

## DOCUMENT

# The First Steps Towards an Optional Protocol under the European Patent Convention on the Settlement of Litigation Concerning European Patents

The structure paper of the Working Party on Litigation mandated by the Intergovernmental Conference of the Member States of the European Patent Organisation on the reform of the patent system in Europe\*

### PART A: *Introduction*

The 1973 European Patent Convention (EPC) has introduced major improvements to the patent system in Europe, such as a centralised procedure for the grant of patents that is based on a uniform patent law and conducted in a single language, a high quality protection standard, and a *de facto* harmonisation of the provisions of the national patent laws governing patentability, validity and extent of protection.<sup>1</sup> The EPC, however, was only one element of the European Patent System as conceived by the European Economic Community in the 1960s and 1970s. Another important element was the Community patent, which should have complemented the EPC to provide for a single patent for the whole European Community. However, the Community Patent Conventions signed in 1975 and 1989 have not entered into force, and probably never will. Recently, the European Commission took the initiative again to create a supranational European patent for the entire European Union by way of a regulation to be enacted under the EC Treaty. The EPC and the future Community patent are not competing patent systems; as long as the Member States of the European Patent Organisation (EPO) are not all Member States of the European Union, both systems of

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\* The original English version of the paper, as well as the German and French translations, can be found at <http://www.ige.ch/D/jurinfo/12.htm>.

The Working Party on Litigation is chaired jointly by Germany, Luxemburg and Switzerland. For the German co-Chair: Hans-Georg Landfermann, President of the German Patent and Trade Mark Office; for the Luxemburg co-Chair: Serge Allegrezza, Conseiller de Gouvernement 1ère classe, Chargé de direction, Direction de la Propriété Industrielle et des Droits Intellectuels; for the Swiss co-Chair: Roland Grossenbacher, Director of the Swiss Federal Institute of Intellectual Property.

The structure paper as follows was sent to us on behalf of the co-Chair by Felix Addor, Chief Legal Officer and Deputy Director of the Swiss Federal Institute of Intellectual Property ([felix.addor@ipi.ch](mailto:felix.addor@ipi.ch)) and Stefan Luginbuehl, Legal Advisor, Patent and Design Law, Swiss Federal Institute of Intellectual Property ([stefan.luginbuehl@ipi.ch](mailto:stefan.luginbuehl@ipi.ch)), who were involved in the writing of the said paper under the co-Chair of the Working Party on Litigation. They are responsible for this article's Introduction, as well as for its Conclusion. These two persons gladly accept any comments on the structure paper and will ensure that any comments are forwarded as appropriate to the mandated EPO Working Party on Litigation. The Intergovernmental Conference took place in Paris on 24 and 25 June 1999.

<sup>1</sup> The 1997 Green Paper on the Community Patent and the Patent System in Europe (COM(97) 314 final).

patenting will complement each other and therefore co-exist in Europe.<sup>2</sup> Therefore, it is of utmost importance to develop both systems in parallel and to maintain a fruitful dialogue between the EPO and the European Commission. Both systems should aim at and finally lead to the best possible protection for the users of the European Patent System, including the most adequate enforcement of their rights in litigation before the courts.

Once the European patent is granted by the European Patent Office, it is treated like a national patent. Consequently, the national courts of the Member States of the EPO have jurisdiction for proceedings concerning infringement and validity of European patents within the territory of these States. This situation leads to the risk that judgments in different designated States may be contradictory and therefore may lead to legal uncertainty.

To avoid this risk, and to overcome other disadvantages of the present situation, an Intergovernmental Conference of the Member States of the EPO was held in Paris on 24 and 25 June 1999 at the invitation of the French government. The Conference adopted a mandate<sup>3</sup> that sets up two working parties. One working party was charged with the task of studying the reduction of (translation) costs of the European patent. The other working party, the Working Party on Litigation (WPL), was charged with the following issues:

- first, to study under what conditions the principle of arbitration in litigation relating to validity and infringement might be acknowledged by the EPO Member States;
- second, to define the terms under which a common entity can be established and financed, to which national jurisdiction can refer to with a view to obtaining advice on any litigation relating to validity and infringement of European patents;
- third, to elaborate a draft text for an optional protocol to the EPC,<sup>4</sup> which, with regard to litigation concerning European patents, would commit its signatory States to an integrated judicial system, including harmonised rules of procedure and, at least, a common court of appeal.

This article will focus on the third issue, only.

Up until now, the WPL has held three meetings.<sup>5</sup> Moreover, its Chair discussed the draft for a structure paper on an optional protocol on the settlement of litigation

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<sup>2</sup> The EPO currently has nineteen Member States: all the Members of the European Union, plus Cyprus, Liechtenstein, Monaco and Switzerland. Turkey will join the EPO during the course of 2000. At 1 July 2002, the EPC will be open for accession to Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania, Slovakia and Slovenia.

<sup>3</sup> See Official Journal, European Patent Office, 1999, 546 ss., as well as GRUR Int. 1999, 722 ss.

<sup>4</sup> During the course of the ongoing revision of the EPC, a new provision for special agreements to be inserted in Part IX of the EPC was presented. This proposal will likely be submitted to the diplomatic conference on the revision of the EPC, which will take place in Munich in November 2000.

<sup>5</sup> The meetings took place in Lucerne (14 and 15 September 1999), in Berlin (25 to 27 January 2000) and in Luxembourg (14 to 16 June 2000).

concerning European patents (European Patent Litigation Protocol—EPLP) with patent judges from eight European countries<sup>6</sup> at an informal meeting, and permanently exchanged ideas with the European Commission, the Union of Industrial and Employers' Confederations of Europe (UNICE), the Institute of Professional Representatives before the European Patent Office (*epi*) and the EPO, all of which were involved from the beginning as observers in the work of the WPL. The following structure paper of an EPLP was approved by the WPL at its last meeting in Luxemburg. At this meeting, it was also decided to submit the paper to a second Intergovernmental Conference scheduled for October 2000 in London, together with the following draft mandate:

“1. The Intergovernmental Conference takes note of the documents ... ‘Principle elements of an optional protocol on the settlement of litigation concerning European patents’ and ... ‘Proposals regarding the ‘common entity’ to be studied by the Working Party on Litigation under the mandate issued by the Paris Intergovernmental Conference on 24 and 25 June 1999’, together with the minutes of the Luxemburg meeting of the Working Party on Litigation ...

2. The Intergovernmental Conference mandates the existing Working Party on Litigation to submit to the governments of the Member States of the European Patent Organisation, no later than the end of 2001 and in treaty language, an optional agreement on the settlement of litigation concerning European patents, including a separate part concerning a common entity, it being understood that the Member States of the European Patent Organisation shall be free to join only the part on the common entity. The work will be taken forward on the basis of the documents in point 1 and shall take into consideration the relationship to a community patent system.

