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9

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Practical and legal overview of the current patent landscape anno 2017

1 INTRODUCTION

The major objective of this analysis is to provide a legal and practical overview of the current patent landscape anno 2017.

A patent is a legal title granting its holder the exclusive rights to prevent third parties, from exploiting (i.e. making, using, offering for sale, selling or importing) infringing products without authorisation in a defined country and for a limited period.

This definition contains four main characteristics:

- exclusive right
- without authorisation
- defined country
- limited period of time

In return for this legal protection, the patent holder has to disclose the invention to the public.

At this point, there is an arsenal of international and European instruments dealing with patent law.

For example at international level, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the Paris Convention and the Patent Cooperation Treaty (PCT) should be taken into account.

At European level, the European Patent Convention (EPC) is the leading instrument.

Additionally, there is the Agreement on Unified Patent Cooperation which significantly contributes to the integration process in Europe, in particular to the establishment of an internal market within the European Union characterised by the free movement of goods and services and the creation of a system ensuring that competition in the internal market is not distorted. On top of that, it should be noticed that by virtue of Regulation (EU) No 1257/20121, patent proprietors can request unitary effect of their European patents so as to obtain unitary patent protection in the Member States of the European Union participating in the enhanced cooperation.

The legal instruments at national level fall beyond the scope of this research because they vary from country to country.

This analysis has been divided into three parts and begins by the practical steps for obtaining a patent. It will then go on to the examination of the validity of a patent. The last part is concerned with the granting procedure.

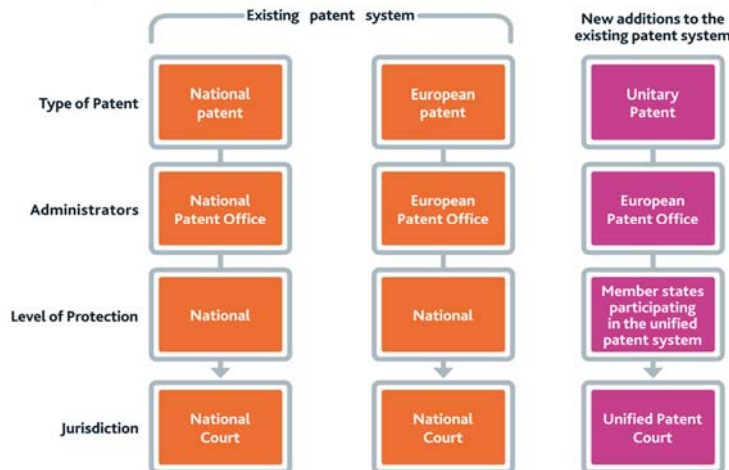
2 THE PRACTICAL STEPS FOR OBTAINING A PATENT

Currently there are four routes for obtaining a patent which might be combined:

- the 'international' route which results in an international patent;

- the ‘traditional’ European route which results in an European patent: the entire patent grant procedure is governed by the EPC alone;
- the ‘unitary’ European or Euro-PCT route which results in an European patent with unitary effects;
- the “national route” which results in a national patent.

Patent system in Europe



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3 EXAMINATION OF THE VALIDITY OF A PATENT

Step 1: Is it an invention?

In order to be qualified as an invention, it needs to be a technical solution for a technical problem.

Nevertheless, there are some technical solutions which are qualified as inventions (because they are solving a technical problem) but still not patentable because they are explicitly excluded from patentability.

Step 2: Fulfillment of the patentability requirements?

There are three substantive requirements: the invention needs to be novel, have an inventive step and be industrial applicable.

Finally, there is one procedural requirement, namely the invention needs enabling disclosure to the public.

4 GRANTING PROCEDURES: APPLICATION AND EXAMINATION

The granting procedure consists in an application and examination stage. The procedural steps depend on the chosen route:

- **National granting procedure**

The patent application is governed by national patent legislation and is filed with the national patent office.

- **European granting procedure**

The patent application is governed by the EPC and is characterized by one single application and examination procedure.

There are two main stages:

→ Examination of the formalities which is limited to a novelty search.

Result? A patent as filed in its unexamined form

- Substantive examination resulting in
Result? A patent as filed after examination

The examination procedure shall result in:

- Grant of the patent
- Grant of a patent but scope limitation
- Refusal of the patent

- **International granting procedure**

A common way of pursuing patent rights outside the home country is to file an international-type patent application, also called the PCT- application.

To pursue international patent protection, the candidate patent holder needs to file a priority patent application in his or her home country. The international patent application does not automatically lead to global patent protection but the patent holder needs to apply for patents in each of the countries and regions where patent protection is sought. Hence, there is only one application which launches the procedure in these national courts. The final decision is national.

After the international stage, the candidate patent holder has the choice:

- either he chooses the old-fashioned PCT - application route which follows the national procedure. This is the case when he wants to obtain patent protection in a few countries. The candidate patent holder pushes an international button and knocks on the door of the PCT which then starts the procedure at national level.
- - either he chooses the Euro-PCT route which involves an additional step known as the European validation. To pursue patent protection in Europe, the patent holder needs to file a single European patent application with the European Patent Office (EPO). In that case, the patent application generally follows the examination and granting procedure according the EPC.

5 ACTION REQUESTED

The LAP is invited to take **note** of this information.