The London Protocol and the Community Patent. Now or in 20 years.

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Warsaw

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JUSTIFICATION OF THE PATENT SYSTEM

WIN / WIN AGREEMENT

INVENTOR

EXCLUSIVITY

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- **EXCEPTION TO FREE COMPETITION**
- **LIMITED IN TIME**

SOCIETY

DISCLOSURE OF INVENTION

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- **CLEAR & COMPLETE**
- **SUFFICIENT TO WORK THE INVENTION**

EPC Art. 65 TRANSLATION OF EP

- Member States accepted to restrict their ability to file European Patents in 3 languages – English, French, German.
- EP would only be prosecuted in any of these 3 languages.
- Upon grant, MS were able to require a full translation of the EP into the official language of the MS (art.65).
- In this Agreement, some countries (those without EN, FR, DE as an official language) gave up their right to prosecute EP in their official language provided that upon grant they would be able to request a full translation into their official language.

I. LONDON PROTOCOL

- A further attempt by those Member States with an EPO official language to restrict the ability of the others to apply art. 65 EPC, i.e. their freedom to require a full translation into the official language of the MS.
- MS may require translation of only the claims into a MS official language.
- MS* may require a full translation only into one of the EPO official languages – English, French, German.
- MS may require a full translation into MS official language in litigation.
- Who is the winner? → US
  - Files 25.74% of EP → Saves a lot of translation.
  - The majority of EP are filed in English and several LP countries will require EP in DE or FR to be translated into EN.

** Except those MS with one of the 3 EPO languages as an official language who will accept the EP in the language it was filed in.*

ON LANGUAGES

- PATENTS AND LANGUAGES ARE VERY CLOSELY LINKED TO EACH OTHER
- INVENTIONS ARE DISCLOSED IN WORDS AND NEED TO BE UNDERSTANDABLE FOR ALL THE POPULATION IN THE PROTECTED TERRITORY
- PATENTEE IS RESPONSIBLE FOR PATENT TEXT:
  - Art. 83 EPC – The inventor should disclose the invention in a manner sufficiently clear and complete for a person skilled in the art to be able to work the invention
  - Art. 84 EPC – Claims define the scope of protection
  - Art. 69 EPC – Description & drawings shall be used to interpret the claims
- OBVIOUSLY THE PATENTEE SHOULD BE RESPONSIBLE FOR THE TRANSLATION AND SUFFER THE CONSEQUENCES OF ANY MISTAKE

→ LOSS OF PROTECTION (Art. 70 EPC)

ON LANGUAGES

- PATENTS GRANT EXCLUSIVE RIGHTS IN EXCHANGE FOR DISCLOSURE
- DISCLOSURE MUST BE DONE IN A FORM UNDERSTANDABLE TO THE ADDRESSEES
- THE FORM TO COMMUNICATE TO ADDRESSEES IN ONE COUNTRY IS IN THEIR OWN LANGUAGE (TV, BOOKS, NEWSPAPERS, ETC.)
- THE FACT THAT DISCLOSURE OF PATENTS IN THE OFFICIAL LANGUAGE OF THE COUNTRY IS A BURDEN FOR PATENTEES, IT DOES NOT MEAN THEY SHOULD SKIP THEIR OBLIGATION TO DO SO. THIS IS THE VERY RAISON D'ÊTRE OF PATENTS.

