

Written evidence from the Chartered Institute of Patent Attorneys

The European Unitary Patent and the Unified Patents Court

Introduction

Summary

1. A 'Unitary Patent' system for the European Union (EU) is proposed. This is to be introduced using the 'Enhanced Cooperation' system by two European Regulations as well as a separate Court Agreement between the EU countries taking part (all except Italy and Spain). This paper sets out
 - I. The history and process (§§ 4-13)
 - II. Evidence basis for this legislation and alleged cost savings (§§ 14-24)
 - III. Constitutional points and Arts 6-8 of the Patent Regulation (§§ 25-31)
 - IV. 'Bifurcation' (§§ 32-34)
 - V. Exclusivity and Transitional Provisions (§§ 35-44)
 - VI. Supplementary Protection Certificates (§§ 45-48)
 - VII. Other matters (§§ 49-54)
 - VIII. Conclusions (§§ 55-59)

2. The economic evidence for adopting the system as currently proposed is at best unreliable. We expect the proposed system to be less convenient, less flexible and more expensive, particularly for smaller companies. The law will become uncertain because certain aspects may be referred to the European Court of Justice (CJEU) for interpretation. Important questions as to how the system would work remain to be answered. If there are problems, the proposed system will be difficult and may be impossible to amend.

The Institute

3. This evidence is given on behalf of the Chartered Institute of Patent Attorneys (CIPA). CIPA was founded in 1882 and was incorporated by Royal Charter in 1891. It represents virtually all the 1,900 or so registered patent attorneys in the UK, whether they practise in industry or in private practice. Total membership is over 3,200 and includes trainee patent attorneys and other professionals with an interest in intellectual property (patents, trade marks, designs and copyright). It became, by the Legal Services Act 2007, the official regulator of the patent attorney profession in UK, its regulatory functions being carried out completely independently of the membership.

I. The history and process

4. Since October 1973, 38 states, including all Member States of the European Union (“EU”), have signed the European Patent Convention (“the EPC”). Importantly, the European Union was not a party to the EPC. The EPC provides for the current central procedure for granting European patents by the European Patents Office (“the EPO”). Although the granting procedure is centralised, the result is a bundle of national patents, each of which is subject to the law of the Member States in which the patentee claims protection. That is to say, a patentee might elect, when filing its patent application, for protection in the Netherlands, the UK and Germany. When the patent is granted, the patentee then has a bundle of national rights – a Dutch patent, a British patent and a German patent – each of which is subject to the national laws of the Member States for which it is granted, independently of the rights granted in respect of any other Member State. Where the same dispute is being fought in more than one country, then this country by country enforcement can be a costly, time-consuming exercise that can sometimes lead to conflicting decisions as between the courts of the Member States. (But this does not arise in all disputes.)
5. A proposed unified patent system has been in discussion for over 40 years – a system which would increase the cost-effectiveness, certainty and efficiency of enforcing patents in Europe. In 2000, the European Council officially reopened discussions on a proposed Community patent. That summer the Commission put forward a proposal for a Council Regulation on the Community patent which provided for the accession of the EU to the EPC and the creation of a unitary patent which would be granted by the EPO. In 2007 the Commission presented a document entitled “Enhancing the patent system in Europe” to the European Parliament. This proposed to create a unified system to enforce current European patents and the future Community patent. The Council also drafted an international agreement between the Member States, the EU and other states party to the EPC which would create a unified court that could hear actions in relation to European and the proposed Community patents. In 2009, this led to further proposals by the European Commission for what was known as the European and Community Patent Court (ECPC), which included a separate proposed Regulation for a Community patent.
6. Following concerns by some Member States, including Ireland, Greece, Spain, Luxembourg and Italy, the European Council requested the opinion of the Court of Justice of the European Union “CJEU” under Article 218(11) TFEU over concerns that the draft agreement was incompatible with the EU and EC Treaties. On 8 March 2011, the CJEU found that the draft agreement was incompatible because it would deprive national courts of the power or obligation to refer a question of EU law to the court for a preliminary ruling under Article 267 TFEU: and if a decision of the unified patent court were to be in breach of EU law, it could not be subject to infringement proceedings by the commission nor could it give rise to financial liability on behalf of EU Member States.
7. It had become clear prior to the CJEU’s decision that a collective agreement between the EU and Member States in relation to the unitary patent and unified court would not be politically possible. Following the CJEU’s decision, on 10 March 2011 the Council authorized 'enhanced cooperation' for unitary patent protection. 'Enhanced cooperation' allows groups of Member States to integrate

