

# Taking soundings

**On 12th July the European Commission held a public hearing on the future of patent policy in Europe. Crowell & Moring's Kristof Roox, who was present, reports on the discussions.**

On 12th July 2006 the European Commission held a public hearing on future patent policy in Europe. This was the second step of a public consultation launched in January 2006 with the aim of collecting stakeholders' views on the current patent system and on what measures could be taken in the near future to improve this system. The hearing was based on a Commission document containing concise preliminary results of the 2,515 written responses to the questionnaire.

In Europe, patent protection is currently provided for in two ways, neither of which is based on a Community legal instrument: national patent systems and the European patent system under the European Patent Convention (EPC). Although cost issues were raised at the public hearing, this system was considered to work well. There was however a universal concern among stakeholders for the quality of patents. Maintaining standards must come before cost-saving.

The structure under the EPC only provides for a common and single European patent application and granting system by the European Patent Office (EPO). A European patent is not a unitary patent, but essentially a bundle of national patents.

As a result, each Member State may still require that, in order to be legally valid in their territory, the European patent must be translated into their official language(s). This translation burden will, however, be mitigated once the London Agreement enters into force<sup>1</sup>. This agreement was concluded with the aim of creating a cost attractive post-grant translation regime for European patents. The Parties to the Agreement undertake to waive, entirely or largely, the requirement for translations of European patents to be filed in their national language. This means in practice that European patent proprietors will no longer have to file a translation of the specification for patents granted for an EPC Contracting State Party to the London Agreement and having one of the three EPO languages as an official language. Where this is not the case, they will be required to submit a full translation of the specification in the national language only if the patent is not available in the EPO language designated by the country

concerned. To enter into force, the London Agreement must be ratified by at least eight Contracting States, including the three where the most European patents took effect in 1999 – France, Germany and the UK. It goes without saying that the majority of the participants called for an urgent ratification of the London Agreement.

Another effect of the "bundle" approach is that infringement and validity questions are governed by various national laws and dealt with by national courts with different procedural rules. There are no provisions in the EPC for a court with powers to settle patent disputes at European level. This purely national litigation system results in multiple patent litigation involving high costs, complexity, forum shopping and uncertainty. As significant differences exist between the various national court systems, diverging and even contradictory decisions on the substance of the cases are frequent<sup>2</sup>. The lack of cross-border enforceability of European patents was regarded by most of the participants of the public hearing as one of the major problems with the current system.

Cross-border litigation under the Brussels and Lugano jurisdictional Conventions has often been used in an attempt to solve this problem. Pan-European injunctions have primarily been pronounced by Dutch and Belgian Courts, and have created great controversy. However, the European Court of Justice (ECJ) recently curtailed this attempt to centralise patent infringement proceedings. In *GAT v Luk* the ECJ gave a broad interpretation of Article 16(4) of the Brussels Convention – Article 22(4) Brussels I Regulation – by deciding that, whenever the validity of a patent is questioned, only the court of the country where the patent was issued could give judgment<sup>3</sup>. This interpretation strikes a heavy blow to the chances of bringing cross-border patent proceedings to the national courts, as a party would merely need to bring into question the validity of the patent to oppose jurisdiction.

In *Roche v Primus*, the ECJ had to deal with the question of whether cross-border jurisdiction could be based upon Article 6(1) Brussels Convention/Brussels I Regulation, a specific rule concerning co-defendants<sup>4</sup>. The ECJ ruled that this article does not provide

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cross-border jurisdiction over a foreign defendant, stating that there is no risk of irreconcilable judgments in European patent infringement proceedings brought in different member states involving multiple defendants domiciled in those states, as only an identical legal and factual situation could lead to irreconcilable judgments. In multinational European patent proceedings, the facts are not identical since the defendants are different and the alleged infringements are not the same. Furthermore, application of the national law of each contracting state for which the patent has been granted could lead to different results. These judgments put the multinational litigation problems into even sharper focus.

## The Community patent

To overcome the problems of the current system, the Commission promotes the creation of a Community patent. Following the failure of the Luxembourg Convention<sup>5</sup>, the Commission in 1997 issued a Green Paper on promoting innovation, launching a broad discussion on the need to take new initiatives in relation to patents. This resulted in 2000 in a Commission Proposal for a Council Regulation on the Community Patent. According to this proposal the Community Patent will be a single, unitary patent which will be effective throughout all EU Member States. It will be litigated on a unitary basis in a specially created Community Patent Court within the framework of the ECJ, with decisions on infringement and validity having effect throughout the EU.

It is questionable whether a consensus can be reached regarding the Community Patent. Discussions had made clear progress when a political agreement was reached on 3rd March 2003. Although the Commission's original 2000 proposal provided a three-language system, the 2003 political agreement provided that the patent claims should be filed in all the EU official languages<sup>6</sup>. One year later in

March 2004 the Competitiveness Council failed to agree on the details of the Regulation. In particular, time delays for translating the claims and the authentic text of the claims in case of an infringement remained problematic issues throughout discussions and ultimately proved insoluble.

