EU PATENT POLICY

POST-HEARING BRIEFING DOCUMENT

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Commissioner McCreevy supports the European Patent Litigation Agreement (EPLA)

At the European Commission's July 12 hearing[1] on the future of patent policy in Europe[2], internal market commissioner Charlie McCreevy declared himself in support[3] of the proposed European Patent Litigation Agreement (EPLA). The Commission will make a formal proposal on patent legislation, centered around the EPLA, before year-end. The European Parliament's five largest political groups agreed in May to vote on a patent policy resolution at the September II plenary.

A non-EU project...

The proposed EPLA[4] is, like the European Patent Convention (EPC) of 1973, a *non-EU* treaty, and it would establish a new *non-EU* organization, the European Patent Judiciary (EPJ), which would create and run a new *non-EU* European Patent Court (EPCt). The EPCt would replace the national courts of countries acceding[5] to the EPLA with respect to all litigation concerning the infringement and/or validity of patents granted by the *non-EU* European Patent Office (EPO). The EPCt would comprise a centralized appeals court, likely to be based in Munich (where the EPO is already headquartered), and up to three regional chambers of first instance per country.

...that will very probably require EU involvement

According to the Commission's legal services, EU member states would not be free to conclude the EPLA on their own[6]: with cross-border litigation[7] and the enforcement of intellectual property rights[8] already being subject to the *acquis communautaire*, the Community would have to be involved under a mixed agreement. Some of the driving forces behind the EPLA disagree, fearing that ratification of the EPLA under EU procedures, especially if the European Parliament were to be codecisive, would add another (and even greater) risk to the need to reach an agreement at an intergovernmental conference followed by ratification in national parliaments. At a public event[9] in June, a DG MARKT director talked about the possibility of obtaining an opinion from the ECJ on this institutional question. Given commissioner McCreevy's pro-EPLA stance and the crucial relevance of the issue, the Commission is likely to ask for an ECJ opinion sooner rather than later.

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1 http://ec.europa.eu/internal_market/indprop/patent/hearing_en.htm
2 http://ec.europa.eu/internal_market/indprop/patent/consultation_en.htm
3 http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/453&format=HTML&aged=0&language=EN&guiLanguage=en
4 http://www.european-patent-office.org/epo/epla/index.htm
5 The proposed EPLA allows the accession of the European Patent Organisation's (EPOrg) contracting states. The EPO is an EPOrg organ. The EPOrg's contracting states include 24 EU member states (all but Malta), the soon-to-accede member states Bulgaria and Romania, as well as Iceland, Liechtenstein, Monaco, Switzerland, and Turkey.
6 http://ec.europa.eu/internal_market/indprop/docs/patent/consult_en.pdf (section 3 / page 7)
7 "Brussels" Regulation on recognition and enforcement of judgments (Council Regulation 44/2001)
8 Directive on the enforcement of intellectual property rights through civil procedures (Directive 2004/48/EC)
9 IBC Legal/Informa – The Future of Patent Litigation in Europe (06/30/06, Crowne Plaza, St. James Park, London): http://www.iplawportal.com/NASApp/cs/ContentServer?pagename=marlin/home&MarlinViewType=MARKT_EFFORT&siteid=30000000389&marketingid=20001374744&proceed=true&MarEntityId=1156841335105&entHash=1001dc57ed4

Higher cost of litigation in most cases and lower quality of judicial decisions

At present, EPO patents, which are bundles of national patents, can only be enforced country by country. That fact is, admittedly, less efficient than a centralized court system. The proponents of the EPLA, spearheaded by the EPO, base their official reasoning on the following pretexts:

- *"The cost of parallel litigation involving the same patent in multiple countries would be reduced."* But according to Nokia[10] and GlaxoSmithKline[11], parallel litigation accounts for only a small percentage of all patent suits, while estimates[12] show the average cost of most cases would rise. Even an organization as large as Nokia considers it sufficient to enforce a patent in one major market in order to settle all related disputes on a Europe-wide basis. For now, the total number of patent suits in Europe is low in absolute numbers (~1,500/yr.).

- *"National differences in the application and interpretation of the EPC would be eliminated."* That effect could be achieved better through a harmonization directive, but after the experience with the software patent directive that the European Parliament amended heavily at the first reading and threw out at the second reading, the EPLA's proponents would leave harmonization to handpicked, EPO-friendly judges rather than to elected lawmakers.

- *"The quality and reliability of judicial decisions would increase as a result of specialization. In some countries, there is lack of judges specialized in patent law."* But even Nokia and GlaxoSmithKline have already voiced concerns[13] about this claim. And the draft EPLA would allow members of the EPO's boards of appeal to serve as EPCt judges (even simultaneously)[14] although they lack the expertise to deal with infringement and indemnification issues: they have received formal training only to examine, or reevaluate, patent applications.

