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Community Patent « Common political approach » EPLA Position paper

The European Patent Lawyers Association (EPLA) comprising lawyers with many years experience in European Patent Law litigation welcomes the breakthrough achieved in the EU Council in creating a Community Patent. European patent litigation lawyers and their international clients have awaited the establishment of such a Community-wide patent right for more than 30 years. By adherence to the European Patent Convention the Community offers inventors the option to choose between the traditional "European Patent" offering, by a central grant through the European Patent Office, a bundle of national patent rights on the one hand and the new unitary Community Patent covering the entire Common Market on the other hand.

The choice which inventors will make will largely depend on the quality which the Community Patent system can offer, and this quality will be determined by the cost of obtaining and maintaining a Community Patent and by the cost and the speed of the Community Patent Court which will decide infringement and nullity proceedings.

Regarding the structure of the Community Patent Court, the Council, until now, has not followed the European Parliament Resolution that the first instance should consist of regional courts with a central appeal court giving guidance to their decisions which was also the unanimous advice of European patent litigators represented by EPLA. Instead, the Council has opted for a central court of first instance for all Community Patents. The Council, thus, went further than the court system in the United States, where patent cases are heard, in the first instance, by different Federal Courts and, on appeal only, by a central appeal court and is not coherent with the court system for Community Trademarks, Designs and Plant-Breeders-Rights (entrusted to the national courts of member-states). The solution favoured by the Council will, as EPLA and its members expect, deter many inventors, especially small and medium size firms, from using the Community Patent system.

- Patent owners will generally prefer to use a court nearby – which for many would seem to be less costly – and therefore have a tendency to choose the EPC bundle patent instead of a Community Patent. They might also want to cooperate with their known and trusted patent litigation lawyers representing them in a first instance litigation. If they have to carry the costs of sending them to a central court of first instance they may well rather choose the less costly alternative of continuing to use the EPC-bundle-patent giving them the opportunity to use a court nearby.
- A single central patent litigation court for the Community patent will offer no solution in the event of over-long procedures, or bottle-necks, in such a central court. Under the present system of the EPC-bundle-patent the patent-owner may choose the court giving the most speedy procedures. A kind of healthy "competition" of the first instance national courts has reduced the duration of first instance procedures in some of the EPC-member-states to 6 - 9 months. If the proposed system has only one central first instance court the patent owner has to make use of such a court, even if the duration of patent litigation procedures exceeds 1 or 2 or even 3 years as is quite often the case in the appeal procedures in the EPO and in the Alicante Office (for Community Trade marks) or – closer to the problem – in the procedures before the CFI and the ECJ. A bottle-neck situation almost certainly will arise because of the language and translation problems in invalidity and infringement cases.
- Without a choice between different courts and without competition between them as a guarantee of speed and quality, and in particular without the possibility to litigate close to the place of infringement, the future Community Patent will lack important features which users want. Here again the US system can be cited as an example: Although the US do not have specialized courts, a number of courts/judges have specialized in patent law and developed an especially fast procedure which has led to a concentration of patent litigation in these courts. The central Court of Appeal is there to ensure harmonization. One must not overlook the possibility that, if in Europe there is no choice within the system, users will choose between the available systems which may lead to a failure of the Community Patent.
- The belief that harmonization and predictability of decisions can only be achieved with a first instance central court is contradicted by the practice in different areas. How different chambers within the same institution may decide can best be demonstrated by the Boards of Appeal in Alicante and also in the EPO. On the other hand, with a competent and experienced appeal court a predictable case law can develop as can be demonstrated by the practice of the German Supreme Court in patent cases.

- EPLA, for this reason, proposes, as a first step, that the interim-period (planned to end "at the latest by 2010") be extended for a period sufficient to allow existing resources in the Community to demonstrate how they can contribute to the success of the Community patent. As the Community Patent will have, for cost reasons, a slow start, the period until 2010 is not long enough for such a practical demonstration.
- Such an approach will certainly be more in line with the Principle of Subsidiarity. It is, above all a safer and more practical proposal.

EPLA offers its and its experienced members advice in finding good practical solutions concerning the questions discussed. EPLA further offers its advice for the great number of detailed questions still to be solved in creating the first civil law court system and civil procedure law system in the EU.

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