

01 December 2017

Vice-President Andrus ANSIP
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels

By email: cab-ansip-web@ec.europa.eu

Dear Vice-President Ansip,

IP2I welcomes the Commission's IP Package: effective and rigorous implementation of safeguards is key to preventing abuses of Europe's patent legal system

I am writing on behalf of IP2Innovate (IP2I) to provide our comments on the IP Package that was adopted by the Commission on 29 November that included multiple communications.

IP2I welcomes the safeguards outlined in the IP Package that are designed to prevent abuses of Europe's patent legal system. It is now critical that the Commission work closely with the Member States and stakeholders to ensure these safeguards are implemented in practice in the Member States and the upcoming UPC for litigation involving any type of patent. The problem of abusive litigation practices in Europe is not limited to Standard Essential Patents (SEPs) but applies to all patents.

Upward trend in Patent Assertion Entity activity in Europe

IP2I members are concerned about the impact of abusive litigation practices perpetrated by Patent Assertion Entities (PAEs) on European manufacturers and innovation in Europe. That abuse harms innovation whether it involves SEPs or non-SEPs.

The latest data¹ clearly demonstrates that there is an upward trend in PAE litigation in Europe. PAEs do not innovate and they do not create and sell

¹ Darts-IP, The Rise of Non-Practicing Entity (NPE) Cases Outside the United States, <https://www.darts-ip.com/the-rise-of-non-practicing-entity-npe-cases-outside-the-united-states/>

new products. They buy up patent portfolios to bring litigation and demand settlements from producing companies. PAEs exploit Europe's patent litigation system for their own financial gain at the expense of European innovation and Europe's economy.

Certain features of Europe's patent legal system facilitate abusive litigation practices

PAEs are successful because they are able to take advantage of certain features of Europe's patent legal system to target European manufacturers with abusive litigation practices that give them leverage to demand settlement payments beyond the value of their patent:

- Automatic permanent injunctions;
- Bifurcation of infringement and validity decisions;
- Ineffective fee shifting provisions;
- Low quality patents;
- Lack of transparency in patent litigation data.

The Unified Patent Court will make Europe more attractive to PAEs

The UPC promises to raise the quality and efficiency of the European patent system. However, the UPC also represents the first time in history that a patent holder can block a product from the entire European market. That will be true no matter how trivial the patented invention compared to the overall product. Many commentators fear, and some PAEs have made it clear, that this leverage will make Europe more attractive to PAEs. Given this risk, IP2I believes that policymakers need to take measures now to counter the abusive practices of PAEs in Member States.

The IP Package contains safeguards to prevent abusive litigation practices

IP2I welcomes the safeguards outlined by the Commission in its IP Package that are aimed at preventing abuses of Europe's patent legal system:

- **Application of the proportionality principle / judicial discretion in the granting of remedies:** the IP Package makes it clear that courts are bound by Article 3(2) of the IPR Enforcement Directive, and notably the requirement to ensure that injunctive relief is effective, proportionate and dissuasive. IP2I agrees with the

Commission that consideration need to be given to the relative relevance of the disputed technology for the application in question and the potential spill-over effects of an injunction on third parties. Courts should also consider whether an injunction creates leverage beyond the value of the patent. Unfortunately, this is not the practice in most member states, a situation that directly contributes to the growth in PAE litigation.

- **Providing for clear and effective rules on the reimbursement of legal costs: IP2I welcomes the Commission's view that** Article 14 of the IPRED precludes national legislation providing for flat rates which are too low to ensure that, at the very least, a significant and appropriate part of the reasonable costs incurred by the successful party are borne by the unsuccessful party. To deter abusive litigation, defendants who successfully defend themselves against a PAE should be able to recoup a sufficiently significant amount of the costs they incurred. A security interest may be necessary to ensure that PAEs cannot be intentionally underfunded in order to avoid payment.
- **Greater transparency of patent litigation data:** IP2I welcomes the Commission's call on Member States to systematically publish judicial decisions in proceedings relating to IPR infringements and to step up work on the case law collection database launched by the EUIPO to make it as comprehensive and as user-friendly as possible. But this will only be a first step. All filings should be public so that policy makers can understand the full extent of the litigation environment.
- **Judicial training:** IP2I agrees with the Commission that there are differences in the way certain IPRED provisions (for instance on injunctions, damages and legal costs) are implemented and applied in practice. As a consequence, depending on where judicial proceedings are initiated, outcomes may be very different, both in terms of substance as in terms of efficiency or effectiveness. PAEs take advantage of these differences to initiate litigation in jurisdictions that give them the most leverage (for example, jurisdictions that issue automatic injunctions). To address this problem, IP2I agrees with the Commission that training sessions for judges are crucial. Judges who are more aware of the leverage created by the threat of an automatic injunction and the abusive litigation practices perpetrated by PAEs are more likely to exercise their judicial discretion in the granting of remedies to counter such abuses.

- **Monitoring the impact of PAEs in Europe:** IP2I welcomes the Commission's assessment that PAEs are becoming increasingly involved in the SEP licensing market and the Commission's undertaking to monitor the impact of PAEs on the SEP licensing market in Europe. The same trend can also be seen for non-SEP patents, and IP2I encourages the Commission to monitor the impact of PAEs on these patents too.

Practical implementation of the safeguards is critical to preventing abuses

The safeguards outlined by the Commission in its IP Package are an essential first step to prevent abusive litigation practices involving any type of patent, SEPS and non-SEPs. The key now is for the Commission to be clear that these safeguards apply to all patents and work with Member States, industry, the legal profession and the judicial authorities to ensure these safeguards are implemented and applied in practice.

Yours sincerely

Patrick OLIVER

Executive Director

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