EUROPEAN PATENTS GRANTED IN 2006

Country of Origin	Total	%
Austria	656	1.04
Belgium	561	0.89
Bulgaria	4	0.01
Switzerland	2205	3.51
Cyprus	15	0.02
Czech Republic	21	0.03
Germany	14 274	22.74
Denmark	507	0.81
Estonia	2	0.00
Spain	361	0.58
Finland	885	1.41
France	4 498	7.16
United Kingdom	2 254	3.59
Greece	30	0.05
Hungary	35	0.06
Ireland	121	0.19
Iceland	7	0.01
Italy	2 317	3.69
Liechtenstein	134	0.21
Lithuania	0	0.00
Luxembourg	67	0.11
Latvia	2	0.00
Monaco	11	0.02
Netherlands	1 919	3.06
Poland	17	0.03
Portugal	19	0.03
Rumania	0	0.00
Sweden	1 501	2.39
Slovenia	21	0.03
Slovakia	8	0.01
Turkey	31	0.05
Partial Total	32 483	51.74
Japan	12 044	19.18
United States of America	14 834	23.63
Others	3 419	5.45
Partial Total	30 297	48.26
Total	62 780	100.00

WHO SHOULD PAY THE TRANSLATION COSTS?

- THE PARTY WHO OBTAINS THE RIGHT (PATENTEE) OR THE PARTY WHO MUST RESPECT IT (THIRD PARTIES)?
- PROPORTION OF TRANSLATION COSTS:

NON-EU MS = 52.06% { US: 23.63, JP: 19.18 }

EU MS {
- EE, LT, LV, RO } = 0% (4)
- BE : 0.89, BG : 0.01, CY : 0.02, CZ : 0.03, DK : 0.81, ES : 0.58, GR : 0.05, HU : 0.06, IR : 0.19, LX : 0.11, PL : 0.03, PT : 0.03, SI : 0.03, SK : 0.01 } < 1% (14)
- AT : 1.04, FI : 1.41, IT : 3.69, NL : 3.06, SE : 2.39, UK : 3.59 } < 4% (7)
- FR : 7.16, DE : 22.74 }

PROBLEMS OF LP FOR MS WITHOUT AN EPO OFFICIAL LANGUAGE

- Transfer of technology lost. Description contains the technical information sufficient to work the invention.
- Lack of legal certainty. Claims are interpreted with description. Equivalents (art. 69 EPC).
- Transfer of translation costs from beneficiary of exclusivity (patentee) to society, who loses the only benefit given to it by the patent system (transfer of knowledge and technology).
- Break of balance and loss of justification of the patent system in countries with an imbalance between EP filed and received.
- PL only has 17 EP (0.03%)[1] granted to its citizens compared to 62,763 (99,97%) from abroad and will be a clear loser if it ratifies the LP.
- Constitutional / Human rights obstacles.

[1] *EPO statistics for 2006.*

CONCLUSION I

- FOR POLAND THERE IS NO INTEREST TO JOIN THE LONDON PROTOCOL
- IT WILL MEAN FOR POLISH BUSINESS TO HAVE TO TRANSLATE 99.97% (62,763) OF EUROPEAN PATENTS INTO POLISH, PAID BY POLISH ENTERPRISES TO SAVE TRANSLATING 0.03% (17 PATENTS) INTO OTHER LANGUAGES
- IT WILL INCREASE LEGAL UNCERTAINTY ABOUT THE SCOPE OF PROTECTION OF EP IN POLAND FOR POLISH ENTERPRISES

COMMUNITY PATENT

OBJECTIVE: TO HAVE A SINGLE PATENT FOR ALL EU TERRITORY

PROPOSAL:

- PATENT OFFICE: EPO
- LAW: CP REGULATION APPLIED BY EPO
- COURTS: EUROPEAN COURT THAT WOULD ALSO DEAL WITH EP

REASONS:

- A SINGLE EXCLUSIVE RIGHT
- A SINGLE PROCEDURE TO ENFORCE IT

WHERE ARE THE PROBLEMS?

