

# Report Q162



## Community Patent Regulation

### 1) Names and Functions of Committee Members

Chairman:	Peter-Ulrik PLESNER (Denmark)
Co-Chairman:	Luc SANTARELLI (France)
Secretary:	Enrique ARMIJO (Spain)
Members:	Geoffrey BAYLISS (United Kingdom) Nanno LENZ (Germany) Anna FERREIRA DA SILVA (Portugal) Takashi ISHIDA (Japan) Gerald J. MOSSIGHOFF (USA) Luigi Carlo UBERTAZZI (Italy)

### 2) History

The special committee was established to study and prepare an opinion paper expressing the views of AIPPI national and regional groups of the European Commission Proposal for a Community Patent Regulation.

The special committee has prepared a report of 10 June 2002 for the Lisbon ExCo meeting, a report of 30 October 2003 for the Lucerne ExCo meeting, a report of 1 June 2004 to the Geneva Congress, a report of June 2005 for the Berlin ExCo and a report of July 2006 for the Gothenburg Congress.

Neither the ExCo meetings nor the Congress passed any resolution in relation to the Community Patent.

### 3) Development since the Gothenburg Congress

The establishing of a European Court System adjudicating Community patents has from the outset been an integrated part of a possible community patent regulation. The court system as such has been followed by Q165, which Committee also has followed and reported on the EPLA proposal.

The development in the latest years seems to show that the work with a court system for European patents will be forwarded to a certain extent as an alternative to a community patent.

One question has been whether the Member States can agree on the EPLA or whether entering into such an agreement is exclusively governed by Community competence. On 1 February 2007 the legal service for the Parliament issued a legal opinion with the following conclusion:

*"It follows that the Community's competence is exclusive for the matters governed by EPLA and Member States therefore are not entitled on their own to conclude that Agreement."*

In March 2007 the Commission of the European Communities issued a draft communication from the Committee to the European Parliament and Council with the title "A patent strategy for Europe".

The communication analysed the existing patent litigation system in Europe and described three alternatives as the way forward:

A. The EPLA option

B. An alternative opinion, which is described in the following manner:

*“Some Member States consider that, rather than establishing an EPLA court for European patents only, it would be preferable to set up a unified court structure which could deal with litigation on both European patents and future Community patents. They advocate the creation of a specific Community jurisdiction for patent litigation on European and Community patents making use of the jurisdictional arrangements in the EC Treaty.”*

C. An integrated option which is described in the following manner:

*“The way forward could be to reflect on one single system inspired by the principles on which consensus is emerging, and addressing the respective concerns of Member States and stakeholders. This could be achieved by creating a European Patent Judiciary as foreseen in the draft EPLA but which should be constructed so as to allow, when the Community patent eventually enters into force, to also handle Community patents. It could also be achieved by creating a specialised Community jurisdiction which should have competence for litigation on Community patents and European patents, taking on board features of the EPLA system.”*

The details of such a court solution are not known.

In the communication the Commission also commented on the Community patent and the paper contains the following text:

*“Simultaneously, the Commission is of the opinion that efforts to create a single Community-wide patent must continue. The Community patent remains the solution which would be both the most affordable and legally secure. Statistics show that in the context of translations costs the Community patent is more attractive than models under the present system of European patents.*

*The Council’s Common Political Approach of 2003 is rejected by stakeholders in the consultation mainly on two grounds: the inadequate jurisdictional arrangements and an unsatisfactory language regime. The Commission believes that a truly competitive and attractive Community patent can be achieved provided there is political will to do so.*

*As stated before, stakeholders in particular expressed difficulties with the entirely centralised jurisdiction. These concerns should be taken into account in the work on the single Europe wide patent. jurisdiction system.*

*On translation costs the Commission notes that stakeholders firmly reject the approach which foresees translation of all the claims of the Community patent into all official EU languages (now 23 official languages). Many favour the Commission’s proposal as a sound basis for an agreement, The Commission will explore with the Member States how to improve the language regime with a view to minimizing translation costs and increasing legal certainty, for the benefit in particular of SMEs.”*

This text indicates that the Commission has not abandoned the idea of a Community patent.

#### **4) Latest development**

1. The German Presidency issued a further Questionnaire on 23 April 2007 (Council of the European Union document 8566/07) in relation to the future European patent system. This questionnaire was sent to the national delegations at the Working Party on Intellectual Property (Patents) and deals, inter alia, with the language regime and with the future jurisdictional system for the Community patent.

The summary of the Member States' answers was published in a new EU working document (11622/07) on 12 July 2007.

2. The "Bundespatentgericht" organized an international symposium entitled "The Future of the Patent Jurisdiction in Europe" in Munich on 25 - 26 June 2007. This was the last attempt made by the German Government to push forward the debate on the subject matter.

The two different governmental positions already known, namely, the German position defending the EPLA and the French position, backed by Italy and Spain (among other States), proposing a European Community base Court, were maintained.

3. On 27 June 2007 there was a meeting of the Working Party on Intellectual Property (Patents), still under German Presidency.

The EU Commission representative stated, in reference to EPLA, that the Commission legal services held that Member States could not act independently of the EU.

The EU Commission representative stated the wish to find a compromise solution between the German and the French proposals. This compromise could be based, in principle, on decentralisation of the Courts of first instance, centralisation of the Court of Appeal, and technical qualification of the judges.

4. On 12 July 2007, by means of the Working Party on Intellectual Property (Patents), the Portuguese Presidency issued document (EU 11622/7), mentioned in paragraph 1 above, entitled "Towards an Enhanced Patent Litigation System and a Community Patent - How to Take Discussions Further".

This Document summarizes the work to be done to arrive at a compromise solution.

The Portuguese Presidency intends to hold four meetings of the Working Party on Intellectual Property (Patents) on 20 July (already held), 14 September, 17 October, and 7 November, during which the details of such a compromise solution will be debated.

The following eight issues in relation to the court systems will be discussed in detail at the first three meetings:

1. degree and mode of decentralization of the first instance of the litigation system
2. features of the second instance
3. qualification of judges and technical experts
4. allocation of cases and relationship with the Brussels I Regulation
5. rules of procedure
6. provisional and precautionary measures
7. operating costs
8. arbitration procedures

In relation to other outstanding issues related to the Community Patent, such as the future language regime, the Portuguese intention is to discuss them at the last meeting of the Working Party during its Presidency, to be held on 7 November 2007.

## **5) Future work for the Special Committee**

Special committee Q162 will continue to follow the development.