3. The Intergovernmental Conference agrees to the following working arrangements for the Working Party on Litigation: a sub-group, comprising initially Denmark, Germany, France, Luxemburg, Monaco, The Netherlands, Sweden, Switzerland and the United Kingdom, will produce a draft agreement and submit it to the Working Party on Litigation for consideration. The sub-group will decide its constitution and may engage expert assistance.

4. The Intergovernmental Conference expects the European Patent Organisation adequately to support and finance the Working Party on Litigation, including the sub-group, and any expert assistance.”

As a result of its discussions, the WPL decided to go a step further than its mandate and to present a structure paper which covers key court and procedural rules not only for a European Patent Court of first, but also of second instance. However, some delegations took the view that a system with national first-instance jurisdiction would be preferable to a complete European solution.

The structure paper suggests creating a supranational European Patent Court with

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<sup>6</sup> This meeting took place in Berne on 8 December 1999. Participating judges were Bruno Boval, France; Dieter Braendle, Switzerland; Josine Fasseur-Van Santen, The Netherlands; Pierre Gehlen, Luxemburg; Magnus Göransson, Sweden; Sir Robin Jacob, United Kingdom; Kathrin Klett, Switzerland; Alf Linder, Sweden; Ernst J. Numann, The Netherlands; Antje Sedemund-Treiber, Germany; and H.C. Thomsen, Denmark.

its own procedural law, having exclusive jurisdiction for cases concerning the validity and/or infringement of European patents and also having jurisdiction to order interlocutory relief. Moreover, it is suggested that the applicable substantive law should be found as far as possible in the EPC. However, it will be necessary to introduce some rules of harmonised law into the EPLP. In addition, it is proposed that decisions revoking European patents in whole or in part should take effect *erga omnes* in all EPLP States, whereas decisions on infringement should take effect only *inter partes*. Enforcement must be left to national authorities.

Although the future European Patent Judiciary should be truly European and therefore be composed of judges of different nationalities, it should at the same time have local presence. Therefore, the court of first instance should consist of regional chambers and conduct its oral proceedings not at its central seat but in the country of the defendant. The courts of first and second instance could comprise a number of national judges who may continue to serve in their national courts. Finally, it is suggested that the main principles of procedural law must be set out in the EPLP, but that the more detailed rules of procedure and the practical organisation of the proceedings will have to be laid down in separate court rules.

These proposals are far-reaching and may result in fundamental changes in the current framework of litigation. Thus, it is felt that the Intergovernmental Conference should have at its disposal the results of a broad public discussion on this important subject. To enable and enhance this public discussion, and because this promising initiative has not received up until now the publicity it deserves, it seems necessary to publish the discussion paper on an EPLP.

## PART B: *Principal Elements of an Optional Protocol on the Settlement of Litigation Concerning European Patents*

### GENERAL REMARKS

#### I. TERMS OF REFERENCE

On 24 and 25 June 1999, an Intergovernmental Conference of the Member States of the European Patent Organisation<sup>7</sup> was held in Paris. In view of the need to improve the enforceability and legal certainty of European patents by establishing a jurisdictional system ensuring uniform interpretation of the European patent, it was recommended that the Organisation's Member States take whatever measures they consider necessary to study the restriction to a minimum of the number of courts dealing with patent litigation.

The Conference also mandated a Working Party on Litigation, chaired jointly by Germany, Luxemburg and Switzerland, to:

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<sup>7</sup> As at 1 January 2000: all Members of the European Union plus Cyprus, Liechtenstein, Monaco and Switzerland. Turkey is joining the EPO sometime during the year 2000.

- study under what conditions the principle of arbitration in litigation relating to validity and infringement might be acknowledged by the Organisation's Member States;
- consider how a common entity can be established and financed to which national jurisdictions can refer aspects of litigation relating to validity and infringement with a view to obtaining an opinion;
- present a draft optional protocol to the European Patent Convention which would commit its signatory States to an integrated judicial system, including uniform rules of procedure and a common court of appeal.

The report containing the WPL's proposals was to be submitted to the governments of the Organisation's Member States and the EPC Revision Conference before 1 July 2000.

At its first meeting in Lucerne on 14 and 15 September 1999, the WPL, *inter alia*, mandated the Chair to draw up, for the next WPL meeting at the end of January 2000, a discussion paper which should set out the basic contents of an optional protocol, including the main court and procedural rules for a European patent court of first and second instance as well as the necessary provisions of substantive law. There was a clear preference for the European patent court of first instance to have some form of local presence.

On 8 December 1999, a draft of this discussion paper was discussed in Berne with a number of experienced patent judges from some EPC Member States in the presence of representatives of the countries forming the co-Chair.

Between 25 and 27 January 2000, the discussion paper was discussed at a secondary plenary session of the WPL. A group of six to eight delegations was basically in favour of the proposals in the paper, which were also strongly supported by UNICE and the *epi*. A group of around four delegations accepted the idea of a European patent court of second instance, but wanted first-instance jurisdiction to remain with national courts.

The WPL requested the Chair to develop the model of a European patent court of first and second instance. In response to this, the discussion paper was reworked and further elaborated.

## II. PURPOSE OF THIS PAPER

The mandate of the Intergovernmental Conference to the WPL is to draw up an optional protocol on the settlement of litigation concerning European patents (EPLP: European Patent Litigation Protocol), which all EPC contracting States can sign or accede to if they so wish (EPLP States).

For reasons of time, given the complex and fundamental issues to be discussed and decided, this revised paper cannot be expected to present a full and finalised protocol. However, it is possible to outline the protocol's structure and give a reasonably detailed description of its contents.

The EPLP should contain all the necessary rules on the establishment and functioning of a European patent court of first and second instance ruling on disputes relating to both the validity and infringement of European patents.

### III. REFERENCE TEXTS

The EPLP should be based as far as possible on existing texts and provisions, in particular:

- the EPC and its implementing regulations;
- the 1989 Community Patent Convention (CPC);
- the 1989 Protocol on the Settlement of Litigation concerning the Infringement and Validity of Community Patents (CPC Protocol on Litigation) and associated Protocols (Protocol on Privileges and Immunities, Statute of the Common Appeal Court (COPAC Statute));
- the Brussels and Lugano Conventions;
- the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement);
- national law of EPC contracting States.

## THE OPTIONAL PROTOCOL ON THE SETTLEMENT OF LITIGATION CONCERNING EUROPEAN PATENTS

### IV. BASIC CONSIDERATIONS

#### A. LEGAL BASIS IN THE EPC

If the EPLP is to be enacted under the aegis of the European Patent Organisation, it seems preferable to create a clear legal basis in the EPC (see Articles 2 and 64(3), EPC). This could be done as part of the forthcoming revision of the EPC. A proposal to this effect has been submitted to the Committee on Patent Law (see Annex II to this document).

It would also be possible to set up the EPLP outside the European Patent System, in which case there would be no need for a special legal basis in the EPC.

