

EU 2004 IP Enforcement Directive

Key messages: Any changes to the 2004 IP Enforcement Directive that would make it excessively restrictive for European courts to issue injunctions or introduce new apportionment rules for the calculation of damages based on the value of the smallest saleable patented unit, would incentivise companies to infringe patented technologies of their competitors, and make it much more difficult to compete on innovation. Similarly, if patented technologies would benefit from lower patent protection in Europe than in other regions, the incentive to invest in R&D would be reduced or eliminated, and innovative companies could relocate or file their patents in regions where patent protection is more robust.

Legislative changes to the 2004 IP Enforcement Directive will be considered in the coming months as part of the forthcoming review of the European Copyright Framework¹. In this context and in line with the strategy adopted for the Unified Patent Court (UPC), the IP standardization framework and for the EU-US Transatlantic Trade and Investment Partnership (T-TIP), we caution the EU institutions against the misleading idea that the EU patent judicial framework is at risk of becoming a “patent troll paradise” as a result of the forthcoming UPC² in conjunction with the existing rules of the 2004 Enforcement Directive.

Indeed, any changes to the 2004 IP Enforcement Directive rules would affect all patent holders, in every industry sector in Europe. In fact, new rules devaluing IP and/or weakening IP enforcement would benefit a narrow group of large US companies but would be highly detrimental to all other players and most industries (e.g. pharma, engineering, etc.), carrying broad consequences on competitiveness, revenues and innovation in Europe across all industrial sectors.

For example, if changes to the 2004 IP Enforcement Directive would make it excessively restrictive for European courts to grant injunctions or would introduce new apportionment rules for the calculation of damages based on the value of the smallest saleable patented unit, this would incentivise companies to infringe the patented technologies of their competitors, and make it much more difficult to compete on innovation.

Without the risk of being exposed to timely remedies, infringers have no incentive to voluntarily sign a licensing agreement as, in the worst-case scenario, they would be condemned to pay damages. The potential licensing revenue for European innovators would be too low and arrive too late (being the end of business of most small and medium sized enterprises (SMEs) and put at significant risk the financing instruments for technology based start-ups, that mostly rely on seed and venture capital.

On innovation, if patented technologies would suffer lower patent protection in Europe, the incentive to invest in R&D would be significantly reduced or eliminated, and innovative companies could relocate, or at least file patents in regions where patent protection is more robust. The weaker or inefficient patent protection is, the more innovative companies will protect their innovation through trade secrets. As a result, with innovation increasingly protected through trade secrets, the rate of publication and other dissemination of innovation would be slower than in case when innovation is protected in the balanced way, i.e. including patents.

¹ http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf

Page 8: “The Commission will make legislative proposals (...) in 2016, (...) modernizing enforcement of intellectual property rights, focusing on commercial-scale infringements (the ‘follow the money’ approach) as well as its cross-border applicability”

² BBC news June 26 2015 - <http://www.bbc.co.uk/news/technology-33285119> - “Sprint loses \$30m patent battle...”

- “US politicians do appear serious about reform, but Europe is going in the other direction with its future Unified Patent Court. That brings about the possibility of enforcing weak patents, Europe-wide,” he said. “Europe could become the new patent trolls’ paradise.”