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WHILE THE UNIFIED PATENT COURT WAS SLEEPING: HOW TO INVALIDATE A EUROPEAN PATENT CENTRALLY

In a decision published in March 2020, the German constitutional court has decided that the German ratification of the agreement on a Unified Patent Court violates the German constitution, because the ratification did not pass with the parliamentary majority required under German basic law.

Nevertheless, this does not mean that it is currently not possible to challenge the validity of a European patent by means of a centralized procedure. In fact, ever since its inception the European patent system has allowed any third parties to file an opposition against the grant of a European patent at the European Patent Office (EPO).

In opposition proceedings, the validity of the opposed European patent is reviewed by a panel of three EPO Examiners who have extensive experience in opposition proceedings.

In opposition proceedings, the validity of a European patent can be challenged mainly on the following grounds:

- The subject-matter of the European patent falls within the few categories for which the European Patent Convention provides that no patents shall be granted;
- The subject-matter of the European patent is not novel or inventive over the prior art;
- The subject-matter of the European patent is not industrially applicable;
- The European patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art;
- The subject-matter of the European patent extends beyond the content of the application as filed.

During the opposition proceedings, the patent owner and the opponents have the right to file briefs and to request to be heard at a final hearing held before the Opposition Division. These hearings usually last several hours, often last up to an entire day, and occasionally last more than one consecutive day.

Any decision taken by the EPO Opposition Division at the end of the hearing can be appealed before the EPO Boards of Appeal, whose members are highly experienced professionals. Their task is to review the Opposition Divisions' decisions for their legal and procedural correctness.

If at the end of opposition and subsequent appeal proceedings a European patent is declared invalid (i.e. it is revoked), this revocation decision is immediately and automatically applicable in all states designated by the opposed European patent.

Similarly, if at the end of opposition and subsequent appeal proceedings a European patent is declared valid (with the claims as granted or on the basis of amended claims submitted during the opposition proceedings), this decision also is immediately and automatically applicable in all states designated by the opposed European patent.

Thus, the European patent system already provides a unified, efficient and highly impactful procedure for third parties to challenge the grant of a European patent, even as we wait for the Unified Patent Court to come into force.