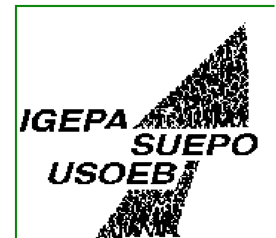
INTERNATIONALE GEWERKSCHAFT IM EUROPÄISCHEN PATENTAMT
STAFF UNION OF THE EUROPEAN PATENT OFFICE
UNION SYNDICALE DE L'OFFICE EUROPEEN DES BREVETS

Zentraler Vorstand Central Executive Committee Bureau central



10 May 2010
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For the attention of the Members of the European Parliament involved in intellectual property issues

EU Patent legislation
Accession of the European Union to the European Patent Organisation

Dear Madam, dear Sir,

The European Parliament is currently preparing its position with regard to the EU Patent system and EU patent legislation. SUEPO, the Union of European Patent Office employees[1], is concerned about the shape of the future institutional cooperation between the EU and the EPO and wishes to draw your attention to this subject.

Commission and Council consider the European Patent Office, an intergovernmental body established outside the EU Institutions, as the right entity to take on the important public authority task of processing and granting EU Patent applications. SUEPO welcomes the trust granted to the EPO. SUEPO shares the Commission's and the Council's opinion that Europe's existing, complex patent system urgently needs upgrading in order to meet the needs of the EU's "Lisbon Agenda": the European patent system currently lacks a single patent title and single patent jurisdiction[2]. Due to the split legislation there is also a lack of efficient coordination between EU patent policy and other relevant EU policies in the fields of intellectual property policy (plant varieties, trade marks...), competition, internal market issues, regional and SME policies.

However, the public perceives legislation under the existing intergovernmental European patent system to be intransparent. Further, the strong presence of chief executive officers of national patent offices in the governing body of the EPO, the EPO Administrative Council, results in an unhealthy competition between the European Patent Office and the national patent offices. It also hinders the harmonization of quality and renders more difficult an efficient distribution of tasks between the EPO and the national patent offices which is in the interest of the users of the system[3].

SUEPO is concerned about the future institutional link between the EU Institutions and the EPO. In our view, gearing the EPO to the EU legislator can only be achieved effectively through the accession

[1] SUEPO is an affiliate of Union Syndicale Fédérale (USF), European Public Services Unions (EPSU), European Trade Unions Confederation (ETUC)
[2] Harhoff, Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System, Final Report, Study commissioned by DG MARKT of the European Commission, Tender No. MARKT/2008/06/D, 31 December 2008, as revised on 9 February 2009, p. 40; see also Van Pottelsberghe in http://www.bruegel.org/uploads/tx_btbbreugel/pb_2010-02_300310-2.pdf
[3] Van Pottelsberghe, Danguy, Economic Cost-Benefits Analysis of the Community Patent, Study commissioned by DG MARKT of the European Commission, 7th April 2009, http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf

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of the EU to the EPO: i.e. when the EU becomes a signatory of the EPC. The institutional concept allowing an efficient and legally sound gearing of the two organisations is available[4]. This concept would permit the EU to rely on the EPO to grant EU patents that are examined under legislation truly legitimated by EU legislative processes. In contrast, any contractual relationship between the EU and the EPO, should such an option be considered, would raise a number of serious legal uncertainties.

1. It is particularly worrying that currently the EPO bodies, including legislative[5] and judicial[6] bodies, feel that they are not formally bound by EU legislation.

2. If a simple contractual relationship between EU and EPO is opted for, the procedures that allow the European Parliament to be involved in the legislative process (Art.218 EU Treaty) can be circumvented. Procedures allowing the European Parliament to hold the Commission accountable have no effect on a legislator - like the EPO - that is institutionally located outside the EU Institutions. The draft EU Patent Regulation[7], which is based on Art.118 of the EU Treaty, incorporates the EPC which may change in substance according to the wishes of the 37 EPO Member states. Under a contractual relationship, an external legislator would be allowed to substitute into legislation under Art.118 EU Treaty. This would entail a loss of procedural rights of the European Parliament and introduce a structural inconsistency in the EU legislative process.

3. EU Patent applicants and third parties alike could challenge the validity of the EPO decisions based on national constitutional law, inspired by the appeal filed by a German businessman before the German Constitutional Court[8] (unconstitutionality of the European arrest warrant). Indeed, it is doubtful whether the European Patent Convention (EPC) provides for sufficient legal basis for the EPO to conclude far reaching agreements between the EU Member States and the EU (neither Art.40 EPC, nor Art.149 EPC).

4. Following the "Lisbon" judgement of the German Constitutional Court[9], the validity of the envisaged EU Patent Regulation itself could be challenged based on the failure to meet constitutionality standards equivalent to German standards, since an important element for the creation of the EU Patent, the EPC, would stay outside constitutionally safe legislation.

5. Litigation brought before the ECJ (Court of Justice of the European Union) by patent applicants or third parties[10] may entail a challenge of the validity of the EU Regulation itself, for instance because of a lack of involvement of the EU Parliament.

6. The danger described for the EU Patent Regulation may also apply to the decisions of the European and Community Patent Court, since the agreement on this Court (Art.14) foresees the applicability of the EPC also for the validity assessment of EU Patents.

It would be highly problematic that individual patent applicants, patent owners or third parties be put in a position of challenging the validity of the whole European legislative construction. The risk taken in opting for a contractual relation between the EPO and the EU would be entirely disproportionate.

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[4] Council document 14551/03, 13th November 2003

[5] EPO Official Journal 8-9/1999, p.573, paragraphs 2-3:
"2. Directive 98/44/EC of the European Parliament and of the Council of 6th July 1998 (hereafter the Directive) on the legal protection of biotechnological inventions entered into force on the 30 July 1998. EU member states are required to implement it in national law by 30 July 2000.
3. The European Patent Organisation itself is not subject to this formal requirement."

[6] See decision of the Enlarged Board of Appeal of the EPO G 1/06, point 6:
"The Boards of Appeal apply the provision [*the Directive*] because it is law under a specific Rule of the Implementing Regulations to the EPC, and not because the Directive is a source of law to be applied directly."

[7] Council document 8588/09, 7th April 2009

[8] Bundesverfassungsgericht, judgment of the18th July 2005, "2 BvR 2236/04"

[9] Bundesverfassungsgericht, "Lisbon Treaty judgement", “2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09”

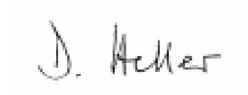
[10] Art.48 of the Draft European and Community Patent Court agreement, Council document 7928/09, 23rd March 2009

In the light of the considerations above we urge you to give the considered accession of the EU to the EPO under Art.218 EU Treaty the highest attention. Should you have doubts on the relevance of the questions raised by SUEPO, we suggest that an opinion be requested from the European Parliament's Legal Service.

Yours sincerely,

Edward Daintith
Chairman SUEPO Central Executive Committee

Desmond Radford
Chairman SUEPO The Hague



Dorothée Heller
Chairwoman SUEPO Munich

Carmen Schuhmann
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Peter Kempen
Chairman SUEPO Berlin

Copy: Mr J. Buzek, President of the European Parliament
Mr M.Barnier, Commissioner, DG MARKT