Latest developments on EPLA

by Dr. Jochen Pagenberg

1. The Commission Communication of 29 March 2007

In view of the intervention of the French Government in the last months of 2006, the EU Commission had decided to postpone the announced Communication on the Future of European Patent Policy which originally had aimed at a mandate for the Commission in order to participate in the work of EPLA. Only with three months delay the Commission Paper was published. It contained on three pages a summary of EPLA ("A"), of the French proposal ("B") and an alleged Commission compromise ("C").

The Paper was received by industry, the interested circles and several governments with disappointment, since it did not contain any concrete proposals and lacked explanations as to which court structure, which specific courts and which judges would be chosen for the "decentralized system". It remains unclear until today whether the French proposal or the Commission proposal would be compatible with the EU Treaty.

2. Questionnaire of German Presidency of 23 April 2007

The German Presidency then decided to prepare a questionnaire for the 27 member states in order to obtain more details about the courts in the member states which deal with patent infringement, the number of cases and number of (specialised) judges. The results of the answers to this questionnaire which were distributed as an Annex to a paper of the Portuguese Presidency dated July 12, 2007 were very interesting:

- 14 countries have less than 10 patent cases per year,
- about half of them have not had one case over many years
- only 4 countries have more than 100 cases per year

3. Paper of the Portuguese Presidency of 12 July 2007

The Paper of the Portuguese Presidency of July 12, 2007 discusses points of the Commission's *"Proposal C"* accepting that the first instance should be *decentralized*. However, it assumes that there are different degrees of decentralization imaginable, reaching from a small number of decentralized chambers in *only a few countries* to a reduced number of national courts in *each* country, according to the proposal of the Community Patent Regulation - and similar to the Community Trademark Regulation. The latter proposal would have the result that "specialized" patent tribunals would be available in all member states, with the advantage that the official language of the member state could be used.

However, since this proposal would also have the result that inexperienced courts could be used to invalidate patents European-wide.

The Portuguese paper has taken over from the Commission paper an unacceptable rule: the idea of an allocation of cases by a central unit among the different regional chambers. This would create a constitutional problem for a number of countries since it constitutes a violation of the principle of the *legal judge*. This question had already come up – and was rejected - in the early years of the EPLA discussion.

The Paper also considers again the translation question for the Community Patent with a possibility of member states to renounce on translations into their official languages in exchange for financial incentives. It also mentions the "English only" rule which had been put forward by some business organisations, but everything is still far from definite. The paper also mentions the possible use of a European machine translation program on which the EPO is presently working.

4. Munich Symposium and Outlook

It seems that time is running out for the Commission since companies are becoming impatient in view of the low pace of the Commission which seems to forget the clearly expressed wishes of the users during the hearing on July 12, 2006 in Brussels.

On 25 and 26 June 2007 a *Munich Symposium* was organized by the Federal Patent Court. At the well attended conference also some top international patent judges from three continents as speakers (Jacob (UK), Jian Li (China), Meier-Beck (Germany), Mimura (Japan), Randall (USA)), as well as members of the EPLAW Board (Franzosi, Mooney, Pagenberg).

The German Minister of Justice, Ms. *Zypries,* expressed her disappointment with the progress achieved and warned the audience that she would opt for definitely stopping the whole discussion and devote the resources to other projects.

Ms. Fröhlinger, the new Director for industrial and intellectual property within GD Internal Market said that the necessity to involve the EU is not a matter of the *acquis* but a question of the competence for this field of jurisdiction, which in view of the mixed competence of member states and the EU requires a qualified majority.

Lord Justice *Jacob* warned against a dilution of EPLA - which Justice *Meier-Beck* of the German Federal Supreme Court had referred to as *the only realistic alternative* to the present situation -, when he said there is no point in changing *unless we can produce something better.*

It was therefore not surprising that in his concluding summary the organizer of the Munich Symposium, President *Lutz* of the German Federal Patent Court, while still expressing his optimism with respect to successful negotiations, repeated also the message from industry by underlining that

the time window seems only to be open for a short period of time, mentioning a maximum of six to twelve months.

Although Mr. *Nooteboom* of the Commission spoke of a "blamage" if this prestigious project would fail.

Brigitte Zypries,
German Minister of Justice

Raimund Lutz,
President, Federal Patent Court

At the Munich Symposium
25 - 26 June 2007