THE EU IS FORMED BY 27 MEMBER STATES EACH HAVING:

- ITS OWN GOVERNMENT
- ITS OWN LANGUAGE / LANGUAGES
- ITS OWN PATENT LAW & COURTS
- ITS OWN INDUSTRY WITH VERY DIFFERENT LEVELS OF DEVELOPMENT
- VERY DIFFERENT PRODUCTIVITY IN PATENTABLE TECHNOLOGY

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IT IS VERY DIFFICULT TO REACH A CONSENSUS ON A SYSTEM THAT WOULD BE USEFUL & ACCEPTABLE FOR EVERYBODY

THERE ARE NOT THE SAME NEEDS IN ALL MEMBER STATES

CONCLUSION II

- THE PATENTEE SHOULD BE RESPONSIBLE FOR THE TRANSLATION AND BE LIABLE FOR TRANSLATION MISTAKES (Art. 70 EPC)
- IF THE PROPOSED MACHINE TRANSLATION WORKS SO WELL, PATENTEES WILL BE ABLE TO USE IT AND SAVE TRANSLATION COSTS, BUT THIS SHOULD BE DONE UNDER THEIR RESPONSIBILITY.
- THE CURRENT LEVEL OF TECHNOLOGY DOES NOT PERMIT TO ANTICIPATE MAJOR ADVANCES IN THE FIELD, OTHERWISE TRANSLATION COSTS WOULD NOT BE AN ISSUE ANY MORE AND NOBODY WOULD TALK ABOUT THIS.

CONCLUSION III

- THE PROPOSED ARTICLE 24b FOR CP IS NOT ACCEPTABLE
- THE TRANSLATION SHOULD HAVE LEGAL EFFECTS

→ OTHERWISE THIRD PARTIES IN MS:

- Will not be able to receive the disclosure provided by Art. 83 EPC
- Will not be able to know the scope of protection (Art. 84 EPC)
- Will not be able to interpret the claims in light of the description (Art. 69 EPC)

CONCLUSION IV

- FOR 52% OF CASES (32,645 PATENTS) THE SAVING IN TRANSLATION COSTS WILL BENEFIT COMPANES OUTSIDE THE EU AND THE BURDEN AND COST WILL BE TRANSFERRED TO COMPANIES OF MEMBER STATES
- FOR 18 MS THE SAVINGS WILL BE CLOSE TO 0% AND INCREASE OF COSTS WILL BE CLOSE TO 100% (WILL HAVE TO TRANSLATE 62,780 PATENTS)
- FOR 7 MS SAVINGS WILL BE LESS THAN 4%
- FOR FRANCE THEY WILL BE 7%
- FOR GERMANY THEY WILL BE 22.7%

WHO ARE THE REAL WINNERS WITH THE COMMISSION PROPOSAL?

IS THE EPO THE MOST APPROPRIATE ORGANISM TO DEAL WITH CP?

- EPO IS NOT ABLE TO COPE WITH INCREASING NO. OF APPLICATIONS
- PARIS CRITERIA: 3 YEARS → NOW 6.5 YEARS
- PROPOSAL OF DEFERRED EXAMINATION OF EP
- RAISING THE BAR ON INVENTIVE STEP
- INCREASING OPERATIONAL COSTS OF EPO
  - PENSIONS
  - STRIKES
  - RECRUITMENT

  → INCREASE IN FEES

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  - LEGAL UNCERTAINTY
  - INCREASE IN PROSECUTION COSTS

CONCLUSION V

BEFORE GOING AHEAD WITH THE IDEA OF A CP GROUNDED ON EPO, IT WOULD BE BETTER TO SOLVE THE PROBLEMS WHICH ARE THE "REAL" PROBLEMS OF THE PATENT SYSTEM IN EUROPE:

- GRANT EP MORE QUICKLY & WITH GOOD QUALITY
- AT LOWER OPERATIONAL COSTS

THE CP WILL REPRESENT ANOTHER BURDEN FOR EPO THAT IT IS NOT PREPARED TO HANDLE

EUROPEAN AND COMMUNITY PATENT COURTS

- WHY FOR EUROPEAN PATENTS?

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  THEY ARE NATIONAL PATENTS AND SUBJECTED TO NATIONAL LAW

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  NATIONAL COURTS

- FOR CP, WHY DEVIATE FROM SOLUTION GIVEN TO CTM & CD?

