EPLAW

European Patent Lawyers Association

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President's Report 2011

2011 was another eventful year in the discussion of the future European Patent Court, and one can only cite a few highlights in order to explain where we stand today.

1. *Unitary Patent and the translation agreement*

After the failure of the *Community Patent* in 2010 as a result of the rejection by Italy and Spain of the proposed language regime the Commission started the project of *enhanced cooperation* for accomplishing the establishment of what is now called *unitary patent*. 25 member states joined the project which aims at the adoption of a translation regulation and a regulation on enhanced cooperation in the area of the *creation of* unitary patent protection (st 9226/11 and st 9224/11 of April 15, 2011). A number of draft versions have been published since April 2011.

The most controversial text has become the draft Regulation on a Unitary Patent and its Arts. 6 – 8 which contain substantive law rules on *direct and indirect use of* the invention and *the limitation of the effects* of the unitary patent. Resolutions of the European Patent Judges Association and of EPLAW Board Members in their capacity as advisors in the Commission's Expert Group, eminent patent scholars (Prof. Krasser MPI) and large industry groups (Business Europe, ICC) had severely criticized the Regulation and requested the deletion of Articles 6 to 8 and their transfer into the text of the Patent Court Agreement. The reason for the opposition is, that these provisions if included into the Regulation would become part of the EU legal order so that they would be interpreted by the ECJ instead of the new Patent Court, a result which even the Commission had always promised that it would not happen.

The discussion continues today on our Congress. And I can tell you already that all our efforts yesterday ended in failure. I will wait for Margot Fröhlinger who will tell you what the latest very bad news are. I have announced suspense – you will get it.

The background of this quarrel lies in the concerns of practitioners that these provisions would become part of the EU legal order and as core rules on scope of patent protection would dramatically increase the number of referrals of patent cases by the Unified Court to the ECJ. Already the additional time, cost and unpredictability of ECJ procedures on patent law would be a serious deterrent for industry and users at large. In addition, since Article 69 EPC will remain subject to the jurisdiction of national courts and could therefore not be interpreted by the ECJ, this could in addition lead to controversial decisions about the scope of protection in a given case.

Eminent patent scholars like Prof. Kraßer of the Max Planck Institute in Munich in a detailed legal opinion, former Lord Justice and now Professor Robin Jacob have joined EPLAW in their opposition against this part of the "patent package" and have emphasized their warning against the detrimental effect of this proposal for the acceptance of the new court system. Practically all circles of industry fear that if these provisions remain in the regulation, this could become a "deal breaker", since it is rather unlikely that with the resulting enlargement of the competence of the ECJ the expectation of high quality, effectiveness, speed as well as reasonable costs could still be guaranteed which were promised as goals of the new patent litigation system for Europe. It is also unknown whether the judges of the ECJ would even be keen to receive hundreds of additional patent cases between private parties which are mostly difficult to deal with and would cause additional delays also for the other cases of the ECJ which are too long already.

At the Venice Juges' Forum on October 28 and 29 both EPLAW as well as the Venice Judges passed resolutions, based on an expert opinion by one of the most eminent professors of patent law in Germany, Professor Krasser of the Max Planck Insititut in Munich, which requested the deletion of the substantive patent law rules from the Regulation. During the last meeting of the Commission's Expert Group on November 18, this question was again discussed in the presence of the Polish Presidency and the future Danish Presidency, and the experts confirmed their vigorous opposition against the present version of the Regulation. Industry followed with letters by the ICC and Business Europe which all asked for a deletion of Art. 6 – 8 of the Regulation. The constant refusal by government officials against the nearly unanimous opposition of the users to amend the texts reminds me of the year 2003 when the Commission and the member states tried to impose upon the users their version of a patent litigation system which led to a unanimous rejection by the users so that the Commission had to shred its proposal. It seems that some people have forgotten this lesson and try to create trouble for the patent world.

2. *The Unified Patent Court*

On March 8, 2011, the long awaited decision of the ECJ in the *opinion procedure* under Article 218 TFEU on the compatibility of the draft agreement for an EEUPC (European and EU Patent Court) patent litigation system was published. The ECJ came to the result that the draft agreement was not compatible with the EU legal order.