policies, even where other Member States do not agree. Italy and Spain brought actions against the Council arguing that the Council had misused its powers in instituting 'enhanced cooperation'. These cases are pending.

8. Following the CJEU's decision, the momentum to establish a unified patent court and unitary patent system increased rapidly. From the summer of 2011 to December 2011, numerous draft texts of the proposed Regulation establishing unitary patent protection and the Draft Agreement on the unified patent court were circulated. Despite being informed of numerous vital concerns¹ with the various versions of the Regulation and Draft Agreement by judges, patent professionals and industry throughout this period, including a unanimous resolution by the Intellectual Property Judges Association, it came as a surprise to the profession when, on 2 December 2011 the European Parliament's Legal Affairs Committee and the Polish Presidency declared that there was a "done deal on the EU patent". Later that day it was announced by the Council that the following week they would agree on the seat of the unified patent court, the Proposed Regulations and Draft Agreement. On 5 and 6 December 2011, it was clear through various Council press releases and conferences, that there was substantial political pressure to agree on all elements of the package and initial the agreement on 22 December 2011.²
9. Disagreement on the location of the Central Division of the proposed Unified Patent Court by Member States slowed this process down. However, on 20 December 2011 the Legal Affairs Committee of the European Parliament approved all elements of the package. None of the issues raised by the patent profession had been addressed in the latest version of the Regulation and the problems, as set out below and in the written submissions of EPLAW and the IP Bar Association, remain. The story on the Draft Agreement is less clear – the latest version has yet to be seen by the public.³
10. Although it was hoped that under the Danish Presidency the rush to agreement on the proposals would be driven, not by political urgency, but by the objective of achieving an efficient, workable and cost-effective patent system, these fears nevertheless remain. Last week, the President of the European Commission, President Barroso, told Parliament:

*"I call on the three Member States, France, Germany and the United Kingdom, who are holding this up over a site issue of some offices, to swiftly find a compromise. Frankly, it is not acceptable! It is not acceptable that such a crucial initiative is blocked over such a trivial disagreement. Europe needs to innovate to grow. And innovation is severely hampered by the current complex and expensive rules that we have been trying to overcome for decades. It is time now to make history and to score a victory for ambition, for common sense and above all for Europe's innovators."*⁴

1 These concerns are listed in this paper, as well in the submissions of EPLAW and Mr. Henry Carr QC.

2 This never occurred.

3 The lack of a current Draft Agreement highlights the lack of transparency which has beset the profession throughout the legislative process and negotiations. This has made it very difficult for the profession and industry to comment usefully on the proposals.

4 Press Release dated 18 January 2012,
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/13&format=HTML&aged=0&language=EN&guiLanguage=en>

11. However, the comment from President Barroso again confirms the patent profession's and industry's concerns that these proposals are being rushed through primarily to score a political victory, the objective of creating a cost-effective and user-friendly unified European patent system being put second.
12. We believe the process would have benefitted from more input from professionals such as CIPA. During the run up to the CJEU's Opinion, we were informed that it was too early for us to provide detailed comments on the various draft documents. After Enhanced Co-operation was adopted, we were told that it was now too late.
13. Nevertheless, a group of professionals met in the UK and produced a detailed paper on key issues. Although this concentrated on the Court Agreement, comments were made on other issues too. Although some changes have been made to the Court Agreement, we have not seen a new text. Comments on the Draft Regulation seem to have had no impact at all.