EU DIRECTIVE 2004/48/EC ON ENFORCEMENT

- DATED 29/04/2004
- RECENTLY IMPLEMENTED
- ITS AIM WAS ADDRESSED TO HARMONISE THE ENFORCEMENT OF IP RIGHTS, INCLUDING PATENTS
- FOLLOWING THE PRINCIPLE OF SUBSIDIARITY THIS IS THE CORRECT APPROACH THAT WILL GUARANTEE THE RIGHT BALANCE BETWEEN PATENTEES AND THIRD PARTIES

WHAT ARE THE MAIN ARGUMENTS IN FAVOUR OF A CENTRALISED SYSTEM

- COST
- COMPLEXITY

} DUPLICATED LITIGATION

- LEGAL INSECURITY: RISK OF CONTRADICTING COURT DECISIONS IN DIFFERENT MEMBER STATES

HOW MUCH DUPLICATED LITIGATION EXISTS?

- NOBODY KNOWS
- Prof. Harhoff Study for EC: "THE EXACT EXTENT OF DUPLICATION IS UNKNOWN" (p. 15)
- EXPERIENCE SHOWS THAT THERE ARE VERY FEW CASES OF DUPLICATION
- MUCH CONCENTRATED IN A SINGLE SECTOR = PHARMACEUTICAL INDUSTRY
- IN PRACTICE DUPLICATION IS LIMITED SINCE:

1. IF PLAINTIFF ACTS IN DOMICILE OF DEFENDANT THIS IS USUALLY ENOUGH
2. EVEN IF IT IS NOT SO, LIKELIHOOD OF OBTAINING SAME RESULT IN A SECOND JURISDICTION IS HIGH → COERCITIVE EFFECT (THIS IS THE BASIS OF PATENT SYSTEM)
3. LIKELIHOOD OF COMPANIES OF MOST MEMBER STATES BEING INVOLVED IN PATENT LITIGATION IS AS DEFENDANTS
4. MOST EU COMPANIES ARE SMEs

DUPLICATION IS NOT A REAL PROBLEM FOR MOST EU MS

FOR MOST EU COMPANIES THE REAL PROBLEM IS TO HAVE A SYSTEM THAT:

- ENSURES RIGHT OF DEFENCE
- COURT IS CLOSE TO DEFENDANT'S DOMICILE
- IS AFFORDABLE: NOT TOO COSTLY

IMPORTANCE OF LANGUAGE OF PROCEEDINGS

- UNDERSTANDING OF SCOPE OF PROTECTION FROM THE BEGINNING, NOT AT TIME OF LEGAL ACTION
- AVAILABILITY OF LOCAL PATENT LAWYERS WHO UNDERSTAND & SPEAK LOCAL LANGUAGE FLUENTLY
- AVAILABILITY OF JUDGES AND TECHNICAL EXPERTS WHO UNDERSTAND & SPEAK LOCAL LANGUAGE
- AVAILABILITY TO ASSESS AND DEFEND THE CASE IN LOCAL LANGUAGE

MAIN PROBLEMS OF COMMISSION PROPOSAL

(I)

FORUM SHOPPING → { COUNTRY OF DEFENDANT OR PLACE OF INFRINGEMENT } → DETERMINATION OF LANGUAGE OF COURT PROCEEDINGS

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THE COURT AND LANGUAGE OF PROCEEDINGS SHOULD ALWAYS BE THE LANGUAGE OF DEFENDANT FOR A DECISION WITH EU EFFECT AS IN CTMs/CDs

MAIN PROBLEMS OF COMMISSION PROPOSAL

(II)

INVALIDITIES SHOULD ALWAYS BE DEALT WITH BY THE LOCAL/REGIONAL DIVISION NOT BY THE CENTRAL DIVISION

INVALIDITY AND INFRINGEMENT ARE VERY MUCH RELATED. DEFENDANT SHOULD BE ABLE TO DISCUSS VALIDITY IN HIS OWN LANGUAGE WHEN SUED

