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**The EU Patent Package
- how Poland changed its tune**

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CHRONOLOGY OF EVENTS

1. Initial enthusiasm

- **12.2010-03.2011** – Poland in the Enhanced Cooperation's initiative group (12→25)
- **07-12.2011** – Polish Presidency
- **09-12.2011** – UPC Agreement progress and another failure
- **22.12.2011** – planned signing ceremony of UPC Agreement in Warsaw (a ballroom in the Warsaw Royal Castle booked)

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"The Polish Presidency was ill-advised to rush the negotiations on this agreement with a view to a signing ceremony taking place in Warsaw on 22 December..."

"The Polish Presidency was ill-advised to prevent substantive amendment of the re-draft of the agreement..."

House of Commons, European Scrutiny Committee's report, 05.2012

CHRONOLOGY OF EVENTS

2. First symptoms of the change

- **01-02.2012** – ACTA debate and ACTA on Polish streets / launch of the Internet Freedom Congress
- **02-04.2012** – involvement of the Parliamentary Commission of Innovation and Modern Technologies
- **05.2012** – start of the media offensive of the anti-Package alliance (Polish Chamber of Patent Attorneys, the most important business organizations, other NGOs, distinguished IP law professors, scientists and students, politicians – Parliament and EP members, etc.)
- **06-11.2012** – the time of quarrels and compromises in the EU

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"The attempts to justify the new solutions by the Ministry of Economy show that the perception gap of the decision-makers is deeper than the technology gap which exists between our country and the leading European economies. "

Open letter of the Polish IP law professors, 05.2012

CHRONOLOGY OF EVENTS

3. The real change of tune

- **12.2012-02.2013** – second offensive of the anti-Package alliance
- **06.12.2012** – Deloitte report eventually made public → the Parliamentary Commission takes another action
- **17.12.2012** – EU Regulations adopted – Poland still in the game but the new Minister of Economy raises his doubts and concerns
- **23.01.2013** – meeting with industry reps in the President's Chancellery
- **19.02.2013** – (non)signing of UPC Agreement
- **20.03.2013** – the new position officially announced in the Parliament

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"The problem remains..."

"We have to make it clear that this decision (...) means for us the need for very intensive work."

"Mere satisfaction from the fact that we stay on the outskirts of the process, because we believed it was a better solution, cannot make us stop doing our homework."

Janusz Piechociński, Deputy Prime Minister and Minister of Economy,
20.03.2013

Art. 18(2) of Regulation 1257/2012

By way of derogation (...), a European patent for which unitary effect is registered (...) shall have unitary effect only in those participating Member States in which the UPC has exclusive jurisdiction with regard to European patents with unitary effect at the date of registration.

Rec. (25) of Regulation 1257/2012

It is (...) of paramount importance that the participating Member States ratify the Agreement on a UPC in accordance with their national constitutional and parliamentary procedures and take the necessary steps for that Court to become operational as soon as possible.

EFFECTIVE ARGUMENTS

1. Overall condition of the economy and innovation

- "Generic" industry (recipient, not creator of new technologies) / non-inventive micro and SMEs (99.8%)
- Disproportion between the state of innovation / technological potential in Poland and in the highly developed countries – who will be the actual beneficiary of the System? (asymmetry of benefits)
- Burden on the business and the science – costs of patent clearance, costs of disputes, costs of licences, etc. (to be shifted to consumers?)
- Lack of the legal security and restricted freedom of business operation
- As a result – barrier for development of the entrepreneurship / innovation and reduced chances of catching up highly developed countries

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European patents granted in 2012

- PORTUGAL – 30
- **POLAND – 80**
- SPAIN – 405

- FRANCE – 4,803
- JAPAN – 12,852
- GERMANY – 13,321
- USA – 14,699

European patent applications in 2012

- PORTUGAL – 139
- **POLAND – 552**
- SPAIN – 2,526

- FRANCE – 12,159
- GERMANY – 34,167
- JAPAN – 51,693
- USA – 63,504

- SAMSUNG – 2,289
- SIEMENS – 2,193
- BASF – 1,713
- GE – 1,702
- LG – 1,635

European patents granted in 2012 (in total)

- 65,687

European patents validated in Poland in 2012

- 6,710 (10.2% of the total number)

Patents in force in Poland at the end of 2012

- 41,233 (in total)
- 22,877 (EPs)

European patents with unitary effect after 20 years

- 65,000 per 1 year → 1,300,000 after 20 years (???)

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"Adoption of the unitary patent by Poland is as if the disabled requested liquidation of the Paralympics, because they want to compete with other athletes, additionally paying for organization of the Games."

