

November 2018

Marika Lautso-Mousnier,
Member of Cabinet of Jyrki Katainen
European Commission Vice-President
for Jobs, Growth, Investment and Competitiveness

**Consistent application of IPRED proportionality requirement essential for
the functioning of the Single Market**

Dear Ms Lautso-Mousnier,

On behalf of IP2Innovate, I am writing to provide you with our comments to the upcoming Communication on the Single Market, which is currently being drafted by the Commission following a call from Member States to carry out an analysis on the state of enforcement and application of internal market rules and to suggest how to improve the functioning the Single Market.

[IP2Innovate](#) is a coalition of small and large companies that create innovative products and services in Europe and collectively hold thousands of European patents, as well as European industry groups that represent in total over 65 companies. IP2Innovate is concerned that imbalances in Europe's patent legal systems are being exploited by patent assertion entities (PAEs) to the detriment of Europe's innovators and the public.

We are convinced that our call to bring balance to Europe's patent legal system is particularly important in light of the upcoming Commission's Communication on the Single Market. The inconsistent application of the Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED) constitutes a barrier to the functioning of the EU single market and undermines the purpose of Europe's patent system, which is to support innovation and growth. The "IP Package" published by the Commission last November acknowledged the need to address the significant differences in the way the Directive is applied across Member States and correct those applications that are inconsistent with the IPRED's principles.

With regard to patent rights, IP2Innovate is particularly concerned that the requirement enshrined in Article 3(2) of the Directive that remedies shall be proportional is not properly applied in all EU countries. In most Member States it is a common practice for courts to issue an immediate permanent injunction upon a finding of infringement, without considering whether an injunction is the most appropriate and proportionate remedy in the circumstances of each particular case.

One consequence of the automatic granting of injunctions without consideration of proportionality is that the threat of an injunction by patent assertion entities (PAEs) is enough to force operating companies to pay high settlement fees regardless of the value of the infringed patent compared to the overall value of the product, and regardless of whether the allegedly infringed patent is valid. Operating companies give in to excessive demands from PAEs because they fear that their products will be removed from the market even though the goal of the PAE is to receive a cash payment.

The Commission's IPRED Guidance of November 2017 made clear that when considering remedies, "the competent judicial authorities should generally conduct a case-by-case assessment" of the specific features of the IP right and the character of the infringement. However, there are still divergent views among Member States on how the proportionality assessment should be conducted. In most Member States, the proportionality principle is simply not applied in patent infringement cases. We believe that there is a need for the Commission to work with Member States to offer further clarification on the proportionality assessment in patent cases by offering a list of factors that courts should consider in deciding what remedy to apply. This would promote consistency among EU Member States and bring balance to the patent system by avoiding disproportionate outcomes that harm innovation and discouraging abusive litigation practices. Such guidance would benefit the proper functioning of the single market.

In its Single Market Communication planned for November 2018, we urge the Commission to send a clear message to Member States that the consistent application of the IPRED, and in particular the proportionality requirement for remedies, is essential for the integrity and smooth functioning of the Single Market and serves the purpose of patent legal system to support innovation and growth.

Please do not hesitate to let us know if we could provide any further information that could be useful in the context of your work on the Communication on the Single Market.

Kind regards,

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