

+Verweise

## Another Year of Debates on Patent Jurisdiction in Europe and No End in Sight?

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### Introduction

**Business people do not normally invest in projects where others have already failed and expectations for success are low. When they continue to take part for years and years in discussions on the establishment of a common European patent court system, it must be very important to them. Indeed, words can even be very promising, particularly when they are spoken by the Commissioner for the Internal Market of the EU Commission:**

A good patent system benefits innovation. A bad one can be very prejudicial. We need to do better in explaining why patent protection may be needed and the benefits it may have.<sup>1</sup>

With an active, constructive approach by the Commission, I believe we could provide a momentum to achieve a successful outcome.<sup>2</sup>

Was it worth waiting for? Did the Commission live up to its promises? Did somebody „explain“ to those Member States with little or no patent experience what a „good patent system“ is and what it can do? Did the Commission use an „active, constructive approach“ in order to „achieve a successful

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outcome“? Or was it another typical year of twists and turns, contradictory statements and obstructive manoeuvres behind the scenes, with illusionary goals that many have apparently given up, like the Lisbon Agenda? The two citations cover the time between 2005 and 2006. Expectations were high in the year that followed, and the period after the consultation of the users and the Commission hearing in Brussels on 12 July 2006 until the end of the German Presidency in June 2007 will be examined and evaluated below.

### I. Commission Consultation and Questionnaire



Many still recall the enthusiasm after the hearing in July 2006 in Brussels where for the first time in six years, after the publication of the draft of a Community Patent Regulation, users felt that somebody in the political field, in the Commission, was actually interested in listening to the wishes of those for whom the new patent system was allegedly intended: big industry, SMEs, patent practitioners and judges. One even had the impression that the representatives of the Commission who were present at the hearing were not even offended when approximately 95% of the user organizations<sup>3</sup> rejected all proposals from Brussels, told the Commission to shred the Common Political Approach of 2003 and opted for EPLA as the only solution for a working patent litigation system for European patents.

A 95% vote is overwhelming, and everybody must have thought that this was a breakthrough at last - and that the conducting of a survey was the best idea of the Commission in all those years. The Commission itself summarized the wishes of the users as follows:<sup>4</sup>

Both industry and patent attorneys seem to favour the Community's involvement in the European Patent Litigation Agreement (EPLA). This preference flows from the general opinion that the existing patent system based on the EPO and the EPC works well and outstanding problems relate to the lack of unitary jurisdiction. Some also believe that it could act as a precursor for the Community patent and its jurisdictional system. Support for EPLA is not presented as incompatible with support for the Community patent....

Although stakeholders mostly called for a centralised jurisdiction during the first attempts to introduce a Community patent, this tendency is now reversed with big and small industry alike insisting on local first instance specialised courts in order to preserve proximity and accessibility of justice, with a centralised Community and/or EPLA appeal court in order to guarantee uniform interpretation of the law.

This was a late recognition of the wishes of the users - for six years the Commission had regarded EPLA as detrimental to European integration -, and at that point users hoped that it might perhaps not be too late for a successful result. Commissioner McCreevy still emphatically supported this vote two months later, so that such hopes were well founded:

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I see EPLA as a practical, concrete initiative to bring greater unity in the case-law on patents in Europe. And that - legal certainty - is what our industry, big and small alike, needs. There are hundreds of thousands of patents granted by the EPO. Even if we have a Community patent there is a need to streamline the jurisdiction process for EPO granted patents.<sup>5</sup>

Users have been repeating this for all those years, and finally the Commission seemed to have understood. The result of the hearing was that the users did not even wish to continue the discussion on the present text of the Community Patent Regulation and requested a new draft.

An impressive number of meetings, conferences and resolutions concerning EPLA followed the Brussels hearing of which only some can be mentioned here.

## II. Paris Conference of the Cour de Cassation of 2 October 2006

An interesting conference with international attendance had been organized by the then President of the *Cour de Cassation* in Paris, Justice Canivet. He had invited a number of judges from several countries as speakers and an audience of patent specialists, which consisted of additional judges and a greater number of patent practitioners of several EU Member States, as well as industry representatives.<sup>6</sup> The European Patent Office was represented by its president, Mr. Pompidou, and the Commission by Mr. Temmink instead of the invited Mr. Stoll. The French Justice Department had been invited as well, as Justice Canivet mentioned, but no representative was present. There was a rumour that some people in the Justice Department no longer liked EPLA, but refused to discuss why.

The common denominator of most speakers at the conference was that

- EPLA is regarded as the appropriate litigation system for European patents.
- EPLA guarantees speed, quality and experience of judges.
- EPLA should therefore be adopted as soon as possible in view of the wide support from all areas.
- Decentralized national courts would help to achieve high quality, predictability and easy access even for small and medium-sized enterprises.
- The basic idea of EPLA should not be changed: optional membership, with existing national courts that act as EPLA courts; in particular it should not become a „Community EPLA“.<sup>7</sup>

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- EPLA courts should have no connection with the EPO in order to avoid any suspicion about the division of powers between an administrative body and a court.
- If necessary, a start should be made with only five or six countries in order to facilitate consensus.
- A mandate for the Commission would be superfluous if the Commission joins the EPLA Working Party as a consultant in order to ensure that EPLA rules are in conformity with European law.
- The rules of procedures should emphasize the necessity of a speedy procedure at a low cost.

