

## **Resolution on a Central European Patent Court**

### **I.**

1. EPLA welcomes the proposal of the EU-Commission regarding the Community Patent Regulation. Based on the practical patent litigation experience of its members with (national and European) Patents, EPLA would like to contribute to the creation of a Community Patent related court system which is of high quality, is reasonably swift and which achieves its results with reasonable costs for both parties concerned (i.e. the claimant and the defendant).
2. EPLA is concerned about the prospect of possible duplication of patent-related court systems arising out of the parallel plans of the EU-Commission (regarding the Community Patent) and members of the European Patent Convention (regarding a Protocol to that Convention).
3. The EU-Commission has stated that after the Regulation (EC) No. 44/2001 of the Council of December 22, 2000 the competence for establishing a patent-related court system in Europe lies with the Community. If this view is legally correct, EPLA is of the opinion that the efforts should be concentrated on the Community Patent system. It urges EU-member states to cooperate in Council deliberations on the draft Community Patent Regulation, so that the time limit set by the Presidents of the Council (end of the year 2001) can be met. Correspondingly, EPLA, in this Resolution, states its opinion only regarding the Community Patent system as proposed by the EU-Commission in the draft Community Patent Regulation. However, the Resolution is relevant also to the European Patent Litigation Protocol Proposals.

## II.

4. The Community Patent related court system must be designed in such a way that the centralisation envisaged is effective regarding its possible benefits (i.e. community-wide protection with an adequate and predictable scope of protection) and, at the same time, the Community Patent related Court System should avoid a prolongation of procedures caused by a bottle-neck situation such as that presently experienced in the patent-granting, opposition and appeal procedures before the European Patent Office. A patent owner who has finally gained his patent through these lengthy procedures expects to be able to enforce his valuable right against an infringer in a reasonably swift and affordable litigation procedure. These **practical** aspects must, in the opinion of EPLA, dominate all decisions regarding a Community Patent related court system.
5. Given these aspects, the personal and cost-related predictions and estimates of the EU-Commission on page 68 of its draft Community Patent Regulation are, as seen from the experience of EPLA-members gained in all major patent-litigation EU member states, grossly understated. If one takes into account the annual number of decisions of a member of an EPO-appeal board, who is dealing only with the question of validity and not, as in the litigation court, also with questions of infringement, leaving aside other possibly complex legal questions regularly arising in patent-litigation, the assumption that a chamber of three judges could deal with 200 litigations per year is clearly unrealistic. EPLA estimates that in order to be able to decide the estimated 1000 patent cases per year, a single central court of first instance, burdened with a widely underestimated language problem, would need more likely between 50 and 100 judges. Such a number of judges, who are experienced in patent cases and able to understand the major languages of the Community (in a wide range of different technical fields) does not exist.
6. Weighing the possible benefits of centralisation (see 4 above) against the probable bottle-neck effect of centralisation already on the first-instance level, it is prudent to confine centralisation – at least for a long initial phase – to a higher instance. The decision of such a higher instance would have a guiding effect on the first instance decisions and would, therefore, achieve, to a large practical extent, a harmonizing effect also regarding the level of first instance. Since in all major patent-litigation EU-member states about 70 % of all patent litigation cases are definitively decided by the first instance court, the higher instance could concentrate on the 30 % of cases which are usually of a more difficult nature and require special attention.

## III.

7. The Community Patent related court-system should, in the opinion of EPLA, take account of the existing systems of protection of IP-related rights on the Community-level, such as:
- plant variety protection (Art. 101 Regulation 2100/94 of July 27, 1994), which is close to the patent-protection of technical inventions, and
  - the protection of the Community Trademark (Art. 93, 94 Regulation 40/94 of December 20, 1993).

8. Both existing systems provide for
- Community-wide protection by a single judgement, if the action is started in the state of the seat of the defendant;
  - the possibility of Community-wide preliminary measures regarding all member states where an infringement is taking place; and
  - the possibility of starting an action on the merits in every state where an infringement is taking place.

These systems allow for internal “competition” of legal and judicial systems which tends to achieve the best possible result. They are at the same time balanced, because they take due regard of the legitimate interests of the defendant.

9. This is another reason for limiting a centralisation (meaning a single court on one level) to a higher instance, as it is successfully provided for in the Trademark System by the guiding role of the European Court of Justice.
10. The Community Trademark-System has only to a limited extent established European rules regarding procedural and material questions (especially sanctions). The TRIPs-obligations of both the Community and the EU member states make it possible to “harmonise” such rules to a larger extent. The Community Trademark System could (and should) be amended accordingly.

11. The following measures could be adopted in the Community Patent Regulation to harmonise Community Patent enforcement. These measures would, at the same time, additionally justify the decision to limit court-centralisation (meaning a single court for the Community) to a higher instance:
- a) A concentration of jurisdiction to one or few specialised Community Patent Courts with national presence in each member state or group of member states;
  - b) the possibility of an appeal to a central European Patent Court;
  - c) uniform rules on the scope of protection;
  - d) uniform rules on the sanctions (including damages; Art. 45 TRIPs, and damages for misuse of sanctions, Art. 48 TRIPs);
  - e) uniform rules on assignment and licensing;
  - f) uniform rules on civil procedure (including provisional protective measures, Art. 50, 57 TRIPs);
  - g) uniform rules on pre-trial and in-trial evidence (Art. 34.1, 43 TRIPs);
  - h) uniform rules on obligations to provide information (Art. 47 TRIPs);
  - i) adoption of the competence-rules of the CTM (see no. 8 above); and
  - j) regulation of the relationship between the negative action for non-infringement and the positive action on the merits by amending Regulation 44/2001.
12. A basic proposal along these lines was adopted by AIPPI in Melbourne and would have the following effects:
- a) More than 70 per cent of the patent litigation cases would be definitively decided by the Patent Courts of first instance, because this percentage is the average in national courts.
  - b) The uniform rules according to no. 11 above would make it possible to leave first instance litigation close to the place of conflict.
  - c) There would continue to be a healthy competition for quality, speed, effectiveness and costs between the courts the claimant may choose.
  - d) Small and medium-size enterprises would favor such a system over a central court already in the first instance.

**Congress 2004****Resolution regarding privilege**

The European Patent Lawyers Association,

- (1) considering that, in most European countries, attorneys-at-law and patent attorneys enjoy professional privilege for the efficient representation and protection of their clients,
- (2) considering that the concept of privilege is also acknowledged at Community level,
- (3) considering that privilege is desirable in that it ensures total freedom of communication between client and counsel, without which the latter cannot fulfill their roles,

RECOMMENDS that countries which do not recognize privilege adopt legislation granting privilege against compulsory disclosure of legal advice or request for legal advice by or to attorneys-at-law and patent attorneys,

CONSIDERS that the invocation of privilege is a right and that no adverse inference should be drawn from the exercise of this right,

CONSIDERS/RECOMMENDS that wherever counsel enjoy privilege in their own countries, it should be recognized and enforced also by foreign Courts.

Brussels, 8 November 2004,

The Secretary

The President

Fernand de Visscher

Kevin Mooney