#### B. CONDITIONS FOR ENTRY INTO FORCE OF THE EPLP

It seems important to establish certain conditions which have to be fulfilled to enable the EPLP to enter into force. For example, a specified number of countries meeting certain criteria—e.g. accounting for a specified number of judicial proceedings concerning European patents and/or a specified number of patents granted or validated—would have to have ratified the EPLP.

### C. RELATION TO THE LEGAL ORDER OF THE EUROPEAN UNION AND TO A POSSIBLE COMMUNITY PATENT

Careful thought must be given to the question of how this project can be carried out while safeguarding the priority of the European Union legal system for EU Member countries without hampering the other signatory States to the Protocol. In particular it should be examined whether a possibility should be created for the European Patent Court, to be created under the EPLP, to put preliminary questions to the European Court of Justice.

It must be clearly understood that the EPLP does not present an obstacle to the introduction of a Community patent as envisaged by the European Commission. There are three reasons for this:

- first, instead of hampering a Community patent, an EPLP could very well turn out to promote the development of a Community patent, being easier to establish and not only spreading the idea of a supranational solution for patent litigations but also demonstrating the advantages of such a solution;
- second, after grant, an EPC patent becomes a “bundle” of patents for the countries designated in the application, whereas the Community patent is to be a single supranational patent for all the Member States of the EU. Both patent systems, therefore, cater to different needs, and can exist in parallel. Users can combine Community, EPC and national patents, with their different effects, to find the solution that best meets their requirements. In the opinion of the European Parliament, both systems should indeed co-exist. If the EPC patent system however is going to be used in parallel to a Community patent system, there is every reason to make also the EPC patent system function as well as possible;
- third, not all (future<sup>8</sup>) EPC Contracting States are also Member States of the EU, so there is a continuing need for a system apart from that of the Community. The addresses of the two systems are not the same.

### D. RELATION OF THE EPLP TO THE BRUSSELS AND LUGANO CONVENTIONS

Careful consideration must also be given to the relation of the EPLP to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) and the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention). Under Article 16(4) of the Brussels and Lugano Conventions, in proceedings concerned with the registration or validity of patents, exclusive jurisdiction is exercised by the courts of the Contracting State in which the deposit or registration

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<sup>8</sup> From 1 July 2002, the EPC will be open for accession by Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania, Slovakia and Slovenia. Turkey is joining the EPO sometime during the year 2000.

has been applied for, has taken place, or is deemed to have taken place under the terms of an international convention. This provision does not, however, apply if the Contracting States to the Lugano and Brussels Conventions are or will be party to any conventions which in relation to particular matters govern jurisdiction, or the recognition or enforcement of judgments (see Article 57 of the Lugano and Brussels Conventions; *lex specialis derogat legi generali*). The EPLP would be such a special convention and would not therefore need to conform to Article 16(4) of the Lugano and Brussels Conventions.

Article v(d) of Protocol No. 1 to the Lugano Convention does not provide otherwise, but simply makes it clear that the courts of each Contracting State have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent, thus following Article 16(4) of the Lugano Convention. This provision does not, however, affect the right of the parties to the Convention under Article 57 to conclude special agreements such as the EPLP which would provide for jurisdiction deviating from Article 16(4).

Moreover, as regards infringement actions, *forum loci delicti commissi* ensures that the European Patent Court has jurisdiction even if the defendant is not domiciled in a State party to the EPLP. However, compatibility of such provisions in the EPLP with the Brussels and the Lugano Conventions must be ensured.

Taking into account the problems caused by in particular the Articles 5, 6, 16, 21, and 22 of the Brussels and Lugano Conventions, it seems necessary to include special rules in the EPLP to deal with these problems.

Of course, any new developments with regard to the Brussels and Lugano Conventions will have to be taken into consideration to ensure genuine compatibility between these treaties and the EPLP. This concerns, in particular, the proposed EU regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 July 1999 (COM(1999)348 final), and especially Article 63 thereof. The text of any future regulation should leave scope for the development of the EPLP.

Finally, the Protocol should be borne in mind in the work of the Hague Conference on Private International Law concerning a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (see the preliminary draft adopted by the Special Commission on 30 October 1999, especially Article 37 thereof).

## V. CORE ELEMENTS OF THE EPLP

The main elements of the proposed system are:

- A. the creation of a European Patent Judiciary (EPJ), comprising a common court of first instance, a common second-instance court and a Registry;
- B. the EPJ should deal jointly with both infringement and validity of European patents, including sanctions and injunctive relief;

- C. the jurisdiction of the EPJ should in principle be exclusive;
- D. the applicable substantive law should be found as much as possible in the EPC, but it will be necessary to introduce some rules of harmonised law into the EPLP;
- E. decisions revoking the European patent wholly or in part should take effect *erga omnes* in all EPLP countries, whereas decisions on infringement would only take effect *inter partes*. Enforcement will have to be carried out by national authorities;
- F. the main features of the organisation of the EPJ (including the number and qualifications of the judges) will have to be described in the EPLP, but the practical organisation of the work will be best left to the courts themselves. The common first-instance court must have a local presence;
- G. the main principles of procedural law must be set out in the EPLP, but the more detailed rules of procedure and the practical organisation of the proceedings will have to be laid down in separate court rules.

These elements are elaborated below.

#### A. EUROPEAN PATENT JUDICIARY (EPJ)

##### 1. *A Common Patent Court of First and Second Instance*

Under the EPLP a supranational European patent court of first and second instance should be set up as a common judicial body for the EPLP States. Industry in particular is strongly in favour of the creation of a common European patent court along these lines.

There are a number of reasons for advocating a common first-instance court. First, only a common European court of first instance, composed of highly qualified and experienced patent judges from different countries with different legal cultures, will be able to achieve the desired goals—i.e. that European patent law is applied and construed in a truly consistent “European” way, and that European patents can be enforced and attacked in all EPLP countries in reliable, affordable and efficient proceedings resulting in quick, high-quality decisions which carry authority and command user confidence.

Second, any alternative would, in large measure, allow the current problems to persist, since much litigation only goes as far as the court of first instance and would therefore not reach the unifying level of the appeal court. At present, multiple litigation relating to the same rights in different jurisdictions leads to inconsistent interpretation of the same substantive law in different jurisdictions and hence different outcomes and a lack of predictability; procedural law, e.g. on pan-European injunctions, is also inconsistent, and forum-shopping is on the increase. These problems cause delay, unnecessary extra costs and general uncertainty, and are harmful to business.

