

Consistent application of proportionality requirement to patent enforcement is essential for the functioning of the Single Market.

Modernization of the EU IPR Enforcement Directive through targeted amendments is needed to fully exploit the potential of the Single Market to boost Europe's productivity.

IP2Innovate welcomes the opportunity to provide input to the European Commission as it develops its Single Market Strategy 2025. We are concerned that the inconsistent application of the proportionality requirement found in 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.

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 or by the new Unified Patent Court. 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 case¹.

Whilst some Member States have codified proportionality in their national laws, other Member States have not. This is likely to result in proportionality being applied in different ways in different Member States, and also within the Unified Patent Court thus undermining the coherence of the Single Market, creating legal uncertainty and market inefficiencies.

One consequence of the automatic granting of injunctions without consideration of proportionality is that the mere threat of an injunction by patent assertion entities (PAEs)² is enough to force operating companies to pay excessive settlement fees regardless of the value of the infringed patent compared to the overall value of the product³. Innovative companies give in to excessive demands from PAEs because they fear that their products will be removed from the market even though PAE's primary goal is to receive a cash payment.

The attacks by PAEs harm innovative operating companies – and ultimately the public – by creating a huge disincentive for investment in the R&D necessary to bring to market the next generation of innovative, including digital and green, products. These products are crucial to boosting Europe's productivity and competitiveness. SMEs are particularly vulnerable to such attacks, especially when a recalled product represents their sole source of revenue. Given the integrated nature of European business operations, with complex supply chains spanning multiple Member States, an injunction in one Member State can have cascading effects across

¹ An analysis of patent court rulings undertaken by Darts-ip for the period 01.1.2015 to 31.12.2020 shows permanent injunctions are granted effectively automatically, without any proportionality assessment, in over 99% of cases in which an infringement was found and injunction requested. Proportionality assessment was done only in 2 out of 628 cases (0.3%) in the EU countries.

² PAEs do not innovate and do not create and sell new products. They are financial vehicles that buy and assert patents against operating companies for the sole purpose of obtaining the highest possible payment. Sometimes they do so by abusing the imbalances in Europe's patent system, in particular the threat of injunctions which are granted effectively automatically in Europe. Evidence points to significant activity of PAEs in Europe: PAEs appear as current owners of almost 20K patent applications at the EPO (source: Non-Practicing Entities in Europe: an Empirical Analysis of Patent Acquisitions at the European Patent Office, November 2021). Eight of the top ten most active PAEs in the EU are based in the U.S. ICT accounts for 74% of the patents asserted by PAEs in the EU. (source: Clarivate report "2024 Non-Practicing Entity global litigation report - Analyzing NPE litigation behavior and outcomes from 2018-2023", May 2024). In the UPC, NPE initiated infringement cases in the ICT sector account for almost 30% of the total number of infringement cases. (source: The European Unified Patent Court and Non-Practicing Entities: A Year of Early Evidence, July 2024).

³ According to a brief by Copenhagen Economics - Economic implications of automatic injunctions in German patent litigation – in the Broadcom-Audi case the estimated settlement payment exceeded the value of the invention by more than ten thousand.

the entire Single Market. The issue has only become more urgent with the new Unified Patent Court's injunctions spanning numerous Member States at once.

The automatic grant of injunctions due to a lack of proportionality is an issue for all patents, including those patents that are essential to the use of standardized technologies (SEPs). In fact, the ability for innovative companies to use standardized technologies in their products – and the resulting benefits of interoperability for consumers – is being harmed not just by the lack of proportionality, but also by the lack of transparency and fairness in the licensing of SEPs. The European Commission has proposed an SEP Regulation to address SEP licensing imbalances and bring critically-needed information to the ecosystem, which is essential for the functioning of the Single Market. Equally important to the benefits that would be brought about by the SEP Regulation are those that would be experienced by the consistent application of proportionate remedies for all patents, SEPs and non-SEPs alike.

We believe that now is the time, 20 years after its adoption, to modernize the IPRED through targeted amendments to ensure that courts in the EU Member States and the newly established Unified Patent Court consistently and effectively consider the proportionality of remedies in their handling of patent litigation cases. Such targeted amendments would ensure the consistent and effective application of proportionality across all EU Member States, creating a more predictable legal environment that supports the free movement of goods and services within the Single Market. By fostering legal certainty and reducing market inefficiencies, these changes will unlock the full potential of the Single Market to drive Europe's productivity and competitiveness.

About IP2Innovate

[IP2Innovate](#) is a coalition of small and large companies that create innovative products and services in Europe and collectively hold thousands of European patents. Our members include Adidas, Apple, Amazon, ASML, Atos / Bull, BMW, Carl Zeiss, Dell, Deutsche Telekom, Freebox, Google, Intel, Microsoft, Nvidia, Proximus, SAP, Spotify and Xiaomi. Our mission is to bring balance to Europe's patent legal system so that it supports innovation, competitiveness and growth to the benefit of the European economy and society.

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