More frustration as the EU's single patent plans hit the rocks once again

After more than 10 years of negotiation, it looks like proposals for the creation of an EU patent have once again failed. And this time there may be no coming back

Brussels, early November, and government ministers from all 27 EU member states gather for what has been termed an extraordinary meeting of the Competitiveness Council. It has been called by the Belgian government, which currently holds the EU presidency. There is but one item on the agenda – the EU patent. The task of those gathered around the table is simple. It is finally to agree on a compromise plan that will allow this unitary right, one that is pivotal to the creation of a true European single market, to come into being.

In the days leading up to the meeting, the briefings were positive. This time, it was said, there was a chance of significant movement; at last, a solution was in sight to the language issues that have dogged the patent since it was formally proposed by the European Commission at the end of the last century. "I really think it's possible to reach unanimous agreement," stated Michel Barnier, the EU Commissioner for the Internal Market. "The current situation cannot continue."

Cost and complexity

The situation he was referring to is the complexity and cost of getting patent protection that covers the entirety of the European Union. Although it is possible to submit one application to the European Patent Office (EPO), once a grant is made the patent must be translated into the languages of all countries in which it is to be held. This can cost anything up to €20,000. By contrast, coverage for the entire United States costs just €1,850. According to Barnier, as well as many industry organisations, this discrepancy harms innovative European companies and makes it harder for them to compete against rivals from other parts of the world.

The problem with an EU patent, though, is that to make it cost effective, there has to be compromise on the languages under which it can be filed. Original commission proposals that focused only on English – the preferred choice of industry – were quickly dropped in the face of opposition from a number of countries. Over time and after protracted negotiations, a new plan emerged. Under this, an application could be submitted in one of the official languages of the EPO – English, French and German – and then, upon grant, translated into the other two. Plaintiffs looking to assert such patents would have to provide full and legally binding translations to defendants in the languages of the countries in which they were based. At the end of 2009, there seemed to be a breakthrough when EU ministers committed themselves to the creation of a unitary patent right. But significantly, they were able to do so only by putting questions of language to one side.

As 2010 wore on, it became clear that there were still major disagreements. Although there was widespread support for the three-language plan, it was not unanimous. A group of countries – including Spain and Italy – stood firm against measures which they considered discriminatory and contrary to the interests of individuals and entities based in countries where the official EPO languages are not used. In order to break the deadlock, new proposals were put forward based on the creation of machine translations that would enable patents to be scrutinised in all official EU languages, though for information purposes only. Further concessions were also made in the lead-up to the November meeting in an attempt to assuage the concerns of recalcitrant countries (see box on page 8).

But it was all to no avail. The 10th November meeting ran long into the night, but the hoped-for compromise was not forthcoming. Afterwards, the Belgians admitted defeat. "We have left no stone unturned, and although we have made progress, we have fallen short of unanimity by the smallest margin ... Things are clear now: there will never be unanimity on an EU patent," said Vincent Van Quickenborne, the country's competitiveness minister. "The presidency will now reflect on how to capitalise on the momentum that delegations have given us," he concluded.

In short, the Spanish refused to budge. Instead, they stuck to their previous insistence on a system that either is primarily based on English or grants equal status to other EU languages.

The only surprise is that any of this came as a surprise. Realistically, it was never going to end any other way. Last June, while speaking at the IP Business Congress (IPBC) in Munich, the commission's Margot Fröhlinger, who has been closely involved in the negotiations since 2007, said that it would need a miracle for any progress to be made. She was absolutely right.

New path forward

The question now is what will happen next. Back in June, Fröhlinger told IPBC delegates that were the path to an EU patent to become irrevocably blocked, an alternative would be to proceed towards an agreement that did not involve all EU member states. It could be done on the basis of what is called enhanced cooperation. This, she explained, would involve those countries that did want to secure some form of transnational patent right – thought to include the United Kingdom, Germany, France, the Netherlands and Sweden – continuing with negotiations, while those which were opposed would not take part or sign up to what was eventually agreed. Indeed, just before the November meeting, a number of member states wrote to the commission asking that it look into this option in more detail.

The idea of using the enhanced cooperation mechanism was suggested by European patent judges at their annual meeting in Venice as far back as 2008. However, there is one major obstacle to progress on this front. While only nine countries must agree to take part in the exercise, they need to be

Margot Fröhlinger
No EU patent miracle

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authorised by a qualified majority of all member states before they can get underway. Under qualified majority rules, a member state is allocated a number of votes according to the size of its population. For a proposal to pass, it must attract 255 votes out of a total of 345 and represent assent from countries representing at least 62% of the total EU population. This is far from guaranteed. If Spain plus Italy and, say, Poland were to come out against such a plan, then enhanced cooperation would be very difficult to achieve.

