the complexity of individual renewal payments across jurisdictions is enormous. The Impact Assessment cited above puts the figure at upwards of EUR 32,000, excluding legal fees, for patent protection throughout the 27 member states of the Union. This cost may well be the primary reason for the infrequency of applications for patent protection in all 27 states: only 2% of the 50,000 patents validated each year cover the entire EU. Such a low figure shows not only that domestic patent proprietors balk at the price of protection but that potential foreign applicants react in the same manner. A precipitous reduction in the cost of patent validation such as that brought about by the patent package under consideration will surely result in a far greater number of (almost) pan-European patents being issued, which, in turn, should result in greater harmonisation across the single market.

By means of the unitary nature of the patents which are to be issued under the *Regulation*, the package also ensures that legal costs will be substantially reduced. The reduction of such costs is of crucial importance to the sustainability of the European patent system. While validation costs imposed on patent applicants are useful to the extent that they are used to perpetuate the system of patent protection, legal costs are a loss to society. This is because they represent a substantial transfer of wealth away from developers, producers and licensors which leads to consumers bearing the cost, either through reductions in research and development spending or increased prices. It is therefore imperative both for consumer protection and the propagation of a 'knowledge-based economy' that such transaction costs are kept to a minimum.

This report has so far criticised the package on the grounds that it fails to take every opportunity to reduce legal costs for patent proprietors and other players. Such criticism is by no means intended to imply that implementation of the package, even including Arts. 6-8 of the *Regulation*, would not in all likelihood reduce legal costs. It is true that unitary effect is a double-edged sword insofar as it reduces legal costs by making the outcome of one case apply for the whole of the territory of the contracting member states, but at the same time raises the stakes of each legal action for the same reason. Nevertheless, the steps the package takes to the end of reducing legal costs are laudable; it is simply disappointing that its drafters failed to take advantage of every opportunity for maximising such reductions.

Conclusion

I therefore conclude the following: the patent package has many failings and oversights, but despite these it still constitutes an advance towards a coherent European patent system which is compatible with the single market. As I have tried to demonstrate, the negative aspects of the package are largely soluble, but whether there exists the necessary political will to, for instance, insist that German local divisions refrain from bifurcating patent disputes is

questionable. Moreover, just as the location of the Central Division of the Court of First Instance created an impasse for several months, argument and compromise look set to dog the progress of the patent package. It could well be the case that these negotiations either cause further damage to the package or, worse, derail the entire project like those of 1975, 1989 and 2000. Seemingly at every turn, deficits of political will obstruct and obfuscate what is fundamentally a step in the right direction: thirty-fold reductions in validation costs and massive reductions in legal costs are not to be sniffed at.

The Future of the Patent Package and Patent Law Reform

It is my belief, as I outlined above, that the implementation of the patent package would bring about significant benefits. It is true that UPC, insofar as it will exist in conjunction with national patent courts, will be costly. This fact, however, ought to be mitigated by the derivation of the court's funding from fees paid by litigants. More importantly, it seems clear to me that it will provide a service which cannot be provided by national courts, and that in doing so will substantially benefit current and prospective patent holders. Even if the eventual application and translation costs associated with a European patent with unitary effect are a small multiple of the Impact Assessment's estimated figure, huge savings will still be made with respect to securing patent protection across the Union. Moreover, the Uniform Court and unitary effect of patents will substantially reduce legal costs incurred in defending or enforcing patents. Both of these effects of the patent package will reduce barriers to entry for small and medium sized businesses and reduce the ability of established players to obstruct new entrants by means of expensive litigation. In their turn, larger European corporations ought to benefit to the extent that reductions in costs will make possible greater research and development or other productive spending. Moreover, international corporations which had previously been discouraged from the European market by the fragmented and costly nature of the patent protection system will find it easier to enter the market thanks to the sweeping simplifications enacted by the patent package.

Even a cursory examination of the data presented by the Impact Assessment demonstrates that Europe is put at a significant disadvantage by the fragmentary nature of the current system. The total number of patents filed at the EPO in 2009 (134,542) was just 40 per cent of the number filed at the JPO and less than 30 per cent of the number filed at the USPTO. Given that the size of the economy and population served by the EPO is greater than both Japan and the US, at least some of this shortfall is attributable to the expense and complexity generated by the current system. If the data are broken down into foreign and domestic filings, it becomes apparent that reform is needed if companies from the rest of the world are to be induced to share their knowledge and engage in business in Europe: while the USPTO received 236,315 foreign applications, the EPO received just 65,945. The fact that a US is six times cheaper than complete protection in Europe cannot be ignored.

These benefits will take effect to a greater or lesser degree, I would submit, according to the extent to which the flaws I have outlined above are eliminated or mitigated. For the avoidance of doubt, it is my position that the patent package would be greatly beneficial to the European economy in general and intellectual property-driven sectors in particular even if

it were implemented as it was initially proposed. If, in the course of the negotiations which are set to take place in September 2012, Articles 6-8 of the *Regulation* are reinserted, this would not change my opinion. Their inclusion should be tolerated if it is the price for the enactment of the package.

Additionally, it may well be the case that the reports on the European patent with unitary effect and the UPC, which are scheduled to take place within six years of their introduction, identify many of the deficiencies of the package which current critics have. Rectifying such flaws may then prove more politically feasible since negotiations will not jeopardise the entire programme. This is yet another reason why the problems in the package should be overlooked in the interest of its more rapid deployment. If the Advisory Committee of the UPC could be given discretionary powers to enact smaller changes as the Court encounters new problems, this would be argument would, I believe, be even more compelling.

In the short term, then, I would advocate the implementation of the patent package in the best state to which it can feasibly be brought. In the medium term, as I have said, improvements could be made on the basis of reports on the operations of the Court. In the long term, however, I would argue that further simplification is highly desirable.

The structure of the patent package and its machinery which has been assessed above is designed to exist above and separate from current national patent regimes. In my view, this would be a mistaken long-term approach. While this patent package is commendable to the extent that it reduces some of the friction inherent in the EPC system, it should not be considered the last word in patent reform. When it comes to intangible assets, either there is a single market or there is not. Ideas travel exceptionally fast, and the fruit of others' endeavours, particularly in the field of software patents, can be expropriated at equal velocity.

In light of this, the most logical European patent system would be one of full integration. That is, contracting member states ought collectively to address the issues associated with substantive patent law and produce a single set of rules in place of historical national patent laws. A corollary of such a system would be the assimilation of national patent courts into the UPC framework, equalising costs and enhancing consistency.

Ultimately, it is counterproductive for the lawmakers of the EU to point to the virtues of the single market while refusing to acknowledge the importance of a single legal framework in which such a market might be able to operate. Nowhere is this oversight more confounding than in the approach taken towards patent law. If the European patent system were to function like a national patent system writ large, it would surely be cheaper, simpler and more conducive to technological advancement. Such a system would be preferable to the chimera – part national, part international and part EU – which will exist upon the implementation of the patent package. It is thoroughly understandable that a simplified system along these lines was not proposed in this package: the leap would, perhaps, have been too great to be conscionable. But the important reforms proposed by the package and the institutions which it creates should be used as a foundation for further reform. If there is to be an enduring

European patent system, unless and until such sweeping reforms are enacted there is more work to be done.

21 September 2012