II. Evidence basis for this legislation and alleged cost savings

Costs, Benefits and Risks

14. Part of the unseemly haste to implement the new European Patent reforms seems to be a belief that a unified system will help the Eurozone out of its current economic difficulties. That belief is difficult to credit. Changes to the patent system may indeed help: but they may significantly hinder the economy if the changes are poorly formulated. How the new system will work remains unclear and so does its economic impact. For example, the official fees for registering and maintaining a patent is still unknown.
15. If done right, the Unitary Patent could be a real boon to the economy. However, as CIPA has previously made clear, we do not consider the current proposals to be the correct basis for establishing a unitary system. We should not change the present system for something worse.
16. Unless amended, the current proposals would be worse than the current system in that it would be:
 - less flexible
 - more uncertain
 - more expensive, both for obtaining protection and enforcing it.
17. Further, the potential economic benefits of the new system remain unclear.
18. We feel the impact assessments done by the Commission are of poor quality and based on information which is no longer current⁵ ⁶. Before the legislation is

5 We reference two papers from the Commission on the costs of the Unitary Patent. However, without knowledge of the fees, we may not know the real cost savings, if any.
http://ec.europa.eu/internal_market/indprop/docs/patent/sec2011-482-final_en.pdf and
http://ec.europa.eu/internal_market/indprop/docs/patent/studies/compact-cost%20-benefit-study-final_en.pdf

6 This paper sets out a view of when the court would be economic -
http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf. This report assumed that the EU would subsidise the Court. It contends that the Court is useful only if it reduces duplicated litigation. It estimates that 60-70% of German litigation is duplicated, but this assumption is not supported by evidence.

released from scrutiny the committee might require that a proper impact assessment be done of the effects of the new regime. This should consider the comparative:

- (a) costs
- (b) speed
- (c) quality of decision-making, including the impact of the inclusion of Articles 6 to 8 (see paragraphs 25-31 below).

If legislation was contemplated in this country such an assessment would be done as a matter of course.

Costs

19. One can hardly doubt that, for those who protect their inventions in all countries of the EU, a unitary patent will cost less to register, less to maintain and less to transfer, than the twenty-five individual national patents it replaces. Such people will certainly save considerably. To date, they have been few and far between⁷; (though there will certainly be more if the costs are sufficiently reduced).
20. We have seen no reliable estimates for renewal fees or of litigation. Nevertheless it is claimed that the new system will be considerably cheaper, to the particular advantage of smaller companies (SMEs)⁸. However, this claim is based on doubtful assumptions⁹. Comparisons are made between the cost of obtaining protection by twenty-five separate national patents via the EPO route with the cost of a unitary patent. This shows the unitary patent to considerable advantage – it could be much cheaper. But whether an SME necessarily needs protection in twenty-five EU countries is not considered. No inventions are ever protected in all countries where patents can be obtained. The cost of rights obtained is roughly proportional to the number of countries in which patents are sought. The additional value of extra rights falls rapidly. An SME with a significant invention will rarely be well advised to file in all countries of the European Union. It is often a better use of limited funds to file only in a few of the larger countries of the EU, those in which competition is likely to be most important. Under current law, for patent

7 “...only around 1,000 patents out of approx. 50 000 annually validated patents (2%) are validated in all 27 Member States. Around 4,000 patents (8%) are validated in 13 Member States and 20,000 patents per year are validated in the largest 5 EU markets (40%). Approximately half of these patents are only validated in 3 Member States – an estimated 25,000 patents per year (50%).” EU Commission paper SEC(2011) 482 Final.

8 “By adopting the European patent, we will make it easier, quicker and cheaper to protect intellectual property; we aim to award the first EU unitary patent in 2013, saving up to 80% on the current cost. This will be as attractive to American companies as European ones – particularly Small and Medium-sized Enterprises.” Máire Geoghegan-Quinn, European Commissioner for Research, Innovation and Science, “Europe: Your Destination for Research and Innovation”; Destination Europe Boston, 20 January 2012.

