Source:

German Bundestag, minutes 18/179 on the 179th session on 23 June 2016, accessible at https://dipbt.bundestag.de/dip21/btp/18/18179.pdf (bit.ly/2QvM2nP).

(Deutscher Bundestag, Plenarprotokoll 18/179 zur 179. Sitzung am 23.06.2016, abrufbar unter https://dipbt.bundestag.de/dip21/btp/18/18179.pdf [bit.ly/2QvM2nP]).

Dr. Stephan Harbarth *(CDU/CSU):* Today we are discussing the implementation of the European patent reform. With the two legislative proposals to be debated today for the first time, we strive to seamlessly implement this reform in our national law on the one hand and to approve the Agreement on a Unified Patent Court on the other.

The present European patent reform is a major breakthrough; it will make a lasting positive difference to the patent system in Europe. Access to unitary patent protection within the EU will not only strengthen the protection of inventions, but it will also create a significantly improved framework for an innovative industry and an integrated European internal market.

Since the 1960s there have been efforts in Europe to unify patent protection. Numerous negotiations and efforts have failed in the past. The present patent reform also faced major challenges. Despite intensive negotiations, it was unfortunately not possible to obtain the approval of all Member States within the EU. Adoption of the reform package was therefore only possible by way of an enhanced cooperation. However, complaints before the European Court of Justice, which were subsequently brought by Italy and Spain, were unsuccessful. Fortunately, Italy has now joined the enhanced cooperation, together with 25 other EU states.

In legal terms, the reform consists of three elements: two EU regulations relating to the creation of unitary patent protection and the translation arrangements to be applied in this respect, as well as the third element, an international Agreement establishing a Unified Patent Court.

But why is this reform necessary?

So far, there are national patents which are granted at the national level in accordance with the respective national procedural rules. It is also possible to obtain a so-called “European patent”, which is granted by the European Patent Office on the basis of the European Patent Convention. Following a uniform examination procedure, the European Patent Office grants the patent by means of a single granting act, which, however, breaks down into a bundle of national patents for the designated Contracting States, which is why the term “bundle patent” is also used.

The consequence is that, as with any national patent, judicial legal protection for the European patent or bundle patent is only possible before the respective national courts. Legal protection remains limited by national law. Therefore, for proceedings on the infringement or the nullity of a patent, currently a number of proceedings are necessary in the respective Contracting States. This can lead to contradicting judgments on the infringement or the validity of the protective right within the common market. This not only results in significant efforts and a lack of legal certainty, but also in a fragmentation of the market.

The present reform solves these problems, leading to a welcome unitary European patent protection which, in the long run, is meant to replace the nation state patchwork solutions.

The "European patent with unitary effect" or unitary patent provides the participating states with a patent with a uniform protective effect for all participating EU states. Accordingly, the patent can only be limited, transferred, declared invalid or expire with effect for all of these Member States.

The existing infrastructure of the European Patent Office, which has proved its worth over the last decades, will be used to grant the patent. Patent applications for the unitary patent will be filed with the European Patent Office, while the existing examination procedure will remain unchanged. If the European Patent Office grants a bundle in the known form, the patent applicant can apply for the unitary effect of the patent within one month.

A combination of unitary and bundle patent is possible. A unitary patent can be obtained for the EU states participating in enhanced cooperation, while a bundle patent can be obtained for the EU states not participating in the enhanced cooperation, such as Spain, or for non-EU states that are party to the EPC, such as Norway, Switzerland or Turkey.

The translation regime for the unitary patent is based on the three-language system of the European Patent Office (German/English/French), i.e. a patent application must always be filed in one language of the three-language system or be translated accordingly in a timely manner.

The Agreement on a Unified Patent Court completes the patent reform as a third element. At first instance, the Unified European Patent Court is divided into central, regional and local divisions. In Germany there will be a total of four local divisions for the first instance. In this way, we want to make it possible to be close to the court and to have easier access to the court system. With Düsseldorf, Hamburg, Mannheim and Munich, we have considered the presently most important locations for patent litigation as the four German local divisions.

In the second instance, an appeal may be brought before a court of appeal which will have its seat in Luxembourg. If a question of Union law needs to be clarified, a referral will be made to the CJEU for a preliminary ruling, as in the case of national courts. The Unified Patent Court will have jurisdiction for patent infringement actions, nullity actions and interim and protective measures, including preliminary injunctions.

At the national level, the legislative proposal on the adaptation of patent law provisions to the European patent reform intends to incorporate the new property right into German law. The planned amendments, in particular to the International Patent Convention Act, will avoid application difficulties that could arise from the coexistence of national and European regulations.

National patents remain unaffected by the European patent reform and can continue to be granted by national authorities. The introduction of a European unitary patent therefore does not exclude the above-mentioned options of a bundle patent and a national patent. Rather, the applicant is given the option of alternative patent applications so that he can determine individually which patent protection best suits his individual needs.

In addition, the draft also provides for the lifting of the existing ban on double protection. In the future, the same invention could be protected by a national patent and, in parallel, by a European patent with or without unitary effect. The draft counteracts the fear of an abusive enforcement of identical protective rights by its owner in different jurisdictions by introducing the "defence of double claim".

The introduction of such defence is mandatory if the ban on double protection is to be lifted. Whether the form of the defence in its current form can sufficiently counter the fear of abusive enforcement will certainly have to be examined more closely in the further legislative procedure.

It also seems necessary to me to discuss the question of generally abolishing the double protection ban. The European legal framework gives the Member States leeway in this respect, and positive experiences of coexistence have been made within the framework of trademark and design law. At the same time, the European patent reform is intended to achieve a simplification of systems and procedures, thereby reducing costs and increasing legal certainty. The admission of parallel protective rights for one and the same invention could undermine precisely these objectives of the reform and the improved integration of the internal market.

In the current legislative process, therefore, we should, in particular, once again take a close look at the coordination and relationship between national and European law.

In order for the European patent reform and the two EU regulations mentioned above to apply, the Agreement on a Unified Patent Court must come into effect. Out of thirteen necessary Contracting States, ten have already ratified the Agreement. In addition, ratification by the three Member States that had the most European patents in force in the year preceding the signing of the Agreement is mandatory.

These are Germany, France and the United Kingdom. France has already ratified the Agreement and set a good example. We should follow that quickly.

It is not only with regard to the unitary patent that one would hope that the United Kingdom will decide to remain in the EU in today's referendum. A UK withdrawal would not only be a black day for Europe and the EU, but would also delay the entry into force of the European patent reform for some time or, in the worst case, even call it completely into question by losing the UK, which is such an important market.

* * *