

Unified Patent Court (UPC)

Key messages: *The signatories forcefully reiterate their support for the rapid Europe-wide ratification and enactment of the UPC while stressing the importance of injunctive relief for innovators in Europe.*

A myriad of small innovative companies, universities as well as medium and large corporations are engaged in research and development activities and would severely be affected if they were deprived of their ability to obtain remedies against the infringement of their valid patents. The UPCA and its Rules of Procedures offer a carefully balanced solution reflecting the fundamental principles of proportionality, flexibility, fairness and equity embodied in European laws.

In the context of EU efforts to establish a Unified Patent Court ("UPC"), it is fundamental that Member States' Courts are not hampered in their ability to grant injunctions as this could deprive innovators of their ability to prevent infringement or to obtain timely remedies resulting from the infringement of their patents in Europe.

Yet some Silicon Valley-based companies are engaged in a campaign based on misleading comparison between the US and the EU patent legal system. Among others, they assert that the EU patent judicial framework is at risk of becoming a "patent troll paradise" as a result of the ratification of the UPC¹ and that the EU internal market will be plagued by the same evils that undermine the US legal patent system today. We believe this will not be the case due to the following reasons:

Firstly, the Unified Patent Court Agreement ("UPCA") provides a balance by allowing courts to use their discretionary power, i.e. courts *may* award remedies (damages, injunctions and other corrective measures) in infringement proceedings considering, amongst other things, the interest of the parties. (Articles 56, 62 and 64 UPCA).

Secondly, the UPCA specifically reflects a general principle of EU law providing that *UPC Courts may subject any such injunction or measure to the posting of a security (...)* considering the principles of *proportionality, flexibility, fairness and equity*.

Thirdly, the UPCA and the corresponding Rules of Procedures have introduced safeguards against patent trolling activities: In the UPCA there is neither automatic injunctions (Arts 62, 63 UPCA) nor automatic bifurcation² (Art. 33(3) UPCA); if the court chooses to bifurcate, it must provide a reasoning (Rule 37(1) RoP), and both rapporteurs (from validity and infringement proceedings) will anyway coordinate the duration of the proceedings to avoid situations where an injunction is granted for a patent that is later on invalidated (Art. 40 UPCA); the loser pays rule applies (69(1) UPCA); and suits against multiple defendants are only possible if there is a commercial relationship and the action relates to the same alleged infringement (Art. 33(1) UPCA), to name some of them.

If the balance achieved through the UPCA and the corresponding Rules of Procedures were to be broken favouring the users of the technology by introducing excessively restrictive rules to grant injunctions, competitors could infringe patented technologies in Europe without the threat of injunctions and the value of such inventions and of any related licenses, would plummet.

The SMEs involved in the development and protection of innovative technologies, needs a unified and

¹ 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."

² the UPC Agreement and the Rules of Procedure allow for the bifurcation of proceedings, that is, for a court to decide on patent infringement at local or regional level while the validity of the patent infringed is examined, separately, by the central division or by the EPO.

consistent European patent system as the markets that they operate are no longer just national, are international being Europe a critical market for them. Current patent enforcement country by country is simply not understood and perceived as too costly by the majority of SMEs. The UPC could be the judiciary framework for European SMEs that today's most successful Silicon Valley companies enjoyed in the 80's and 90's in the US, facilitating its growth.

Finally, if patented technologies do not benefit from the same level of robust patent protection in Europe, innovation will be increasingly protected through trade secrets. And with innovation increasingly protected through trade secrets, the rate of publication and dissemination of innovation will be slower than when innovation is protected in the balanced way, including patents. However, if trade secrets are key for the competitiveness of the European industry, they are not the right protection tools for joint collaborative R&D. Eventually collaborative R&D investments could thrive in regions where patent protection is more robust and leave Europe.

By way of conclusion on the establishing of the Unified Patent Court and the importance of injunctive relief for innovators in Europe, we wish to forcefully reiterate our support for the rapid enactment and Europe-wide ratification of the UPCA and the adoption of the Rules of Procedures. The UPCA and its Rules of Procedures offer a carefully balanced solution reflecting the fundamental principles of proportionality, flexibility, fairness and equity embodied in European laws.