Prof. Stanisław Sołtysiński, press conference, 05.2012

EFFECTIVE ARGUMENTS
2. Language-related problems

- Discriminatory rules
- Contradiction with the basic principle of the patent system (disclosure and access to knowledge)
- Burden of translation costs shifted to weaker market operators (at their own risk)
- Lack of the legal clarity and certainty (no legally binding translations)
- Downsides of machine translations
- Transition period – insufficient safety tool

EFFECTIVE ARGUMENTS

3. Unbalanced court system

- Language issues (foreign language of proceedings possible even in local division, if any; credibility of translations submitted by plaintiffs, etc.)
- Courts in other countries competent to deal with Poland-related cases (not only invalidations and appeals)
- Cost-related issues (fees, foreign attorneys, travel expenses, etc.)
- Strong weapons for patent proprietors and limited defences for alleged infringers

EFFECTIVE ARGUMENTS

4. Lower costs – illusion

- Lower costs – yes, but for whom? (the question of perspective)
- Existing EPO fees – no change
- Must every EP be protected in all 25/27 MSs? (average validation – 6 countries; usually – 3-5 countries)
- Unknown renewal fees (5-7 countries?)
- Are the high costs of the patent protection real barrier for innovation?
– what about the costs of R&D, infrastructure, implementation, commercialization + absorption capacity of the economy?

EFFECTIVE ARGUMENTS
5. Complexity and obscurity of the System

- Multi-layered legal structure (international – EU – national)
- Fragmentation of patent protection in the EU (territorial and substantive)
- Insufficient exceptions and limitations → the risk of dysfunctional and anti-innovative patent practices
- Inherent ineffectiveness of the UPC + continued forum shopping

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"The shift from a unitary and autonomous EU patent right to the hitherto unknown, hybrid creature of a 'European patent with unitary effect' casts doubts on the legal quality of the patent protection thereby afforded."

Max Planck Institute, *The Unitary Patent Package: Twelve Reasons for Concern*, 10.2012

"The multiplication of compromises has resulted in an unworkable solution which industry will no longer wish to use because of serious drafting errors of people who obviously have no practical experience in patent litigation and are not interested in any advice of those who have."

Dr. Jochen Pagenberg, open letter to President Van Rompuy, 05.2012

EFFECTIVE ARGUMENTS
6. The threat of patents as such

- Threat of patent hypertrophy (65,000 per year?) and patent blockade
- Quality of patents granted by EPO
- Threat of patent thickets and patent trolls (anti-innovative practices)
- Patent wars in the EU
- Enhanced enforcement measures ("ACTA bis"?)
- Negative impact on the public health sector (up to 0.5 bn EUR – estimated cost for the National Health Fund in 5-year perspective)

EFFECTIVE ARGUMENTS

7. Contradiction with the Constitution and EU Treaties

- Exclusive jurisdiction of a supernational court
- Language regime
- The right to a fair trial
- Art. 118(1) TFEU as an incorrect basis for the System (no uniform patent protection throughout the Union)
- CoJ EU partially deprived of excercising its judicial review

DELOITTE REPORT

1. Basic assumptions

- Even if Poland does not join, the System will enter into force in other 24 MSs and Polish businesses will anyway be able to take advantage of it
- The situation when the System does not enter into force in all other 24 MSs, or in some of them, was not taken into account
- Two Options were considered: **0** – Poland does not join the System / **1** – Poland joins the System (three scenarios: optimistic, moderate, pessimistic)
- Only those costs and benefits which differ between the Options were taken into account

DELOITTE REPORT
2. Simulation of costs

- Costs resulting from:
 - court proceedings (fees, lawyers, translations, travel, damages) – 5x higher
 - licence fees (incl. cessation of activities or other settlements) – 90-180% higher
 - patent clearance – 10-40x higher
 - adjustment to the System (trainings, UPC local division) – 25x higher
- Costs which are the same irrespective of the Option:
 - patent application and maintenance fees
- Not taken into account:
 - costs resulting from provisional and protective measures
 - costs resulting from cessation of alleged infringements exceeding licence fees
 - probable increase of EPs validated in Poland when it is out of the System (operating in all other participating MSs)

DELOITTE REPORT
3. Simulation of profits

- The only difference between the Options (**160 mln EUR** in 20 years / **310 mln EUR** in 30 years):
 - State budget revenues resulting from distribution of the fees paid to EPO
- Other profits (for businesses) the same, irrespective of the Option:
 - monopoly for use of a patented product/solution
 - revenues from patent licences and transfers
 - image-related advantage
 - access to new markets
 - opportunity to commercialize inventions
- Not taken into account:
 - improvement of the investment attractiveness of Poland as the country within the System

DELOITTE REPORT
4. Final calculation

Moderate scenario (costs only):

20-year perspective: Option 1 – **12.7 bn EUR** higher than in Option 0

30-year perspective: Option 1 – **19.0 bn EUR** higher than in Option 0

Moderate scenario (costs – profits = the net effect):

20-year perspective: Option 1 – **12.5 bn EUR** higher than in Option 0

30-year perspective: Option 1 – **18.6 bn EUR** higher than in Option 0

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"Taking into account only those benefits and costs which differ between the options (...), according to the estimations, a more beneficial is Option 0 (non-implementation of a unitary patent in Poland and non-accession to the Agreement on a Unified Patent Court), irrespective of time perspective or scenario of the development of innovativeness of Polish businesses."

Deloitte, Analysis of prospective economic effects related to the implementation of the system of unitary patent protection in Poland, dated 10.2012, disclosed 12.2012