9 Press releases (from the European Parliament and others), claiming that an EU patent will cost €650, as compared with a US patent costing around €1850, are based on a misunderstanding. They compare different items. The cost for the US patent is (apparently) an estimate of the total official fees from filing to grant. In comparison, the EU figure quoted is only the *extra cost of translations* (eventually to be) required to convert a *granted* EPO application into a unitary patent. A fair comparison would also have to include all the official costs of EPO prosecution, including at minimum a filing fee (€115), designation fee (€555) search fee (€165), fee for examination (€555) and fee for grant (€875), as well as (typically) the first two annual maintenance fees of €445 and €555 respectively. In any event, it makes no sense to ignore the major costs incurred in a (prudent) patent filing - professional fees.

purposes, the EU is not a single market: goods produced legally in a patent-free EU country cannot be sold unlicensed into another EU country where they are patented. Such limited filings may be as cheap as, or cheaper than, obtaining a unitary patent.

21. Another disadvantage of the unitary patent may be maintenance fees. Again, these are likely to be significantly cheaper under the unitary patent system than for separate protection in each of the twenty-five countries. They are unlikely to be cheaper than total renewal fees year on year in a smaller selection of countries. And the unitary patent will be less flexible. If the patentee needs to economise, with a selection of countries he can abandon the less vital rights, and keep the others: with the unitary patent, the only choice is to pay in full or lose all rights.
22. Thus simply to show that complete coverage over the EU will be cheaper under the new system is inconclusive. It could assist large companies who routinely file in all EU countries (for example, drugs firms). It is much less clear that it will save money for SMEs. In any case, any savings on registrations or renewals could go by the board, should the cost of enforcing the patent be prohibitive, or the patents be rendered valueless by perverse decisions.

Litigation

23. The proposed Court system is intended to be practicable and affordable. But there are no reliable estimates of costs here either. Originally the European Union planned to contribute to the costs, but following the CJEU Opinion, the Commission is no longer a party to the Court Agreement and will not be contributing to the costs of setting up this system or training the judges. It therefore appears that much of the costs of setting up and running the courts, which will fall on national governments, will be passed on to litigants. Litigation before the new Courts will be heard by a panel of three or four judges, which (however desirable in a new multinational system) must be more expensive than a single judge. The benefit will be that one action and one decision will replace litigation in several countries. However, such multiple litigation is not at all common (no firm figures are available, although some estimates are no more than 5-10% of patent litigation is duplicated in other Member States), and normally undertaken only by large companies. Such companies have the necessary financial resources and (perhaps even more important) the available manpower. Patent litigation can take up much staff time, which smaller companies cannot spare. So any benefits here are at best unclear.

Economic benefits

24. The Hargreaves Report suggested that a Unitary Patent system would be worth £2.1 billion a year to the UK economy by 2020 ((Hargreaves Report, Supporting Document EE: Table, page 2 line 2; Discussion, pp. 7-8)). There is a strong argument to proceed, if that forecast is reliable. However, we doubt this. The benefits are said to arise by making life easier for small companies, a major source of economic growth. However, we do not see that the proposed changes will on balance make life easier for smaller companies. We think they may make things worse. We note that the Hargreaves Report was completed in the early months of 2011, before details of the current proposals were available. We do not know what

assumptions were made about how the Unitary Patent would work, or how the changes would affect small companies. It would be understandable if in these circumstances projections were too optimistic.