Third, a plurality of first-instance national courts working under different procedural rules would make it extremely difficult to achieve true consistency and to

ensure smooth interaction between first-instance proceedings before a national court and the procedure before the common appeal court, which would have to apply its own rules of procedure. Even if the national courts followed the same set of procedural rules, they still would retain an individual outlook derived from their own national legal traditions, which again would make consistency difficult. If national courts acted as courts of first instance, a body of procedural law for patent cases would have to be implemented in the national laws of all the Protocol States. That in turn means that the rules of procedure will have to be worked out in every minute detail, leaving no eventuality unforeseen. On the contrary, in case of a true European court of first instance, it would be sufficient to lay down in the Protocol only the basic regulations of procedural law and the implementation of these basic regulations could be left to the European court itself. This would ensure far greater flexibility and allow scope for the gradual development of the rules of procedure.

Fourth, a plurality of first-instance national courts would almost inevitably perpetuate forum-shopping and its related ills. A single European patent court of first instance, with jurisdiction in all EPLP States, would put an end to these problems.

Fifth, an important reason against national courts acting in first instance is that the urgent problem of lack of experienced patent judges in many EPC States cannot be solved that way. Thus, the aim of the mandate of the Intergovernmental Conference of the EPC States, to establish a jurisdictional system that meets the need for a uniform interpretation of the European patent will unnecessarily be delayed if there is established just a common court of appeal. Another consequence would be that it would become more costly for the patent holder to defend his rights.

It should furthermore be noted that the principle of subsidiarity does not speak against a European court of first instance, as experience in past years has shown that the problems mentioned are not easily solved at national level.

## 2. *Alternative Solution: A European Patent Court of Second Instance Only*

Some delegations took the view that a system with national first-instance jurisdiction would be preferable to a fully European solution.

### (a) *Reasons for national first-instance courts*

#### (i) *Structure of the European Patent Convention*

A purely European court system for patent disputes conflicts with the basic structure of the European Patent Convention. The European Patent Office grants European patents which in the designated Contracting States have the same effect as national patents and can only be challenged before the national patent courts with binding effect in the designated States. A European court system giving decisions at first

instance having effect in all Contracting States would mean a clear departure from this basic structure.

(ii) *Subsidiarity at the European level*

Judicial functions should as far as possible be exercised in a decentralised manner in the Contracting States, and at the European level a court should only be established for the purpose of ensuring uniformity of court decisions. In many cases, patent disputes can already be decided with final and binding effect at first instance by the courts of Member States. The need for uniform decisions from a central European patent court would be adequately met if the latter had jurisdiction for appeals.

(iii) *Proximity of the courts to litigants*

A European patent court system must ensure a certain degree of proximity between litigants and the court. This is particularly important for small- and medium-sized businesses, and is best ensured by giving first-instance jurisdiction to national courts. Experience shows that first-instance decisions are normally final and binding; in the remaining minority cases, where an appeal is filed against the decision of the national court, it would be acceptable to have centralised jurisdiction at a European patent court.

(iv) *Jurisdiction for patent litigation*

Existing structures at the national level enable patent litigation to be handled competently at first instance. If litigation concerning European patents is left to national courts at first instance, this will ensure that the courts and legal representatives in Member States retain their competence in patent litigation. This is necessary, since national courts will continue to have jurisdiction over patent litigation concerning purely national patents. To maintain and develop the relevant competence, individual Member States will still be free to entrust decisions at first instance to a common court.

(v) *Efficiency of the court system*

A purely European court system would run the risk of being overwhelmed by the sheer number of patent disputes, which might lead to lengthy proceedings and perhaps a loss of quality in decisions. First-instance jurisdiction of national courts would reduce the number of cases to be dealt with by a European appeal court. Initially, litigants would be able to bring cases before national courts giving high-quality decisions within reasonable time at low cost.

(vi) *Related claims*

First-instance national courts could also decide on cases involving further claims—e.g. under competition law—not covered by European patent law. This would avoid parallel litigation.

(vii) *Cost*

Establishing an appeal court only at the European level would be less costly than creating a fully centralised system. Most patent disputes would already be decided with final and binding effect at first instance by the national courts.

(b) *Structural elements of a system with national first-instance courts*

Structural elements of a system with national first-instance courts have not been worked out in detail as the mandate given to the Chair by the WPL was to elaborate a model with a common European patent court of first and second instance. The remaining part of this paper is therefore tailored to that model.

B. THE EPJ SHOULD DEAL WITH BOTH INFRINGEMENT AND VALIDITY OF EUROPEAN PATENTS

The European Patent Court should be competent to rule on the infringement (actual or threatened) and validity of a European patent in one and the same proceedings. A single action enables the Court to consider all the relevant issues and handle the case with maximum efficiency. Claims based on the provisional protection afforded by a European patent application under Article 67 of the EPC should also fall within the exclusive jurisdiction of the European Patent Court. Furthermore, the Court should be competent to deal with actions for declaration of non-infringement of a European patent.

The European Patent Court would have to take account, in infringement proceedings, of any facts or circumstances invoked by the defendant which would rule out an infringement, such as rights of prior users, exceptions to the rights conferred by a European patent (see Article 27 of the CPC), licences, or exhaustion of rights.

An action for revocation of a European patent may be brought before the European Patent Court by direct attack or by way of a counterclaim in infringement proceedings. The patentee should have the right to amend the patent at least before the court of first instance, i.e. to defend the patent with limited scope only.

Finally the European Patent Court should be competent to decide whether or not a defendant has acted contrary to an injunction issued by of the Court.

### C. THE JURISDICTION OF THE EPJ SHOULD IN PRINCIPLE BE EXCLUSIVE

In main proceedings the jurisdiction of the European Patent Court should in principle be exclusive; in matters of interlocutory relief and protective measures, some scope could remain for the involvement of national courts.

#### 1. *Main Proceedings*

##### (a) *Exclusive jurisdiction of the European Patent Court*

The European Patent Court should have exclusive jurisdiction for proceedings concerning the infringement and validity of European patents and for such proceedings only. Where litigation concerns both European and national (parallel) patents, the European Patent Court should have jurisdiction for European patents only; national patents would be dealt with by the competent national courts.

Making the European Patent Court's jurisdiction exclusive is justified by the aim of achieving an integrated judicial system, i.e. ensuring uniform interpretation of European patent law and avoiding contradictory judgments.

##### (b) *Jurisdiction of the national courts*

Notwithstanding the above, the parties could still be allowed to agree that a case should be decided by a competent national court. Such an agreement conferring jurisdiction on a national court could be provided for as an exception to the exclusive jurisdiction of the European Patent Court. However, the decision of the national court should have effect only in the country concerned, in respect of both infringement and validity, and the EPLP would not apply to such litigation.

In any event, the national courts should continue to have jurisdiction for any proceedings concerning the right to a European patent, compulsory or other statutory licences, licensing agreements or employee inventions. The national courts should also retain jurisdiction for issues of copyright, unfair competition, utility models, etc.

#### 2. *Provisional Measures (Preliminary Injunctions and Protective Measures)*

Orders for provisional measures, especially preliminary injunctions<sup>9</sup> and protective measures<sup>10</sup> in cases of actual or threatened infringement of a European patent are an essential part of an effective integrated litigation system. The law on provisional and protective measures should reflect the minimum standards under Article 50 of the TRIPS Agreement.

