



European Semiconductor Industry Association

19 February 2014

POSITION PAPER

ESIA Comments on the Impact of Unified Patent Court on NPE litigation in Europe

Brussels, February 2014

I. Introduction

With the Unified Patent Court (UPC), a specialized patent court having jurisdiction over patent infringement and invalidity will come into existence in the EU. The UPC will have new procedures and will have local and regional divisions at various locations, some in Member States with little experience in patent litigation. There is concern however that companies dedicated to patent exploitation such as Non-Practicing Entities (NPEs) or *patent trolls* may use the UPC to their advantage, in the same way as NPEs are active in the USA.

II. The benefits of the UPC on patent litigation

The UPC will clearly change the balance between the efforts to be invested in patent litigation and its potential benefits. The need to conduct patent litigation in several Member States with different languages, different rules of procedure and different ways to provide evidence, will be replaced by a single procedure, covering an economic area comparable to the USA. In itself, this will be attractive for all patent owners and is likely to significantly increase the value of patents for which the UPC has jurisdiction. This may benefit NPEs, as they can by one procedure, address all activities of a defendant in the EU instead of a single Member State.

In addition, depending on the place or extend of the alleged infringement, litigation can be initiated in a location and language that is unfamiliar to the defendant, thereby creating pressure for an early settlement. According to UPC procedures, validity does not need to be considered during infringement procedures but, at the discretion of the local division, may be diverted to the central division. The possibility of an injunction adds to the attractiveness of

ESIA is an Industry Association of:

EECA : European Electronic Component manufacturers' Association

Rue de la Duchesse 11/13, B-1150 Bruxelles - Belgium

Tél: + 32 2 290 36 60 • Fax: + 32 2 290 36 65 • E-mail: secretariat.gen@eeca.be • Web: www.eeca.eu/esia/home

the UPC for NPEs as they don't have operational activities against which counter assertion is possible.

III. Impact of UPC on NPE initiated litigation

Despite above advantages for patent owners such as NPEs, ESIA believes that the UPC will be less attractive for NPE initiated litigation in comparison with US district courts. The UPC requires a well prepared case to be brought before the court. This means that the patent owner will have to invest in establishing proof of infringement, probably at the level of a detailed comparison between the patent claims and the infringing product or process. This is likely to act as a deterrent against infringement claims that cannot be well established. Also, in contradiction to the US, the UPC does not provide for an extensive "discovery" procedure, meaning that no costs need to be spend for this purpose by the defendant and avoiding cost pressures for early settlement. Moreover, the winning party is entitled to compensation of its costs, leading to a higher risk for the claimant. In fact, similar measures are currently discussed in the US in order to limit the damaging effects of NPE litigation.

Other measures in favor for a defendant against questionable infringement claims are the lower cost and relatively quick handling of the trial as well as the technically experienced judges. The above makes a procedure more predictable and a determined defendant can take the risk of a full trial without being forced in a settlement. Litigation initiated in a division in a region with little experience in patent litigation, would be possible, provided one of the countries in this region is place of infringement. First of all this means that a patent is in force. At least at the start of the UPC, patents in such areas may be rare in the semiconductor industry (Romania or Greece have less than 20 patent publications per year in H01L, vs. more than 2000 in Germany). If infringement is widespread, in particular occurring in the area of three regional divisions, the defendant can relocate the case to the Central Division. Finally, the higher cost of obtaining and maintaining patents in Europe will make patent owners earlier drop patents in which they see little value. Obviously, such patents are no longer available for stretched-out infringement claims.

IV. Conclusion

The UPC will make Europe a more attractive place for patent litigation and enhance the economic benefit of patents in Europe. Nevertheless, the legal barriers in Europe for a patent owner to initiate patent litigation at the UPC are still higher than in the USA, while the incentive for a defendant for an early settlement under pressure of the litigation itself is less. Accordingly, ESIA takes the position that these elements can provide a reasonable balance between the justified interests of a patent owner and those of an operating company, and that the benefits of the UPC, if reasonably implemented, may offset the disadvantage of increased NPE initiated litigation in the field of semiconductors.

For further information, please contact:

Hendrik Abma
Director General
European Semiconductor Industry Association (ESIA)
Tel: + 32 2 290 3660
Web: <http://www.eeca.eu/esia/>

ABOUT ESIA

The European Semiconductor Industry Association (ESIA) is the voice of the Semiconductor Industry in Europe. Its mission is to represent and promote the common interests of the Europe based semiconductor industry towards the European Institutions and stakeholders in order to ensure a sustainable business environment and foster its global competitiveness. As a provider of key enabling technologies the industry creates innovative solutions for industrial development, contributing to economic growth and responding to major societal challenges. Being ranked as the most R&D intensive sector by the European Commission, the European Semi-conductor ecosystem supports approx. 200.000 jobs directly and up to 1.000.000 induced jobs in systems, applications and services in Europe. Overall, micro- and nano-electronics enable the generation of at least 10% of GDP in Europe and the world.