III. Constitutional points and Arts 6-8 of the Patent Regulation

25. CIPA has had the benefit of seeing the written submissions of EPLAW and Mr. Henry Carr QC to the Committee. CIPA unreservedly agrees with their comments in relation the problems associated with Articles 6 to 8 of the Proposed Regulation.
26. The inclusion of Articles 6 to 8 in the proposed Regulation means that the interpretation of the meaning of what constitutes infringement of a unitary patent will be subject to the preliminary ruling jurisdiction of the CJEU. This will result in three considerable problems – increased delay, increased cost and increased uncertainty.
27. Preliminary ruling references to the CJEU have the effect of suspending the litigation between the parties. Once the CJEU has ruled, then the national litigation must restart, in order for the opinion of the CJEU on the points of law to be applied. Those preliminary ruling references are, as Mr. Carr says, “notoriously slow” and can delay proceedings for years leaving both parties in an ambiguous “no-man’s zone” in respect of their legal positions and in turn greatly impacts their, and third party, participation in the marketplace. This delay can have a significant impact on patent rights which, unlike trade mark rights that can last indefinitely, are of limited duration – 20 years. With delay can also come increased expense, as further legal fees are incurred and interest on damages or undertakings accrue.
28. In other areas of intellectual property, namely in trade mark law, opinions from the CJEU have created a body of law which is often unclear, unformulated and devoid of any basis in the provisions of Community legislation and the recitals which aid its interpretation. The very nature of a CJEU reference means that the Court is giving very broad guidance on the interpretation of EU law. It thus does not address, with the required specificity usually demanded by cases, the complicated issues of law and fact at issue. The problems which broad guidance on the interpretation of law can create is likely to be compounded by the fact that the judges of the CJEU, although skilled, will not be equipped with the necessary experience in the field of patent litigation that the referring judges are required to possess under Article 10(1) of the Draft Agreement.
29. Further, when the CJEU issues an opinion it is for the referring national courts to apply that opinion to the facts of the case under their national law. This application can vary as between Member State’s national courts, and indeed even as between judges within the same jurisdiction. This has already created substantial uncertainty in other areas of intellectual property law, notably trade mark law and the laws of copyright. Further, the application of a CJEU opinion by courts may never occur in instances where the parties settle a dispute following the opinion – again leaving the status of law unclear.
30. Such legal uncertainty can lead to more litigation between parties attempting to clarify their respective legal position. It can also prevent parties from entering a market in which they would be free otherwise to compete but for the uncertainty of the legal position and the threat of litigation. Both outcomes increase costs and can damage innovation and the functioning of the market, especially for SMEs.

31. The consequences of this system – increased delay, increased uncertainty, and increased costs - threaten to be replicated in the patent field if Articles 6 to 8 are not deleted from the Proposed Regulation.

IV. 'Bifurcation'

32. This is the system whereby validity of patents is judged separately from infringement – in separate trials, in different courts. It is an important feature of German (and Austrian) procedure, and quite foreign to other countries. In its favour is urged that it simplifies matters – and so it does, for the patentee. But, according to British ideas, it is quite unfair to the party accused of infringement. If the patent is invalid, it cannot be infringed. The infringement trial (in Germany) is faster than the validity trial. Infringement may be found (and the 'infringer' required to cease operations and pay damages) well before the patent is proved to be invalid in the validity trial. An even stronger objection is that the patentee can put a different case in the two trials – particularly about what the patent means. In the infringement trial he will seek to interpret the scope of protection as broadly as possible, so as to cover what the defendant does: in the validity trial he will argue for a narrow meaning, so not covering what has been done before (even if this is similar or even identical to what the defendant has done). Trying validity and infringement together is intrinsically fairer because the patentee must then argue only for one consistent meaning.
33. The availability of bifurcation in Germany will powerfully affect the way the new Court arrangements operate. Patentees will be advised to file their infringement suits in Germany wherever possible. This will be particularly inconvenient for small companies from other countries, which will have extra expense in dealing with overseas proceedings not in their own language. They may be able to get the suit transferred from the local German division of the European Patents Court to the Central Court, so that infringement and validity can be considered together – but arranging the transfer will itself cause added trouble and expense. A cheaper alternative may be to concede the case unargued. This is a discouraging outlook for small companies.
34. Larger companies are also worried. They fear that 'trolls' (companies who buy up patents from a variety of sources, not to develop new products, but in the hope of extracting licence fees from those who do) may be encouraged by 'bifurcation' to step up their activities in Europe. Just how troublesome this may be would depend on the rules of the new Courts (not yet available).