The Commission and the Polish Presidency started rewriting the Draft Agreement and called the new court Unified Patent Court. In spite of enormous efforts from all users, including the EPLAW Board members sitting in the Commission's Expert Committee, the result is also here not satisfactory. Although proposals of the experts found their way into the legal texts but through some mysterious way – after a session of the member state delegations – they come back in disguise. It was a tedious work. During the last six weeks you can count 5 or 6 new versions, each of more than 100 pages by the Polish Presidency, but none of the requests of EPLAW's Resolution dated September 27 can be found in them. Why care about the users who anyway only disturb the work of the mighty politicians.

- The court criticized that also countries outside the EU would become members, since only national courts of EU member states can guarantee the *necessary close cooperation* with the ECJ and the full control required by the case law of this court.

- The ECJ requested a thorough referral practice by the UPC, so that any incorrect application of EU law or an omission of a referral to the ECJ can be sanctioned and member states as well as the deciding court itself could be made accountable for a violation of these rules.

The Commission as well as users regarded this decision as a great disappointment and also patent judges expressed regret that the judges in Luxembourg had not understood the special

needs for patent litigation which require in all instances specialized judges with many years of experience which cannot be found in the ECJ.

The Commission and the Polish Presidency started rewriting the Draft Agreement for what was now called the *Unified Patent Court*, but the result has been criticized from all sides. EPLAW in a Resolution dated September 27 identified a number of points which must be modified as a “bare minimum”. A number of national associations and advisory groups, amongst others from the UK, Sweden and Germany have joined the criticism and pleaded for an overhaul of the texts and urgently requested more time for deliberations in order to avoid another failure of the entire project.

Again a number of national and international associations and advisory groups, amongst others from the UK, Sweden and Germany, Business Europe and ICC have joined the criticism and pleaded for an overhaul of the texts and urgently requested more time for deliberations in order to avoid another failure of the entire project. The Polish Presidency wanted to leave a marker in the history of European patent law, and this it achieved.
My summary of the above:

If one wants a really unattractive, inefficient, unpredictable and probably extremely expensive patent court system, then we will get it; one must only give the ECJ a chance to receive as many referrals in patent law as possible.

If one wants to see substantive patent law in Europe to be decided by judges without any solid knowledge and experience in this field, then one must involve the ECJ whenever possible.

And if somebody intended to lay a solid ground for failure of this - at some time very promising - project, then he will probably succeed.

This constant refusal by government officials to listen to the nearly unanimous opposition of the users reminds me of the year 2003 when the Commission tried to impose upon the users their version of a patent litigation system which led to a definite rejection by the users, so that the Commission had to shred its proposal. It seems that some people have forgotten this lesson and for a second time knowingly take the risk of another failure, because they are not willing to discuss and negotiate the Regulation and the Agreement until reaching a generally accepted system. What happened on December 1, 2011 leads to a patent and court system against the needs and the clearly expressed wishes of the users.

3. *The Venice Judges Forum*

After the Venice Conference in 2010 I was informed by the EPO that the new President Battistelli thinks that the EPO Academy is subsidizing too many judges conferences. He therefore decided that, since the EPO has its own judges conference which offers an education program, this “own” conference which is being held in different countries of the EU should in the future alternate with the Venice Judges Forum so that the conference in 2012 in Venice will no longer be co-financed by the EPO. One reason was apparently also that some member states had complained that the Venice Forum always takes place in Venice.

The reaction of the Venice Judges who do not need education in patent law but are interested in harmonization, mock trials and the development of a high quality patent court were more than disappointed. You cannot try a little harmonization every two years, and the creation of a European patent court system needs permanent attention and discussion. The judges asked EPLAW whether one could eventually organize a smaller conference every second year, since a gap of two years would not fit with the goal of harmonization.

We have therefore started negotiations with the administrator of San Servolo, after the majority of the judges had announced that they wish a continuation of Venice and would be ready to pay for their own travel expenses, accommodation etc., if EPLAW could provide the meeting room We will inform you about the further developments.