The European Patent Reform – Failed for now

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At its Brussels summit on 28 and 29 /06/2012 the European Council, composed of the heads of state and governments of the Member States of the European Union (and not be confused with the Council of the European Union, being a legislative body), reached an agreement on the creation of a EU "unitary patent" and a corresponding court system. However, casually a change was encouraged which may now throw back the whole project to its starting point.

I. The deliberations at the summit

Prior to the summit, despite the persisting opposition by international experts, political consensus was communicated with regard to the plans, i. e. the creation of a "unitary patent" by a EU Regulation and a related court system by an international treaty. Until recently, it was said that the only open issue would be whether the central division of the Unified Patent Court should have its seat in Paris, London or Munich. A debate and voting in the European Parliament were scheduled already for 03 and 04 /07/2012. During the night of 28 /06/2012 the Financial Times then reported on its webpage www.ft.com that the British Prime Minister *David Cameron* wanted to block an agreement as it became known that, following a bilateral arrangement between Germany and France, the seat of the Central Division should be split between Paris and Munich with London to be ignored. Only subject to the condition that the Court of Justice (CJEU) would get no (original) competence in the "unitary patent" court system, he was said to be prepared to support an agreement. This concerns the frequently discussed Articles 6 to 8 of the Regulation which define the rights of the patent owner from the "unitary patent" and their limitations. Due to the lack of experience of the CJEU with handling technically complex cases, the adoption of these articles in the Regulation was widely rejected by expert voices[1], while correspondingly the Legal Affairs Committee of the European Parliament had always defended it as inevitable with regard to the chosen legal basis.[2]

II. The contents of the reached "agreement"

Finally, an agreement was reached[3] which, despite the immediate "press cheering" following the usual political marketing, casts significant doubts on whether a timely realization of the "unitary patent" and a related court system can be expected. It was decided to split the seat of the central division between Paris, London and Munich and to define the competence obviously according to the classification section to which the patent in dispute belongs. Thus, London will be competent for cases from classification sections A ("Human necessities") and C ("Chemistry; metallurgy"), Munich has competence for those from section F ("Mechanical engineering; lighting; heating; weapons; blasting engines or pumps"), while cases belonging to any other sections will be dealt with in Paris. Although this was – in Germany – politically communicated as a success for Munich, upon a closer look this outcome is disappointing. While Paris can be satisfied about the competence for, inter alia, the electronics segment and while London can welcome cases from chemistry, including the highly relevant pharma segment as well as medicinal products, Munich is left with mainly cases from mechanical engineering.

However, all this may in the end turn out to be irrelevant, as the summit final declaration contains a highly sensitive statement:

> *"We suggest that Articles 6 to 8 of the Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection to be adopted by the Council and the European Parliament be deleted."*

The European Council thus proposes – as demanded by experts for a long time – to delete the mentioned Articles 6 to 8 from the Regulation. According to reports, this goes back to a respective demand of the British head of state *Cameron* and is the price which had to be paid for reaching a political agreement.

III. Impacts

Despite all contrary statements in the press, this "solution" did not finalize the project, but has more likely steered it into a dead end. It will be difficult to align the position of the European Council with that of the European Parliament without material changes to the actual draft legislation. Vice versa, also an unchanged retention of Articles 6 to 8 in the Regulation may turn out to be problematic.

The Legal Affairs Committee of the European Parliament has always resolutely insisted on including these provisions in the Regulation, this was regarded as crucial for being able to rely on the chosen legal basis, Article 118 TFEU. In a debate on 21/11/2011, the Swedish MEP *Cecilia Wikström* (ALDE group) had requested that Articles 6 to 8 be deleted from the draft Regulation.[4] *Klaus-Heiner Lehne* (EPP group), rapporteur of the Legal Affairs Committee for the agreement on the court system, had an-

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[1] *Pagenberg*, GRUR 2012, 582 (586).
[2] *Stjerna*, Mitt 2012, 54 (56).
[3] Council Document EUCO 76/12 of 29/07/2012, accessible at bit.ly/34Jy4t4.
[4] Video stream accessible at bit.ly/3gBvs2O.

swered to this proposal as follows (translated from German):