<sup>9</sup> A preliminary (or interlocutory) injunction is the temporary relief afforded once litigation has started, or even before, to prevent irreparable damage from occurring before the court has a chance to decide the case.

<sup>10</sup> A protective measure, e.g. *saisie contrefaçon* or a search order, may be imposed to secure facts and/or evidence concerning an alleged infringement.

(a) *Interlocutory relief*

Since national rules and procedures for granting interlocutory relief vary fundamentally in several important respects, there is a pressing need for common rules on such measures to prevent infringement. The European Patent Court should therefore have the power to grant such interlocutory relief at both first and second instance.

However, the proprietor of a European patent may have a legitimate interest in obtaining swift interlocutory relief from a national judge, especially where the main proceedings are not yet pending before the European Patent Court. Therefore, as long as no infringement proceedings are pending, a party should have the option of requesting preliminary injunctions from either the competent national court or the European Patent Court of First Instance. However, any preliminary injunctions ordered by a national court should be limited to the country concerned and have no cross-border effects. The possibility could be considered of letting them expire if no main proceedings before the European Patent Court are instituted within a certain period. (In any case, compliance with Article 50(6) of the TRIPS Agreement will have to be assured.) Once proceedings are pending before the European Patent Court, the latter should have exclusive jurisdiction for preliminary injunctions.

(b) *Protective measures*

National courts should remain competent to order protective measures according to national law. The outcome of such measures may then be used in proceedings before the European Patent Court.

In those cases where national law demands following up protective measures with main proceedings, the institution of proceedings before the European Patent Court would, of course, have to be sufficient.

The possibility could also be considered of establishing certain protective measures in the EPLP, to enable parties to get protection in all the EPLP States.

D. THE APPLICABLE LAW SHOULD BE FOUND AS FAR AS POSSIBLE IN THE EPC AND EPLP

1. *Extent of Protection and Infringement of a European Patent*

Regarding the extent of protection conferred by a European patent, the EPLP would simply refer to Article 69 of the EPC and the Protocol to that Article.

The question of which acts constitute infringement, i.e. violate the rights conferred by a European patent, could be governed—together with the arguments invoked by the defendant to show that no infringement has occurred—by national law. The Court would then have to decide infringement on a country-by-country basis, relying on national laws which may well differ.

However, bearing in mind that the rights conferred by the patent under national law are largely harmonised with Article 64(2) of the EPC and Articles 25 to 28 and 35 of the CPC, and to avoid any problems where infringement took place in more than one State, the latter provisions should preferably be incorporated into the EPLP.

## 2. *Sanctions for Infringements*

As far as the sanctions and remedies for patent infringement are concerned, the EPLP should include a set of rules providing for at least such sanctions as are contained in the relevant provisions under the TRIPS Agreement (Articles 44 to 48), i.e. injunction, award of damages, destruction of infringing goods, etc. The European Patent Court will have to decide on these sanctions, including the amount of the damages. Responsibility for enforcing the sanctions must lie with the national authorities, as the European Patent Court will have no independent means of coercion.

## 3. *Sanctions for Non-Compliance with an Injunction of the Court*

The sanctions for non-compliance with an injunction ordered by the European Patent Court, such as a fine, should be specified in the EPLP. The Court would be able to impose a fine and decide its amount, but here too, enforcement would be left to the national authorities.

## 4. *Validity of a European Patent*

The EPLP can simply refer to Articles 138 and 139(2) of the EPC. When the validity of the patent is contested, the patentee should be entitled to amend it at least before the European Patent Court of First Instance.

# E. DECISIONS SHOULD HAVE EFFECT IN ALL EPLP STATES

## 1. *Effect of Decisions*

The aim of the EPLP would be achieved most fully if the territorial effect of decisions of the European Patent Court were extended to all EPLP States.

Decisions revoking the European patent wholly or in part should take effect *erga omnes* in all EPLP countries, whereas decisions on infringement would only take effect *inter partes*.

## 2. *Enforcement*

The competent national authorities would enforce decisions of the European Patent Court (including provisional measures), preferably without any further formality

being required. The *exequatur* proceedings of the Brussels and Lugano Conventions should therefore be abolished for EPJ decisions.

If this would not be acceptable, there should be a general provision ensuring that enforcement is to be carried out in line with the Brussels and Lugano Conventions.

F. THE MAIN ORGANISATIONAL ASPECTS OF THE EPJ MUST BE DESCRIBED IN THE EPLP

This paper covers only the main aspects of the European Patent Court which should be included in the EPLP itself or in separate instruments provided for by the Protocol. As far as possible, the latter should be drafted along the lines of the relevant provisions of the EPC, the CPC Protocol on Litigation and the COPAC Statute. Bearing in mind the need for maximum flexibility and the difficulties inherent in amending an international agreement, the details of the organisation and functioning of the Court should be laid down in separate statutes which may be amended by the Court itself or its supervisory body without requiring a revision of the EPLP.

1. *Seat of the Court*

The seat of the European Patent Court should be determined by common accord of the governments of the signatory States (see Article 2 of the CPC Protocol on Litigation). The common first-instance court may, however, sit at any other place in an EPLP State (see below).

2. *The Common First-Instance Court should have a Local Presence*

(a) *Needs of the parties*

It is acknowledged that the litigating parties, especially small- and medium-sized businesses, might prefer to have litigation conducted “at home” instead of having to go to a remote European Patent Court.

This need should be met by allowing the Court to create regional chambers and/or to come to the defendant’s place of residence or business for oral hearings or taking of evidence, sitting in a courtroom provided by the national authorities (“peripatetic court”).

The core of such a regional chamber could be one or more judges from a national court, at the same time acting as judges of the common first-instance court. Each EPLP State should designate one of its courts of first instance to provide the (regional chamber of) the common first-instance court with facilities (courtroom, communication infrastructure, etc.). The registry of that national court could also function as a sub-registry of the common European patent courts. New information technology (e.g. video-conferencing) should be used wherever possible.

(b) *Needs of national courts*

Having national judges at the same time acting as judges of the EPJ would also maintain and even enhance experience of patent law at the national courts. In addition, it would ensure the availability of local judges to serve as rapporteurs.

3. *Number and Qualifications of Judges*

The number of judges needed will depend on how many cases the court has to hear each year. However, at least one highly legally qualified patent judge from every EPLP State should be appointed for each instance.

Problems could arise if any of the countries find that they are unable to provide judges with sufficient experience of patent law. The system must provide for some way of training in such cases. One possibility could be that such a country would appoint a judge as an “assessor” to the common courts. An assessor will be partaking in the sessions and deliberations of the European courts as an extra member of the panel, having only an advisory vote. Also he could assist the rapporteur. The country nominating a judge as an assessor would have to enable him to acquire as much experience as possible in dealing with patent cases before national courts. After this training period, he could be appointed as a full EPJ judge.

