

DECISIVE STEPS TOWARDS THE COMMUNITY PATENT

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The community patent, which was proposed decades ago, now seems to spring to life. Originally, it was slow to develop even though the European Commission submitted a proposal that was to be created by ordinance in August 2000.

The community patent is designed to be a single patent enjoying protection all over the European Union. It will neither replace the European patent, which is a bundle of national patents deriving from a single application, nor national patents, but exist as an alternative to those patents. According to the draft of an ordinance provided by the European Commission, a patent application filed with the EPO with the request of protection in all countries of the EU will be a community patent. Protection is requested for all countries of the EU plus countries which are not member states of the EU (Switzerland, Turkey), it will be a community patent in combination with a European patent.

On March 3, the Council of the EU, which is the representation of the governments, reached an agreement on a common political approach regarding the community patent.

While it is still open when the first community patent application can be filed and modifications of the agreement seem not excluded, the following may be expected:

1. Community Patent Applications

There will be no new central authority for examining and granting community patents. The European Patent Office (EPO) will be exclusively responsible for examination of community patent applications and the granting of community patents. The applications can be filed directly with the EPO, or alternatively with

the national patent office of a member state in its working language(s). Applicants may request that their applications be fully processed by the EPO.

Novelty searches are carried out by the EPO, but may also be conducted by national patent offices.

2. Languages and Translations

Community Patent Applications are, up to grant subject to the language regime of the EPO. The applications have to be presented in one of the three official languages of the EPO. If the applications are originally filed in a non-EPO language, they have to be completely translated into one of the three official languages.

Upon grant of the patent, the applicant must further file a translation of all claims into all official community languages unless a member states waives its right thereto. The translations have to be filed with the EPO and the costs borne by the applicant. This could be a possible burden for the applicant in view of the number of community languages into which the claims will have to be translated (currently 11, in the future 21).

The Council declared that the term "upon grant" has to be interpreted as a reasonable period of time. During that period, the granted patent is valid even if the claims have not yet been translated into all community languages. The German delegation claims that it understands the term "reasonable period" to mean two years after grant of the patent. There was no objection from the other delegations against this interpretation. While this declaration will not be binding, it might influence later case law unless the term "upon grant" is replaced by a precise deadline.

3. Costs

The costs for translating community patent applications into one of the official languages of the EPO shall be borne by the European Patent Office ("mutualization of costs"). The costs for the translation of the claims will have to be covered by the applicant. The annuities shall not exceed the annuities of an average European patent.

4. Central Community Patent Court Dealing with Infringement and Invalidity

The Council agreed upon creating a unitary court for the community patent.

This court of justice will have exclusive jurisdiction in all actions relating to the community patent, be it infringement proceedings, claims of invalidity, declaratory judgment actions or others. Invalidity may also be alleged by way of a counter claim. The jurisdiction also extends to provisional measures (preliminary injunctions). The system provides two levels. In the first instance, a new judicial panel called the "Community Patent Court" (CPC) will have jurisdiction. The CPC shall⁵ be located in Luxemburg, being attached to the Court Of First Instance of the European Communities (CFI). The CPC shall be implemented by 2010 at the latest.

The CPC will consist of several chambers⁶ which sit in sections of three judges. The judges will be appointed by the Council for a fixed term and must have a high level of legal expertise in patent law as well as considerable language skills, since they will have to sit in multinational panels. The language of the proceedings will be the official language of the member state where the defendant is domiciled. Upon mutual requests of the parties, any other official language of the European Union can be selected. It is not quite clear whether this language regime also applies if the defendant has no domicile in the EU.

The CPC may hold session hearings in any member states of the EU. However, the original concept of national community patent courts, which was favored by some member states, has obviously been dropped by the Council.

Appeals against final decisions of the CPC will be handled by the CFI.

While the compromise found by the Council does not expressly address the admittance of Council, it seems quite obvious that any lawyer being admitted into one of the member states of the EU will be able to represent clients before both the CFC and the CFI. This is in line with a proposal submitted by the Commission.

Prior to the establishment of the CFC, community patents shall be litigated before national courts. To that end, each member state shall designate a limited number of courts which will deal with community patents. Appeals against decisions of those national courts will obviously have to be filed with the CFI.

The community patent system will be reviewed five years after the grant of the first community patents. The commission will present a report on all practical aspects of the community patents and, if necessary, make proposals for changes.

It remains to be seen whether the current compromise is wise and practical.

The danger of a bottleneck situation in the jurisdictional system cannot be excluded since the number of judges who are qualified in terms of both legal expertise and linguistic skills is limited. This is especially true in view of the fact that national courts will continue to exist to handle the litigation of European patents and national patents, and therefore will need experienced judges as well. To date, it is not yet decided whether a central court handling litigation of European patents will be created and, if so, be attached to the CPC.