



8 February 2018

## **EPO CONSULTATION ON USER DRIVEN EARLY CERTAINTY (UDEEC) PROPOSAL**

BUSINESSEUROPE has taken notice of the proposal from the EPO to introduce the possibility for applicants to postpone the start of substantive examination for a limited period of time, called User-Driven Early Certainty.

BUSINESSEUROPE would like to provide some preliminary views on this proposal as it is expected to be discussed in a consultation meeting on 9 February 2018 and an upcoming Patent Law Committee meeting on 20 February 2018.

The proposal states that it is a response to a request from certain users. Even though this may be coming from specific users, BUSINESSEUROPE as the Confederation of European business, did not initiate this debate. Despite this we are aware that the proposal may be more attractive to some sectors rather than others.

We do not rule out that the proposal of the EPO might have some advantages especially for patent applicants developing products in the area of cutting-edge technology. At the same time, these would be disadvantages for their competitors.

The adoption of this proposal would be a substantial unprecedented change in the nature of the EPO as it was set up 40 years ago. In this context, one member federation has brought forward the concern that the proposal would mean a change in the compromise language system adopted by Member States of the European Patent Convention (EPC) and imply a change in the EPC.

This is why, BUSINESSEUROPE feels that it is necessary to fully analyse the potential effects, advantages and disadvantages of such a proposal before a final decision is taken.

Consequently, as a minimum this decision should be taken by the Administrative Council with the involvement also of the Budget and Finance Committee.

In the document, we read that only 10% will use the option of postponing examination. We question this assertion for several reasons, e.g.:

- The evidence is insufficient.
- The basis of the proposal is that it will apply on exceptional cases. But this does not take into consideration the “collusion effect” namely the impact of decision of an actor to others. For example, if a party has no intention to use it and if a competitor will use it, then ultimately that party will also use it.



As the European Commission does before proposing new legislation, a detailed impact assessment study should be made ideally by an independent body including interviews with companies, users and civil society about the possible consequences as well as a full assessment of the results of current ongoing initiatives, e.g. Early Certainty from Examination actions.

The patent system must take into account the interests of patent owners and of third parties. The examination exists to guarantee that exclusive rights are granted only to inventions that are new and have an inventive step.

If the proposed reform was adopted, it would change the balance between patent owners and third parties. A deferred examination could risk legal uncertainty for third parties and have negative implications on competition law.

One could also interpret this proposal as having been made at the request of industry and immediately accepted by the EPO. As a result of such an assumption, BUSINESSEUROPE is concerned about the potentially negative impact on the overall perception of the patent system by the European institutions (e.g. European Parliament) and civil society.

We are also wondering to what extent this is in line with the Paris criteria that have been decided by an inter-governmental conference.

None of the other IP5 Offices accepts a deferral beyond 3 years from the filing date (i.e. only 18 months are left when entering the national phase). Applied to a Euro-PCT application entering the EP phase, this would mean around one-year deferral.

We are concerned that the consequences of the reform could be significant. Hence, we advise not to rush towards entry into force of this proposed new procedure by 1 July 2018.

Still if a proposal is adopted after an impact assessment study, measures will be necessary to make sure that the reform does not go beyond the expectations and has no unintended negative effects.

BUSINESSEUROPE looks forward to collaborating with the EPO on identifying the needs and impacts of this key issue for companies before a final decision is taken by the Administrative Council.

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