If that did turn out to be the case, Fröhlinger suggested back in June, some countries may seek to move forward on issues such as further cost reduction through intergovernmental agreements. However, this is not a simple path to go down either, she stated, and would be very much a "last resort".

Spain is different

So, quite where the European Union goes now is hard to say. Spain will, of course, attract a lot of criticism. But it is worth remembering that a solution based principally on English, which the Spanish – perhaps mischievously – support, is unacceptable to a number of other countries, including France and Germany. Such a system would clearly be the most cost effective and the simplest to administer. But for various reasons many EU member states are opposed. It is also worth remembering that globally, Spanish is spoken far more widely than either French or German.

Something else to bear in mind is that, unlike the other big European countries, Spain is a multilingual state. Under the democratic constitution agreed in the years following the death of General Franco, four official languages are recognised: Castilian, Basque, Catalan and Galician; the latter three were suppressed during the time of the dictatorship. Language in Spain is closely tied to regional identity, cultures and nationalist sentiment – it also causes political rows both locally and nationally on a regular basis. As a result, the Spanish are sensitive to linguistic issues in a way that countries such as the United Kingdom, Germany, France and Italy are not.

Consequently, it is hard to see any Spanish government giving ground on the languages of a European patent right without a huge incentive that is sellable on a political level at home. That would surely have to be one which has little or nothing to do with intellectual property, and for that to happen national leaders, as opposed to industry and competition ministers, are going to have to get involved. Given the fiscal and economic challenges that they are currently dealing with, it is difficult to see the EU's prime ministers and presidents being willing to spend the time necessary to find such a solution.

It is certainly the case that without a single patent right, the European Union can never be considered a true single market. What is more, without such a patent it will continue to be much more expensive to get pan-EU protection than it is to get coverage in unitary states such as the United States, China and Japan. But, it seems, that is how it is going to be, unless an enhanced cooperation deal that includes Europe's main patent powers can be achieved. As things stand, the approach that companies take to patenting in the European Union will have to continue to be strategic and based on an assessment of where protection is absolutely vital and where it is not. And that is just going to be the cost of doing business in Europe.

It is not ideal by any stretch of the imagination, but neither is it why so many European companies fail to engage with the IP system in the first place. The reasons for that are far more deep-seated. Perhaps the events in November will give EU member states more time to think about that and maybe even to come up with some solutions. ■

Attempting to break the EU patent language log-jam

In July 2010 the European Commission put forward new proposals concerning the language regime for the EU patent. These were the basis for the discussions that took place at the extraordinary meeting of the Competitiveness Council, held in Brussels on 10th November. A press release issued by the commission on 1st July outlined the main provisions of the plan:

Under today's proposal for a Council Regulation, processing costs for an EU Patent covering 27 Member States would be less than €6200, of which only 10% would be due to translations.

The Commission's proposal builds on the existing language regime of the EPO. The Commission proposes that EU Patents will be examined and granted in one of the official languages of the EPO – English, French or German. The granted patent will be published in this language which will be the authentic (i.e. legally binding) text. The publication will include translations of the claims into the other two EPO official languages. The claims are the section of the patent defining the scope of protection of the invention.

No further translations into other languages will be required from the patent proprietor except in the case of a legal dispute concerning the EU patent. In this case, the patent proprietor may be required to provide further translations at his or her own expense. For example, the proprietor may have to supply a copy of the patent into the language of an alleged infringer, or into the language of the court proceedings when this is different from the language of the patent.

The Commission's proposal also sets out accompanying measures to be agreed in order to make the patent system more accessible to innovators. First, high quality machine translations of EU patents into all official languages of the EU should be made available. Inventors in Europe will therefore have better access to technical information on patents in their native language. In addition, in order to facilitate access to the EU patent for applicants from countries in the EU that have a language other than English, French or German among their official languages, inventors will have the possibility to file applications in their own language. The costs for the translation into the language of proceedings of the EPO (to be chosen from English, French or German by the applicant when they file the application) will be eligible for reimbursement.

Further compromises were tabled on 9th November, including:

- If companies were unwittingly to infringe an EU patent because there was no translation of it into their native language, they would not be held liable for damages.
- The funds needed to bear the cost of translation would be made up front at the beginning of the process.
- For all patents, regardless of language, a full translation into one other official EU language selected by the applicant would have to be undertaken manually (ie, not by machine) within a 12-year period.

Under the Lisbon Agreement, any matters relating to national language have to be agreed unanimously by EU member states.