V. Exclusivity and Transitional Provisions

35. Patents can protect considerable income streams for 20 years into the future. However, patent attorneys have to advise clients at the outset what to file and where to file. Our members are trying to advise their clients now on what they should be doing in order to protect themselves for the next 20 years: should they file through national patent offices or the EPO?
36. To answer that, patent attorneys need to have an idea of both the application process and what happens post-grant – i.e. how enforcement is carried out. When the EPO started, many applicants (if they could afford to) hedged their bets and filed cases twice – once via the National route and once via the EPO. There was

duplication, but it reduced risk – it meant that users could compare the systems and decide whether the EPO was working properly before they had to commit. As users got used to the EPO, this practice reduced. But with the new European Patent Court system as currently proposed, we may end up resurrecting this wasteful practice.

37. If it turns out that, for EPO-granted national patents, the new European Patents Court does not do as effective a job as the national courts it is seeking to replace, then users will want to fall back on the original system – national patents granted by the national patent offices and enforceable through national courts. This decision has to be made early in the life of each invention. It cannot be unmade later. Patent law prevents a later filing for the same invention.
38. So users seek the right to opt out of the European Patents Court system until it has developed a track record. If the track record is weak, then they want to be able to opt out for good.
39. However, this is hindered by two provisions – the exclusivity of the European Patents Court (for all infringement and validity litigation both on unitary patents and on national patents granted by the EPO) and the short transitional provisions. No doubt both of these provisions would help to ensure that the new European Patents Court has customers. But it should gain these on merit, by competing effectively with the national systems, and not by coercion. The EPO has been a remarkable success, without coercion. As an optional new system, competing with national patents, it has won the trust of users (who retain the opportunity to file for patents nationally). It is now a cornerstone of the European patent regime. But if the new Court system doesn't work, it could be severely damaged, because in order to avoid that system, inventors will have to bypass the EPO.
40. The uncertainties are numerous. No one knows yet how the European Patents Court will function or what it will cost. Whilst it is expected to be cheaper than litigating the same patent in three or four different EU member states, it is unlikely to be cheaper than litigation in one member state only. Will cases take longer than they do at present? We don't yet know the Court rules, which will be a key determinant of quality. Such uncertainty as to the quality of the court and system may well mean that many companies will choose to pursue litigation through the national route for many patents in order to avoid the new court,.
41. Of critical importance is whether the enforcement regime will be good for SME's or whether they will find themselves priced out of patent litigation. Can a three-judge, local, regional or central division really be as efficient, flexible and responsive as the Patents County Court? We doubt that this could ever be the case. So an assurance that the PCC will retain its jurisdiction for EPO-granted patent disputes during the transitional period is not enough.
42. These problems would be easily solved by making the European Patent Court's jurisdiction non-exclusive.
43. If the intent ultimately to grant the European Patents Court exclusive jurisdiction over the patents granted by the EPO remains, then the transitional provisions and ability to opt out (or back in) during the transitional period should last much longer. We need to know the track record of the European Patents Court over at least a decade before any such exclusivity starts , and then the compulsion should only relate to applications filed *after* the end of that transitional period and not to all

then pending applications and granted patents.

44. It may be objected that if serious difficulties arise, the system could be amended. We strongly doubt whether this would be easy or even possible. To amend the Court agreement would require unanimity of the parties.