> *"(…) in the trilogue, we have already (…) discussed this and the Commission, via the Legal Service of the Commission, has clearly taken position in that question. This also seems to be the majority perception in the Council* [of the European Union]*, that there is sort of a danger that when these articles are removed from the Regulation, possibly the legal basis will no longer be valid, because this legal basis refers to intellectual property and if there is then nothing specified on the contents of this intellectual property, if can possibly be put into doubt that this is the legal basis."*

This position is opposed by the European Council with the proposed removal of Articles 6 to 8. As a consequence, upon request of the EPP- und S&D parliamentary groups, the debate and vote in the European Parliament planned for 03 and 04/07/2012 were cancelled and the dossier referred back to the Legal Affairs Committee. In its respective meeting[5] a very upset *Bernhard Rapkay* (S&D group), rapporteur of the Judicial Committee for the "unitary patent" Regulation, commented the decisions of the European Council as follows (translated from German):

> *"We have mutually come to a result, and on 2 December last year the chairman of the Legal Affairs Committee, Klaus-Heiner Lehne, received a letter from the presidency of the Council with the negotiated text and a cover letter, in which it is said that the Council undertakes to adopt exactly that text, if the Parliament adopts exactly what we have negotiated and agreed on. For seven months, nothing has happened now, since the Council could not come to a result in another issue, namely the issue where the central division of the Patent Court shall have its seat, for which, however, we have no competence so that we did not interfere. There were three candidates. In the last week, the Council, in its wisdom, decided that all three are admitted. However, this is not the crucial point, although one is tempted to ask whether this has something to do with an oriental bazaar, although I need to come to the defense of the respectable oriental bazaar traders, as this would be an insult to them."*

On the proposed removal of Articles 6 to 8, he declared (translated from German):

> *"The problem is that, in addition, it has been agreed to act on an area of competence of the Parliament and to strike out something in the Regulation itself, namely three central articles. (…) according to the position of many – also of the Council itself in the negotiations in the last year – the removal of the three articles which has now been decided, means a manifest breach of European law. (…) They want to have a regulation and a regulation aims at regulating something. And now they want to remove the content of the regulation, thus exactly what it is meant to regulate. This is truly remarkable."*

Klaus-Heiner Lehne added (translated from German):

> *"The Treaties do not authorize the European Council to legislate. I just want to add to what my colleague Mr. Rapkay has said already. If the European Council, in sessions at midnight, starts to engage in legislation, this obviously results in nonsense. Striking out the Articles 6 to 8 means depriving the proposal of its core part. In the cooperation with the Legal Service and during the expert hearing, we have clearly received confirmation that we can use this legal basis for intellectual protective rights only if we regulate on such intellectual protective rights, i. e. if we define patent claims. Over months, this has been discussed internally and also with the Council and then, upon request of a single head of government, at midnight these three core parts are scraped. The result would be, should we adopt what the Council wants, that we would experience a crash test before the Court of Justice already upon the first referral. This is not justifiable."*

The President of the European Parliament, *Martin Schulz*, thus ordered (translated from German):

> *"Therefore, I notice the following: The subject on which we would have voted tomorrow, was an agreement on first reading, which was reached between the rapporteur and the Council. On 2 December, the Council has informed Mr Lehne in a formal letter, that it has unanimously approved the text in the COREPER* [COREPER is the Committee of Permanent Representatives of the EU member states, it, inter alia, prepares and supports the work of the Council] *formation which we wanted to adopt here tomorrow. The European Council has now asked COREPER to amend this text and to do this tomorrow. Accordingly, we are in the situation that a first-reading agreement has been disbanded by the Council. This means: There is no agreement on first reading. (…) we stop here and, after receipt of the formal letter of the Council to you* [addressing *Klaus-Heiner Lehne*]*, you again engage the Legal Affairs Committee on the matter."*

This was approved unanimously.

In its session on 10/07/2012[6], the Legal Affairs Committee harshly criticized not only the deletion of Articles 6 to 8 from the Regulation requested by the European Council, but also the split seat of the central division. Still very upset, Mr. *Rapkay* said (translated from German):

> *"In conclusion, the deletion of the three articles is clearly not compatible with EU law as this means it is not compatible with Article 118. This is the legal basis, the sole legal basis for this, and, after deletion of these three articles, the legal basis is no longer applicable. Because the legal basis says, a patent with unilateral protection is created, in the ordinary legislative proce-*

[5] Video stream accessible at bit.ly/3gyBhOL.