National judges as well as members of the EPO boards of appeal should be eligible as judges. Their participation should, however, be subject to any exclusion or objection in a particular case (see Article 24 of the EPC). All EPJ judges, whether lawyers or technically qualified persons, must possess ample experience of (European) patent law (see Articles 6 and 31, CPC Protocol on Litigation). They would be appointed for a given term and, at least for a transitional period, would continue to serve on a national court or on the EPO boards of appeal.

The technically qualified judges should be selected from a list of members of national courts and authorities and of the EPO technical boards of appeal, and sit only on the case for which they have been chosen. The presence of technically qualified judges does not of course prevent the court from hearing outside experts.

4. *Composition of the Court*

The court of first instance should be a plenary body composed of three judges. The second-instance court should have a maximum of five members. One judge in first instance and at least one judge in second instance should have a technical background. However, the presiding judge should always be a lawyer.

The question remains whether there should be a common pool from which the judges at both levels—first and second instance—are chosen. A common pool could have advantages in view of the limited human resources available and also because it would spread judicial expertise. An obvious disadvantage is that the outside world could

find it difficult to recognise that the two levels of jurisdiction were independent. A possible solution would be to start with a common pool of judges but then to separate the two instances completely after a transitional period of, say, five years.

#### 5. *Financing of the Court*

The expenditure of the European Patent Court should be fully covered by the Court's own resources, i.e. court fees, and by financial contributions from the EPLP States (see Article 10, CPC Protocol on Litigation). In the long term, however, the Court should become entirely self-financing.

#### 6. *Legal Status, Privileges and Immunities of the Court*

In line with Articles 3 and 4 of the CPC Protocol on Litigation and the Protocol on Privileges and Immunities of the Common Appeal Court, the European Patent Court should have legal personality, and its members should enjoy the privileges and immunities necessary to the performance of their duties.

#### 7. *Management of the Court*

The presidents of each instance should be responsible for overall management and the appointment of the administrative staff. They should have the option of delegating these functions wholly or in part to a secretary-general managing the registry (see Article 8, CPC Protocol on Litigation).

#### 8. *Registry*

The European Patent Court should have a central registry, with sub-registries in each EPLP State.

### G. THE MAIN PROCEDURAL PRINCIPLES MUST BE LAID DOWN IN THE EPLP

Since the EPLP would commit its signatory States to an integrated judicial system, uniform rules of procedure must be created for proceedings before the European patent court of first and second instance. A full and uniform body of procedural law is therefore needed to cover main proceedings, provisional measures and appeals. In the EPLP itself, however, it would be sufficient to lay down the main principles, drafted on the basis of existing texts such as the EPC, CPC, CPC Protocol on Litigation and the TRIPS Agreement. Since procedural rules should be as flexible as possible, and in view of the difficulty of amending an international agreement such as the EPLP, all the details should be dealt with in separate rules of procedure.

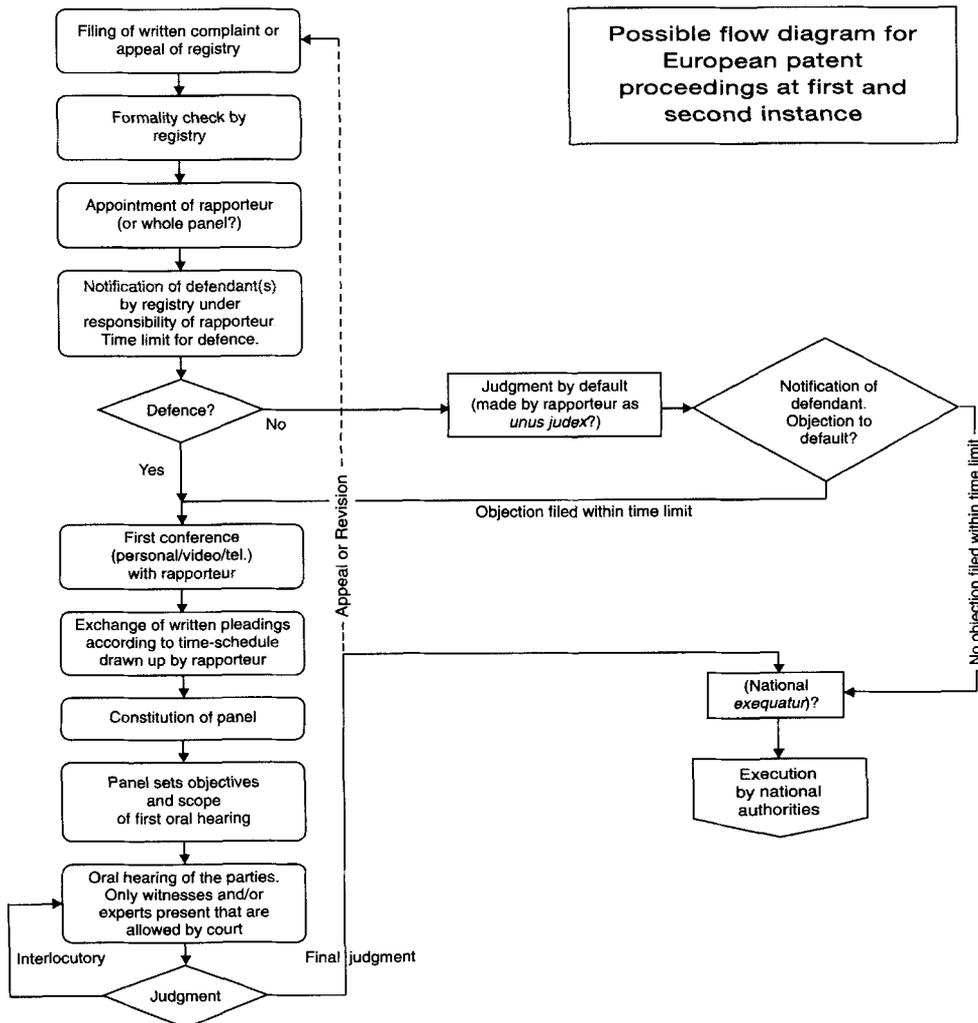
Annex I to this document contains a flow chart for proceedings before the European Patent Court, as a basis for further work.

Annex I also sets out a number of procedural points on which the delegations are asked to consult their national judiciary and other authorities. These points require decisions of principle that have to be taken before any procedural provisions can be elaborated in more detail.

ANNEX I

1. Procedure before the European Patent Court of First and Second Instance

The following flow chart for the procedure before the European Patent Court is intended to serve as the basis for further discussion:



## 2. *Explanatory Notes to the Flow Chart*

### (a) *Filing of the complaint*

The written complaint or appeal should be filed at the central registry or at a national sub-registry. A prescribed standard form should be used, accompanied by further written explanations and/or indications of possible evidence (documentary/expert evidence or names of witnesses).