The results of the questionnaire on the Community Patent were supportive, but not without reservations. Many expressed concerns about the issue of translations. Not surprisingly, the 2003 common political agreement was heavily criticised at the public hearing, as the requirement for a translation of the claims in all languages ignores the needs of industry for cost-effective protection and makes the Community Patent a less competitive and expensive instrument. Some participants still supported a full translation into all 21 EU languages, as a one-language (or at least a limited number of languages) approach would be discriminatory and make access to information regarding technology difficult. It seems however that, if the language issue cannot be fixed, the Community Patent is effectively dead. Why would any business use it when they would have to file 21 mandatory translations, when they could get a European patent instead with fewer translations after the entry into force of the London Agreement?

For the Community Patent to be successful, an effective and quality litigation system is essential. The 2000 Commission proposal provides for a Community Patent Court (CPC). On 2nd February 2004 the Commission further presented proposals for two Council Decisions establishing a Community Patent jurisdiction, under the aegis of the ECJ. Appeals from the decisions of the CPC would be referred to the Court of First Instance and from there to the ultimate jurisdiction of the ECJ. There is however concern whether a CPC would be able to handle the expected numbers of cases and maintain the quality of proceedings. The ECJ lacks the procedures and infrastructure to handle inter party disputes, and definitely not within a reasonable time period. Furthermore, there was some concern about the level of competence of the proposed CPC. A business would be reluctant to obtain a Europe-wide patent if it ran the risk of being revoked by an inexperienced judge. Decentralised chambers are also not envisaged, although these could make use of the experience embodied by (some) national courts and help achieve a workable cost-effective system.

### European Patent Litigation Agreement

An alternative litigation system to deal with the jurisdictional problems is the European

Patent Litigation Agreement (EPLA). Created at the Intergovernmental Conference in Paris in 1999, the EPLA provides for an *optional* litigation system for the states party to the European Patent Convention. The EPLA would set up a European Patent Court which would be independent of the EPO and have jurisdiction over the validity and infringement of European patents. The European Patent Court would comprise a Court of First Instance composed of a Central Division as well as several Regional Divisions. A single central Court of Appeal would be the appellate tribunal. The substantive law to be applied is closely related to that contained within the Community Patent Convention, whose provisions date from the 1970s and closely mirror both the European Patent Convention applied by the EPO, and harmonised national laws. There are also proposed procedural rules dealing with obtainable relief, representation, the ever-problematic language of proceedings (for which provisions mirror those of the EPO), and costs. National courts will continue to deal with infringement and revocation actions concerning national patents and will retain jurisdiction to order provisional and preventative measures in disputes relating to national and European patents. In this way proximity and accessibility can be preserved – a particular concern for small and medium-sized businesses – while the Divisions of the Court of First Instance and Appeal Court can assure uniform interpretation of the law.

The Commission has for a long time vigorously opposed the EPLA, instead plugging its own Community Patent proposal. This opposition was, however, dropped as the EPLA was part of the questionnaire. The consultation process has shown overwhelming support for the EPLA, which is backed by many of Europe's leading IP judges. Some of the participants considered that the EPLA would be the only way forward and that it should be implemented as soon as possible. The following features of the EPLA were stressed: practical and pragmatic agreement, clear procedural rules, optional character, high quality decisions, specialised and experienced courts, and lower costs than actually foreseen by the EPO. Critics claim that the main driving force behind the EPLA is legalising software patents and business method patents via case law, under the assumption that the EPC still forbids those within the EPO granting them since the mid 1980s. They also argue that the proposed "European Patent Judiciary" would lack independent judges and sufficient democratic control, while drastically increasing the number of patent litigation cases and additionally their respective costs,

not least because of the need to generate revenue for self-financing. These objections seem to be substantially flawed. According to the Commission though there are still some institutional hurdles to be tackled if the EU is to become involved in the EPLA initiative.

### Summary

The Community Patent, the London Agreement and the EPLA are valuable and important attempts to overcome the current problems of the patent system in Europe. These solutions are not mutually exclusive. The Commission's consultation process indicated that there is still widespread support from industry for a Community Patent, but not at all cost and definitely not for the compromise in its present form. A vast majority of the stakeholders do not find the proposed language regime, or the jurisdictional arrangements, satisfactory. In his closing remarks at the public hearing, Commissioner McGreevy stated his intention to make one last concerted effort to sort out the outstanding issues and to "*go for one big last push on the Community Patent.*"

Given the overwhelming support for the EPLA, it is very likely that the EPLA proposals will take force sooner provided that the institutional problems can be solved. Whatever the outcome may be, it is clear that the current patent framework needs improvement. An effective patent system is essential for stimulating growth, innovation and competitiveness in knowledge-based economies. 🌱

### Notes

- 1 Agreement on the application of Article 65 of the European Patent Convention, done at London on 17 October 2000, O.J. EPO 2001, 549-553.
- 2 This has recently been clearly demonstrated in the German, Dutch and Belgian decisions in the "Senseo (coffee pad) litigation" on indirect patent infringement.
- 3 ECJ 13 July 2006, (case C4/03).
- 4 ECJ 13 July 2006 (case C539/03).
- 5 The "Luxembourg Conference on the Community Patent" took place indeed in 1975 and the Luxembourg Community Patent Convention (CPC) was signed on December 15 1975, by the then 9 member states of the European Economic Community. However the CPC never entered into force. It was not ratified by enough countries. Subsequently, the Agreement relating to Community patents, (Luxembourg, December 15 1989), was an attempt to revive the project. It consisted of an amended version of the original CPC. But it failed too.
- 6 This common political approach was taken on board in the Proposal for a Council Regulation on the Community Patent of 8 March 2004.