POSITION PAPER

11 March 2008

BUSINESSEUROPE VIEWS ON SLOVENIAN PRESIDENCY WORKING DOCUMENT "EU PATENT JURISDICTION – MAIN FEATURES OF THE COURT SYSTEM – REMEDIES, PROCEDURES AND OTHER MEASURES"

1. INTRODUCTION

BUSINESSEUROPE has consistently voiced the need for a more competitive EU patent system in terms of costs and legal certainty.

Significant efforts have been made at Council level during recent months on a blueprint for a future integrated patent litigation system for Europe, thanks to the work of the German and Portuguese presidencies and with strong support from the European Commission.

BUSINESSEUROPE welcomes these efforts and considers it important that they continue under the Slovenian and French presidencies. It is nevertheless BUSINESSEUROPE's strong conviction that any new litigation system must bring real improvements for companies compared with the current situation, and not just offer politically expedient solutions.

BUSINESSEUROPE will also welcome a renewed effort on the Community Patent from the side of the European Commission. A truly unitary Community Patent is necessary in order to boost Europe's innovation capacity. However, any initiatives on the Community Patent must in any case fully meet users' needs in terms of costs, quality and legal certainty.

2. BASIC REQUIREMENTS OF A COMMON LITIGATION SYSTEM

BUSINESSEUROPE is keen to constructively participate to the debate on the future patent litigation system by highlighting what it considers to be its essential characteristics.

In order for Europe to maintain a pro-competitive climate conducive to innovation, it is imperative that any new European patent litigation system delivers the highest quality, cost-effectiveness, efficiency, legal certainty and reliability.

The first essential requirement is that the court is comprised at all levels of experienced judges capable of handing down well-reasoned decisions, on both validity and infringement issues. It should be noted that the new system will give exceptional powers to judges, who will be entitled to award damages and injunctions, including preliminary injunctions, for the entire territory of the Union and to declare European

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patents invalid in all designated States. Therefore, the highest quality and experience of judges are particularly important for it to succeed.

The second essential requirement is that the new system is a single judicial system. The new court must be a specialised body, distinct from other existing judicial bodies. Multinational and experienced panels should be foreseen in every case that involves parties from different Member States.

The third essential requirement is for a cost-effective system that does not create unreasonable delays in order to allow SMEs in particular to make effective use of the patent litigation system.

3. CONCERNS ON THE CURRENT PROPOSALS

When assessing the current proposals in light of those fundamental requirements, BUSINESSEUROPE acknowledges improvements within the proposed structure of the future litigation system as discussions progress (central first instance court to handle nullity actions with a simplified language regime and technically qualified judges, centralised appeals court, ,training framework for judges). However, there still remain important issues of serious concern for European companies. BUSINESSEUROPE recognises that efforts have been made to meet some of industry's concerns in the current proposal. Nevertheless, the proposed "flexibilities" do not alleviate those concerns.

The proposed structure of the system, in which each Member State has the right to set up its own division, with local judges in the majority and procedures conducted in its local language, raises concerns regarding efficiencies, costs and quality and as to whether a truly integrated European system can be developed. BUSINESSEUROPE is of the strong view that mixed panels with at most one judge per nationality, including both legally and technically qualified judges experienced in patent litigation are necessary at first instance level. For cost and efficiency reasons it seems unnecessary to resort to panels of five judges. As a rule, three-judge panels should be enough. However, one of the panel judges should be a technical judge.

BUSINESSEUROPE has stressed the importance of a simplified language regime for the future patent court system. In the current proposal, "flexibilities" have been introduced concerning the language of proceedings. This could in theory open up possibilities for using more efficient procedural languages in specific cases. However, it can also lead to uncertainty about which language will be used in the case, in particular with the different possible routes for an invalidity counter-claim, and there is even a risk that the language could be changed in the course of the proceedings. This is unacceptable, since it is the source of legal uncertainty and can lead to higher costs for companies, especially for SMEs. For that reason, BUSINESSEUROPE firmly believes that the language of proceedings in both instances -be it in the central or the local division- should be the language of the patent. This would also facilitate the communication between the judges.

The proposed "split jurisdiction" of infringement and validity disputes between the central division and local divisions at first instance is a concept unknown in most EU

countries; with the exception of Germany and Austria. This split seems to be justified as a safeguard because local/regional judges may lack experience in patent litigation. Nevertheless in BUSINESSEUROPE's view, the split is not necessary anymore if multinational panels with both legally and technically qualified highly experienced judges are set up at all first instance levels and not only in the central division.

In addition, since the proposed system is intended to cover not only Community but also European patents, it is important to ensure that the EPC Contracting States that are not EU Member States are not excluded.

As already mentioned, the proposed system would confer exclusive jurisdiction on new courts with power to render EU-wide decisions on both validity and infringement cases. A new and untested jurisdiction system can be uncertain and risky for companies, especially SMEs. In order to build up confidence in the new system, it is therefore necessary to introduce transitional arrangements under which patent proceedings may still be initiated before national courts under national jurisdiction. The transitional arrangements would remain in operation at least until judges have obtained the required training and patent litigation experience and an evaluation of the new system has been satisfactorily conducted.

4. RULES OF PROCEDURE AND REMEDIES

Regarding the proposed rules on procedures and remedies as set out in the current proposals, BUSINESSEUROPE considers that they set a good basis for the continuation of discussions.

BUSINESSEUROPE has always stressed that uniform rules of procedure are necessary for a truly integrated European patent court system. BUSINESSEUROPE welcomes in particular the clear reference to directive 2004/48/EC on the enforcement of intellectual property rights and the work carried out in the context of EPLA, in particular the draft European Patent Litigation Agreement, the draft Statute of the European Patent Court and the Second Venice Resolution of the European Patent Judges Association relating to the rules of procedure of a European Patent Court as the basis for setting up the rules of procedure of the future common jurisdiction.

In particular, the three-phase process described in the Venice II Resolution, with a written phase, an interim phase and an oral phase, should be more clearly adhered to.

Regarding injunctions, a clear distinction should be made between preliminary and permanent injunctions.