### (b) *Appointment of the rapporteur*

The rapporteur is the judge responsible for the case management and the conduct of proceedings up to the hearing before the panel. He could also be empowered to order any provisional measures.

### (c) *Notification to the defendant*

The defendant should be notified by the central registry, on the rapporteur's instructions. The defendant should inform the Court within a set period, e.g. one month, whether he plans to oppose the claim. A period should be fixed for the written defence, with the possibility of one extension to be granted by the rapporteur on a reasoned request by the defendant. Regarding evidence, the defence should comply with the same requirements as the complaint.

### (d) *First conference*

The first conference should be held under the aegis of the rapporteur. If not conducted by video-conference or telephone, it should normally take place in the country of the (main) defendant, thus contributing to the local presence of the court. The purpose of this meeting should be to define and clarify the main issues of the case, to fix the timetable for further proceedings (especially the date of the oral hearing), to examine the possibility—if any—of achieving an amicable settlement, and to ascertain whether evidence need to taken before a first oral hearing.

In principle there is no reason why the first consultation should be limited to a single session with the parties. The possibility could also be considered of authorising the rapporteur to decide on the taking of evidence. This could make it easier to get the case ready for final decision after only one oral hearing by the complete panel of the Court, and reduce the risk of the Court having to give an interim decision.

### (e) *Exchange of written pleadings*

After reading the complaint and the defence, the rapporteur could give the parties

an indication of the points for which they should try to provide the Court with further information. As a rule, one more statement from each side should be sufficient. Time-limits should be set for filing these statements.

(f) *Constitution of court panel*

In the flow chart, the moment for constituting the complete panel has been chosen more or less arbitrarily; this part of the procedure could equally well take place at some other juncture. An advantage of an earlier constitution of a complete panel could be that the rapporteur could discuss with the other members of the panel what to do during the first conference, for instance in the field of gathering evidence. Another advantage would be that the rapporteur could early on consult the technically qualified judges, who could attend the first conference where appropriate.

The best solution would be to include the rapporteur in the panel that decides on the case, but it would also be possible to constitute a wholly fresh panel. The second option would be preferable if the rapporteur has ordered some form of provisional measure, such as a preliminary injunction, and thus taken up a position in the conflict between the parties.

(g) *Evidence*

In line with Article 117(1) of the EPC, evidence before the European Patent Court should include;

- (a) hearing the parties;
- (b) production of documents;
- (c) hearing of witnesses;
- (d) opinions of experts, appointed by the Court or by the parties;
- (e) inspection;
- (f) sworn statements in writing; and furthermore possibly
- (g) experiments ordered by the Court.

(h) *Oral hearing*

As the emphasis of the proceedings would have to be in the written pleadings, the Court should be able to restrict the hearing to the most important points of fact and/or law, but to extend it to other points if necessary. The Court should also indicate beforehand whether it wants to hear certain witnesses and/or experts in plenary session.

(i) *Judgment*

In principle, the case should be ready for final decision after one oral hearing by the

complete panel. If a final judgment cannot be pronounced after the first hearing, the Court could convene a second hearing to take any further evidence required. It should also be made clear whether this further hearing will be held before the Court in plenary session or before one of the judges acting as rapporteur (not necessarily the same rapporteur who acted earlier on).

(j) *Appeal*

An appeal should lie from all final judgments and from those interlocutory decisions against which the Court has allowed an appeal. The review of the decision under appeal should extend to both facts and law. However, stricter rules should apply in appeal proceedings as regards the admissibility of new facts and/or evidence.

The court of appeal can decide the case itself or remit it to the first instance, which will be bound by the decision of the court of appeal. Default or otherwise passive resistance of the party opposing the appellant might have less far-reaching consequences than in first instance.

3. *Rules of Procedure: Points to be Decided in the EPLP*

Although details of the rules of procedure will have to be left to a separate document, it would nevertheless appear necessary to lay down certain principles in the EPLP itself.

The following issues at least, need to be resolved.

(a) *Languages*

It seems appropriate to have the languages of the EPC (see Article 14(1), Rules 1 and 2 of the EPC) as official languages of the Court. As a basic rule, the language of the proceedings should be the language of the European patent in suit, unless otherwise agreed by the parties and the Court (see Article 10(3), CPC).

(b) *Constitution of the panel*

For the reasons outlined above in the explanatory notes to the flow chart, it is proposed to constitute the complete panel directly after the receipt of the claim.

(c) *Legal representation*

Ideally, it would be preferable to allow the parties themselves to act before the Court, but the functioning of the Court and the registry would be far easier and less cumbersome if communication were directed through compulsory legal representatives.

As a supranational body dealing with issues of fact, as well as points of law, the Court will face a multitude of new problems. It is therefore proposed that legal representation be made compulsory.

All persons registered as such by the Registry could act as legal representatives. The Registry would have to register any persons applying for registration and being lawyers admitted to practice before their national courts. A question remaining to be decided is also whether European patent attorneys, with a supplementary qualification in litigation, should be admitted as legal representatives. Certainly it would make sense to require a supplementary qualification, since most European patent attorneys only appear in court from time to time and litigation is not their day-to-day business.

(d) *What kinds of interlocutory measures should be possible?*

In view of the differences between national laws in this area, it would be better to draw up an exhaustive list of specific remedies. The alternative would be to allow the Court to order as it sees fit in each case, which could lead to discrepancies in the practice of different chambers of the Court or different rapporteurs.

It is proposed that at least the following measures may be ordered by way of interlocutory relief:

- injunctions (Articles 44 and 50 of the TRIPS Agreement);
- putting up of securities by either of the parties;
- the sequestration of infringing goods (Articles 44 and 46 of the TRIPS Agreement);
- an order to name the suppliers of the infringing goods (Article 47 of the TRIPS Agreement);
- an order to name customers to whom infringing goods are sold and delivered (Article 47 of the TRIPS Agreement).

(e) *Should there be protective measures on a European level and, if so, what form should they take?*

To avoid excessive discrepancies between the positions of litigating parties from different countries and to comply with Article 50(1)(b) of the TRIPS Agreement, it is proposed to give the European Patent Court the possibility of granting protective measures:

- (a) a measure resembling the French *saisie contrefaçon*; and
- (b) a modified form of the measure known under English law as disclosure (itself a modified version of the old “discovery”).

In particular, the Court should have the possibility to order a party to produce a certain document in its possession. The Court should also be able to issue a protective

order or to take other such measures to preserve the confidentiality of certain information. (This would appear to be prescribed in any case by Article 43 and the final sentence of Article 42 of the TRIPS Agreement.)