[6] Video stream accessible at bit.ly/32Jol3J.

dure, and when just the articles emphasizing this unilateral protection are removed, 118 is no longer given. I think, this is totally clear, insofar one cannot give in on this. (…) *the decision rendered by the heads of state and governments is not decision on the merits, it is a decision within a horse trade.* (…) *And, additionally, this horse trade is then put together with something for which* (…) *the European Council, according to the Treaties, has no competence. It is not allowed to get involved in the legislative process, explicitly in Article 15."*

In terms of the wording chosen by the European Council, according to which a deletion is only "suggested", Mr *Rapkay* remarked (translated from German):

"Now, one can say they quickly got their act together by saying that they only "suggest" [to delete the three articles]. *But I know this from people within the Council, I mean the Council of the European Union,* (…) *who say that if the European Council says so, than we have no choice but to act accordingly. Thus, they have factually interfered with the legislative process which they are not allowed to."*

According to Mr *Rapkay*, a deletion of Articles 6 to 8 would make necessary new material negotiations (translated from German):

"(…) *I have to say this clearly, if the Council would delete these three points* (…) *this would not be a question of three points, but of the whole compromise. As it is not possible to simply say* (…) *everything we have agreed on is finalized, only we do not agree with these three points, we take them out, put everything aside and now we only negotiate on this. Therefore, for me, there is, at the moment, no option for negotiations.* (…) *In case of doubt, we would need to go back at least to the phase draft report with proposed amendments of the colleagues.* (…) *At the moment, I can only recommend and ask that the Legal Service continues to assess the matter a little further. This does not replace our political decision, I want to say this clearly.* (…) *But if it is possible to get legal support or legal positions, also political decisions can be rendered a bit easier. Thus, I would welcome* (…) *if this work could be continued and if, after the summer break, we could, possibly on the basis of a broader opinion...carry this debate further and also think about, how do we proceed."*

At the end of the debate, Mr *Rapkay* added (translated from German):

"On the question: Who are we. We are the Parliament. WE are the Parliament! We are the only ones legitimated for legislative enactments. Not any patent attorneys. It is not our task to legally secure a business model of patent attorneys. (…) *We have not given the starting signal for new negotiations here today, under no circumstances. So far, everything we have negotiated stands.* (…) *We have reached an agreement already nine months ago and we should kindly stick to this."*

As a next step, the Legal Service is now called to assess the legal options in more depth, the Legal Affairs Committee will continue its discussions about the topic after the summer break, presumably in September.

On the other hand, also leaving Articles 6 to 8 in the Regulation, in opposition to the request of the European Council, does not appear to be a valid political option. With some likelihood, the British head of state could hardly accept such solution, as he has already communicated the deletion of Articles 6 to 8 – which was urged widely also in the UK, most recently even by a Parliamentary committee – as a personal success. However, it appears to be impossible to implement the "unitary patent" and the court system without the UK as one of the most important European patent jurisdictions. Furthermore, there are voices indicating that the entering into force of the agreement on the court system, according to the present plans, would require ratification by 13 of the participating Member States, with ratification by some countries, including the UK, being coercive. Should this be true, it would further complicate the situation.

IV. Outlook

For the moment, the negotiations appear to be stuck and it cannot be excluded that, in the end, it will be necessary to start again from the beginning. In terms of the numerous deficiencies still present in the proposals, in terms of which international experts did never cease to demand a profound revision, and with regard to the interests of the users, this would not be the worst outcome as it would allow to finally design the system in an efficient and applicable way.

However, in that case, it would be regrettable that this would not be the result of a political understanding and political interest in creating the best possible unified patent dispute system, but merely a consequence of political "quid pro quo" between the Member States upon which the real objective has apparently moved so far out of sight that, in the end, only a restart can resolve the stalemate. It will be interesting to see how this continues after the summer break.

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For possibilities to support my work on the European patent reform please visit www.stjerna.de/contact/?lang=en. Many thanks!