MAIN PROBLEMS OF COMMISSION PROPOSAL

(III) LOCAL DIVISIONS SHOULD BE AVAILABLE IN ALL MS AND WITHOUT LIMITATION ON NUMBERS

- NUMBER OF CASES IRRELEVANT
- PROBLEMS OF POTENTIAL DEFENDANTS
- SIZE OF COUNTRY, PROXIMITY TO DEFENDANTS

MAIN PROBLEMS OF COMMISSION PROPOSAL

(IV) NATIONALITY OF JUDGES

- JUDGES MUST MASTER
  - LANGUAGE OF PROCEEDINGS
  - ALL OTHER NON PATENT LAWS OF MS
- MULTINATIONAL PANELS → UTOPIC
- ENSURE GOODS PATENT JUDGES IN ALL MS

→ OBJECTIVE OF EU TO TRY TO LEVEL UP ALL MEMBER STATES, NOT TO INCREASE DIFFERENCES

MAIN PROBLEMS OF COMMISSION PROPOSAL

(V) COST

THE SYSTEM PROPOSED WILL BE MORE EXPENSIVE:

- COMPLEXITY OF NEW STRUCTURE
- COSTS OF JUDGES, LAWYERS IN SOME MS MUCH HIGHER THAN IN OTHERS
- LANGUAGE REGIME → TRANSLATION COSTS

FINAL CONCLUSION

- IN EU, MOST COMPANIES WILL BE DEFENDANTS. IN PL 99.97%
- MOST COMPANIES ARE SMEs → OWN FEW PATENTS
- MORE THAN 50% PATENTS IN EUROPE BELONG TO NON-EU COMPANIES
- ARE MORE LIKELY TO BE DEFENDANTS
- FOR DEFENDANTS, DUPLICATION OF LEGAL ACTIONS IS NOT A PROBLEM, PERHAPS AN ADVANTAGE
- THE SYSTEM PROPOSED WILL BE MORE EXPENSIVE THAN THE NATIONAL ONE
- EU COMPANIES, IN PARTICULAR SMEs, DO NOT NEED A CENTRALISED SYSTEM, THEY NEED AN IMPROVEMENT TO THE EXISTING NATIONAL SYSTEMS
- FOR THE CP, A SYSTEM LIKE CTM WOULD BE THE BEST OPTION

WITH THE LONDON AGREEMENT & THE COMMISSION PROPOSALS INDUSTRY IN POLAND WILL BE IN BIG TROUBLE

- TRANSLATION COSTS WILL BE TRANSFERRED FROM FOREIGN PATENT OWNER TO POLISH ENTERPRISES
- THEY WILL RISK BEING SUED BY TECHNOLOGY NOT AVAILABLE IN THEIR OWN LANGUAGE
- THEY WILL NOT BENEFIT FROM THE INFORMATION ORIGINATING FROM EP & CP
- THEY WILL RISK BEING SUED IN COURT:
  - ON THE GROUNDS OF RIGHTS NOT AVAILABLE IN THEIR LANGUAGE UNTIL THEY RECEIVE THE LEGAL ACTION
  - IN A FOREIGN LANGUAGE
  - BEFORE COURTS LOCATED FAR AWAY AND THAT DO NOT SPEAK THEIR LANGUAGE
  - BUT THE EFFECTS OF INJUNCTIONS WILL APPLY TO THEIR OWN COUNTRY AS WELL
  - LITIGATION COSTS WILL BE MUCH HIGHER THAN CURRENT COSTS (4-5 TIMES)

BOTH PROPOSALS LACK A SENSE OF REALITY AND PUT AT RISK THE FUTURE OF INNOVATIVE EUROPEAN INDUSTRY IN MOST MS