VI. Supplementary Protection Certificates

45. Supplementary Protection Certificates ('SPCs') are a form of patent term extension which can be obtained for certain pharmaceutical and agrochemical products. The extension compensates for the time taken to obtain by regulatory approval. These rights mean a great deal to drug developers.
46. Currently the EU SPC regime relies upon patent owners or their licensees seeking the patent term extension once they have been awarded a national or EU regulatory approval. SPCs are granted by national patent offices on national patents, whether granted by them or the EPO.
47. This regime will not extend to the new EU patent. A new regime is required. This is not simply a case of needing to adapt the current regulation to cover the EU patent as well as the national patents, an authority which will grant and administer the SPCs must also be established. Will this go to one national patent office? Delegating this to the EPO may not be acceptable as the EPO, which is not an organ of the EU, has no experience whatever of dealing with SPCs. Further, the decisions of national patent offices are then appealable to the national courts, with referrals available to the CJEU. What will be the appeal route for a refusal to grant an EU SPC? Should that go to the European Patents Court? Or direct to the CFI?
48. A further complication is that an SPC is based both on a patent and on a regulatory approval certificate. Many (not all) of such certificates are issued by national regulatory authorities. Will such national certificates serve to extend the unitary patent throughout the EU? – or only in the country issuing the certificate (in which case the patent would no longer be unitary)?

VII. Other matters

Interaction with the EPC and the EPO

49. In the leaked Opinion of the Advocates-General in August 2009, statements were made about the need for the powers delegated by the EU to the EPO to handle EU Patents to be overseen by an EU court. The CJEU did not address this point in their final opinion. The EPO is not an EU organisation and has 38 Member States, 11 of which do not currently belong to the EU. So it is by no means clear whether or how this system can operate in practice. In effect, the EU may be asking the EPO to run one system where the patents are to be unitary patents and a second system for all its other member states. We also believe there are other inconsistencies between the Regulation and the EPC, which need further review.

50. The new European Patents Court will be overseen by judges qualified in patent law. The experience of both the United Kingdom and numerous other EU Member States is that the appointment of specialist judges in this field generally results in quicker trials. The judges are already familiar with patents (their structure and language), the appropriate law and civil procedures. This results in high-quality decisions.
51. However, to get the most out of a specialist system, it is also important for the cases to be properly presented. Patent attorneys represent clients in patent matters in this country. The English judges have recognised that patent attorneys perform better than solicitors who are not familiar with patent law. The EPLAW proposal does not require lawyers to show any knowledge of patent law – and yet this highly specialised area is the key issue in any dispute before the European Patents Court.
52. At the moment, the draft court agreement grants patent attorneys the right to represent parties in disputes in the European Patents Court, albeit that they may need a further qualification – perhaps similar to that already obtained by patent attorneys in this country who wish to act in the High Court.
53. Even if other matters can arise, disputes before the European Patents Court will centre on patent infringement and invalidity, core areas for a patent attorney's practice. Litigation is often conducted by teams, and if other topics arise the team can be augmented – but it should still be run by someone who has a detailed understanding of the key patent issues.

German Property Law to apply to patents from overseas

54. The default position for all non-EU businesses is that German property law will apply. The drafting in the regulation, and the effects this may have, are still not clear. The original provisions in the Community Patent Convention, where a non-EU party could select the relevant property law by selecting an attorney in the appropriate jurisdiction, would be clearer and fairer.

VIII. Conclusions

55. The current drafts of the Proposed Regulation and Draft Agreement, as currently drafted, will create a system which is the antithesis of the system that was intended to be created. The economic evidence for adopting the new system is doubtful at best. We expect it to be less convenient, less flexible and more expensive, particularly for smaller companies. The law will become uncertain because it is to be decided by the European Court of Justice (CJEU). Important questions as to how the system would work remain to be answered. The current proposals create a system that could be a playground for patent trolls, while legitimate investment in patent protection and enforcement in the EU could decline.
56. Europe's judges, patent profession and industry have repeatedly informed national governments and European legislatures of the systemic problems with the current proposals and solutions to these problems. The current proposals require careful consideration by experts, instead of a rush to politically acceptable but economically damaging compromises.

57. CIPA again urges that the full package for this legislation is properly thought through, with all parts being prepared, so that the package can be looked at as a whole, before it is adopted.

Once that is done, we believe that an effective system would be achieved. In that context, it makes sense for international business that the Central Division of the European Patents Court be located in London.

58. For these reasons, we feel that this legislation is not yet fit for purpose and more work is required if we are to create a patent system which will enhance the creativity of European businesses.