- *"The EPLA, especially if combined with the London Agreement[15] (LA) on the language regime of EPO patents, would pave the way for the European Community patent (ComPat)."* But the combination of the EPLA and the LA would be the death knell for the ComPat, rendering it largely superfluous. A ComPat truly deserving of its name would be granted by an EU agency, subject to EU jurisdiction, and governed by EU legislation (particularly with respect to substantive rules and judicial procedures). While a ComPat granted by the EPO would represent a problematic arrangement, it could still bear some resemblance with the original ComPat idea so long as it were to be subject to EU jurisdiction and legislation.

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10 http://ec.europa.eu/internal_market/indprop/docs/patent/hearing/frain_en.pdf: "As to cost, we would point out that is unusal, at least in our experience, to litigate the corresponding patent in more than one European country and even more unusual to litigate the corrsponding patent in several European countries simultaneously. It is therefore of some concern if, as the EPO has estimated, the cost of centralised litigation would be more than double the cost of litigating nationally in France or Germany [...]"

11 At the recent "Future of Patent Litigation in Europe" conference in London (footnote 9), GlaxoSmithKline's vice president of intellectual property, David Rosenberg, estimated that only 5% to 10% of all patent infringement suits in Europe (across all industries) relate to parallel litigation of the same patent in two or more countries.

12 http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_2006_02_v1.pdf: The EPO, acting as secretariat of the working party in charge of the EPLA, published an impact assessment. Given the EPO's support for the EPLA, it is a safe assumption that the EPO intended to present the EPLA as advantageously as possible. However, for the large majority of cases (which are small to medium-scale), the minimum cost of litigation would increase considerably over the status quo in most countries, except for the UK with its expensive legal system.

13 At the recent "Future of Patent Litigation in Europe" conference in London (footnote 9), GlaxoSmithKline's vice president of intellectual property, David Rosenberg, stated that the creation of a new court system comes with considerable risks concerning future decisions. Nokia's position voiced at the July 12 Commission hearing (footnote 10) has a section that bears the headline "Reliability of decisions – new risks".

14 Articles 2(b) and 6(1) of the Draft Statute of the European Patent Court would allow a member of a board of appeal of the EPO to serve at the same time as a judge of the EPCt.

15 http://patlaw-reform.european-patent-office.org/london_agreement/index.en.php

SMEs to be hit hardest by increased minimum cost of litigation

According to annex 2 to the EPO's impact assessment[16], even the smallest litigation in front of the EPCt will result in court costs of € 97,000 and party fees of € 62,000 each, for the first instance.

Raising the minimum cost of patent litigation far above the cost of national litigation (with the exception of the UK) disadvantages SMEs. In the current (albeit fragmented) setup, an SME can choose to enforce its own patents in a cost-effective location, and if it is sued over an alleged infringement, it will only have to face risks and costs in markets in which it actually operates, as opposed to having to deal with a costly pan-European litigation and higher sums in dispute.

Allowing the enforcement of countless software patents granted by the EPO

The position of the national ministry officials in charge of patent policy on substantive rules is notorious: in the EU Council's working group on patent legislation, they worked out the proposal for a software patent directive that the European Parliament rejected in July 2005. There is also empirical evidence concerning the "quality" of the decisions taken by judges they select: through the EPOrg's Administrative Council, they appoint the members of the EPO's boards of appeal. In a particularly striking decision earlier this year, an EPO board of appeal ruled that anything stored on a computer-readable medium should be considered technical and thus patentable.

While the EPO has already granted tens of thousands of software patents and continues to do so, national courts, especially in such major markets as the UK and Germany, tend to declare many software patents invalid in their countries. Several of the EPLA's proponents who spoke at the July 12 Commission hearing, including the Fraunhofer Institutes and ProTon, complained about the presently weak status of software patents in Europe. After failing to revise the EPC in 2000 and to push the software patent directive through in 2005, certain special interests support the EPLA mainly because it is a new attempt to give software patents a much stronger legal basis in Europe.

The balanced approach of national courts toward patentable subject-matter and the height of the inventive step is Europe's greatest competitive advantage in patent law. But it is in jeopardy now.

Shifting the balance in favor of national ministries and the EPO vs. the EU

The EPJ/EPCt would be firmly under the control of the same group of national ministry officials who also govern the EPO through the European Patent Organisation's (EPOrg) Administrative Council. They would get to appoint, and periodically reappoint or dismiss, the judges. As a result, the new EPCt would support the EPO's excessive granting practice and low quality standards. Judicial independence would be compromised in multiple ways, including the fact that the members of the EPO's boards of appeal (who are EPO employees) could simultaneously be EPCt judges.

Granting full legislative authority on procedural code to unelected ministry officials

The EPJ's Administrative Committee would even be entitled to ratify[17] and amend[18] the EPCt's Rules of Procedure, although such procedural rules should be determined by elected lawmakers. That structural issue gives cause for even greater concern than the absence of an official proposal for the EPCt's Rules of Procedure at this stage. It would be unimaginable for a democratic state based on law to allow public servants to decide on – for an example – the Code of Civil Procedure.

16 http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex2_2006_02.pdf (sections 7 and 8)
17 Draft EPLA, Article 87
18 Draft EPLA, Article 17, Paragraph 2, Item a