(f) *Who should decide on provisional measures?*

It seems an attractive option to give the rapporteur this task. Where proceedings were not yet pending before the Court, an experienced rapporteur would have to be appointed. It could mean however that the rapporteur, as being "biased", would have to refrain from taking part in the decision in the main proceedings. An alternative would be to create a pool of experienced judges, not only serving as members of a court panel but also acting especially as "rapporteurs" for preliminary injunctions. Protective measures could be left to the rapporteur as a decision in this respect does not imply an opinion on the merits of the case.

(g) *What should be done if proceedings are instituted with the European Patent Court while opposition proceedings are still pending (in first or second instance)?*

It is proposed to give the European Patent Court the discretion to stay the proceedings, but this should not be compulsory in all cases.

(h) *Up until what point in the proceedings should it be possible for a plaintiff to withdraw his action, and what consequences will such withdrawal have?*

The proposal is that a plaintiff be allowed to withdraw his claim at any time as long as no final decision is given by the Court. However, he would have to pay the defendant's costs as fixed by the Court, based on the amount of work done so far and the value of the matter in dispute. The plaintiff should in principle not be barred from starting the same action again, as there is no *res judicata*, subject to the discretion of the Court to strike the new case out because of abuse of procedural law.

A further possibility would be to bar the plaintiff who has withdrawn a claim from filing the same claim again. This would necessitate devising criteria to determine when an ostensibly new claim, which may have been reworded, is in fact the same claim as before.

(i) *Should costs be awarded to the winning party, and, if so, what costs?*

Proposed is a system in which the losing party will, as a rule, have to pay the costs of the winning party. A system whereby each party pays its own costs tends to create a situation in which litigation carries no substantial risk to the plaintiff (provided he can find counsel willing to act on a contingency basis), whereas the defendant faces costly proceedings which can spell ruin for him even if he wins the case.

To avoid separate proceedings only concerning costs, a system is proposed in which the Court, in its final decision, also takes a decision about the awarding of costs. The amount should be fixed by the Court and could be made dependent on the estimated economic importance and the complexity of the case.

(j) *What sanction should be applied for non-compliance with an order of the Court?*

The sanction for non-compliance would have to be laid down in the EPLP, as national law provides no basis for it. It is proposed that the Court be able to enforce its orders by imposing a fine. Details of the fine (the amounts due per infringement, day and/or item) should be decided by the Court, which should also have the power to fix a maximum and/or minimum amount.

The EPLP should also address the question whether such a fine should be payable to the plaintiff (and if so, whether it should be taken into account when awarding damages) or to a body such as the European Patent Organisation. (Obviously, it cannot be payable to the Court itself.) The question whether a fine is forfeited or not should be decided by the European Patent Court itself.

(k) *Should exequatur proceedings be necessary?*

Proposed is a system in which the decisions of the European Patent Court should be directly executable by the national authorities without any *exequatur*. This would save costs to the parties and also speed up the execution of decisions, which could be crucially important in the case of (preliminary) injunctions.

(l) *Should the filing of an appeal have suspensive effect?*

Decisions about the validity of a patent can only come into effect if they are no longer subject to appeal. For other decisions, a system is proposed in which an appeal normally has automatic suspensive effect, but the common first- or second-instance court would nevertheless have the possibility to allow, as the case may be under the condition of appropriate securities, the provisional executability notwithstanding appeal. This, again, could be very important in the case of interlocutory injunctions.

(m) *Should the Court be allowed to review its own decision?*

A review of its own decision by the last judicial body having ruled on a case should be possible, but only in exceptional circumstances, e.g. where fraud has been discovered or fundamental procedural rules have been violated (see the proposed new Article 112(a) of the EPC (CA/PL 17/00)). Review of the common first-instance court should only be possible in cases where the ground for review has not emerged until after the

elapse of the time-limit for appeal. The possibility could be considered of allowing such a review only after the issue of a *certiorari* order by the common second-instance court.

(n) *Notification of parties*

All Member States of the European Patent Organisation are also party to the Hague Convention of 15 November 1969 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This Treaty does not seem to have kept up with modern developments in the field of communication and, moreover, does not seem to function very well in practice, causing very long delays in civil proceedings where the defendant chooses not to appear. Although the European Patent Organisation is not a party to this Convention it seems worthwhile to create special rules on this matter (as is anyway permitted by Article 25 of the Hague Convention<sup>11</sup>).

Notification should, on the one hand, ensure that the addressee has indeed received the relevant documents and, on the other hand, prevent abuse in blocking proceedings. A good system of notification, especially of the defendant, is the more important if one would wish to abolish separate *exequatur* proceedings of (default) judgments. The system operated by the EPO boards of appeal—parties are notified by registered letter—appears to work well in practice.

For preliminary injunctions or protective measures it should be possible to allow more flexible ways of notification, provided the Court is satisfied that notification has indeed taken place. However, the proposal of 4 May 1999 for a Council Directive on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (COM (1999) 219 final) has to be taken into consideration to ensure genuine compatibility with EU law.

ANNEX II

*Proposal for a New EPC Provision to be Inserted in Part IX of the Convention (CA/PL 24/00)*

PART IX  
SPECIAL AGREEMENTS  
NEW ARTICLE XX

*Other Agreements between the Contracting States*

1. Nothing in this Convention shall be construed to limit the right of the Contracting States to conclude agreements on any matters concerning European patent applications or European patents which are subject to and governed by national law, such as in particular:

<sup>11</sup> Article 25 reads as follows: "Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties."

- (a) an agreement on the establishment of a European Patent Court common to the Contracting States party to that agreement, competent to settle litigation concerning European patent applications or patents;
  - (b) an agreement on the establishment of an entity common to the Contracting States party to that agreement, competent to deliver opinions on issues of European patent law, referred to it by a national court of such a State trying an action concerning a European patent application or patent;
  - (c) an agreement to the effect that translations of European patents, as may be required under Article 65, be dispensed with fully or in part or may be filed with, and published by, the European Patent Office.
2. The Administrative Council shall be competent to decide that:
- (a) the members of the boards of appeal may also serve on a common European Patent Court or a common entity established under any such agreement and take part in any proceedings before that court or entity in accordance with the terms of that agreement;
  - (b) the European Patent Office provide a common entity with such support staff, premises and equipment as may be necessary for the performance of its duties or the expenses incurred by that entity be borne fully or in part by the Organisation.

#### PART C: *Conclusion*

During its last meeting in Luxemburg, the Working Party on Litigation decided to ask the Intergovernmental Conference for a new mandate, as shown in the Introduction. This mandate should enable the Working Party on Litigation to continue its work on the basis of the ideas in the discussion paper and to produce a text for an EPLP before the end of the year 2001. Before the work goes any further, there should be a broad discussion about this project and its advantages and possible disadvantages. Only in that way will it be possible to reach the aim everybody wants: a judicial system for patent cases in Europe that brings the necessary harmonisation of European patent litigation, decisions of good quality, as well as a system of high speed and of reasonable price and that is acceptable to the majority of the users.