### **III. AIPPI Executive Committee Meeting in Gothenburg, 9-12 October 2006**

On 9-11 October 2006, the AIPPI, the largest worldwide association in the field of IP law, held its bi-annual Executive Committee meeting in Gothenburg, Sweden. The AIPPI passed a Resolution on EPLA for the fourth time in the last six years, which reads in its substantive part:

*AIPPI*

*urges* the Member States of the European Patent Organisation

- 1) To adopt EPLA after convocation of a Diplomatic Conference as early as possible.
- 2) To invite the European Union represented by the European Commission to cooperate in the preparatory work for the conference with the goal being ensured that the legal rules of EPLA be in conformity with Community law.

AIPPI is of the opinion that a further delay in the conclusion of the Agreement should be avoided, which can only be assured if the concept of a voluntary agreement in its present form is maintained.

#### IV. The „Mystery Paper“

Some strange things happened three months after the Brussels hearing. During the Finnish presidency, a meeting of the heads of state had convened on 20 October 2006 in Lahti, Finland, for which Commissioner McCreevy had announced a Communication of the Commission on the results of the Brussels hearing and future patent policy. From sources within the Commission, and also as a result of the self-proclaimed goals in view of the users' vote, governments of Member States had expected that the Commission would come up with a concrete proposal and would give the green light for EPLA and whatever form of cooperation with the Commission. In the draft of the paper that had come to the attention of some insiders in Brussels, one could indeed find on page 6 of the paper among other more general statements the conclusion of the Commission, according to which „The adoption of a cost-effective EPLA is the most important step.“

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When the final version of the paper arrived in Finland, page 6 had mysteriously been exchanged, and one could now read that

The adoption of a cost-effective *Community patent* is the most important step. In the meantime, in order to lift a significant barrier to innovation, the Member States and the Commission should together make the existing patent system more efficient by improving the means for litigation through a *Community instrument*.<sup>8</sup>



Several heads of state, among them Angela Merkel from Germany, were not „amused“ by this unforeseen change of wording and the shift of the expressed goal of the Commission after Brussels. In the Financial Times Deutschland of 20 October, a headline read „EU Commission snubs Berlin - Government feels pushed aside by new patent document“. Further investigations disclosed that apparently the French Justice Department, in cooperation with the General Secretariat of the EU Commission, was behind this manoeuvre and that the General Secretariat had changed the text without the knowledge of the competent Commissioner McCreevy. An internet news service under the heading „Banana Republic“ spoke about „A political brawl between Germany and France over EPLA “. <sup>9</sup>

#### V. Principles of Procedure for EPLA Courts at the Judges Forum in Venice

The optimism after Brussels had also reached the Second Judges Forum in Venice, which was to take place on 3-5 November 2006, again organized jointly by the European Patent Lawyers Association (EPLAW) and the European Patent Office Academy. Patent judges and attorneys, inspired by the favourable European-wide acceptance and support of EPLA, agreed that it was time to discuss the future EPLA procedure, which apart from some general rules had not yet been finally resolved in the text of the EPLA draft.

With the aim to formulate procedural guidelines that would guarantee inexpensive, efficient and high-quality litigation, a committee of six patent judges and five members of the Board of Directors of EPLAW gathered for a four-day working

session from 30 October to 2 November 2006, prior to the Judges Forum.<sup>10</sup> Starting from a number of general procedural concepts contained in the EPLA draft, the committee agreed that the above requirements called for a

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„frontloaded“ procedure with strict rules for case management on the model of Continental procedures. It may be viewed as a miracle<sup>11</sup> that, despite the well-known differences between the Continental courts and the UK, a unanimous result could be reached for each question discussed, albeit sometimes after intense discussions about different concepts.<sup>12</sup>

## VI. The „French Paper“

Then came the big disappointment. One country, France - apparently surprised not only by the vote of the users at the hearing in Brussels, but even more by the change of direction of the Commission<sup>13</sup> -, announced that it was against EPLA. In a paper of less than three pages, France asked for a court system with „Community judges“.<sup>14</sup> Distributed in October 2006, undated, without a signature or file number, it said:

France proposes to grant jurisdiction over European patent litigation to the Community judge, based on the *existing jurisdictional structure in the European Union*.<sup>15</sup>



The French authorities propose that an agreement be concluded between the Member States of the European Union in order *to grant to the EU jurisdiction* over litigation relating to European patents granted according to the European Patent Convention of 5 October 1973 (EPC).

Other parts of the paper were rather vague:

- ˆ ... creation of a unified jurisdictional system for patents in respect of the Community framework ...
- ˆ ... the French proposal builds on the existing jurisdictional structure of the EU ...
- ˆ ... the first instance: specialized judicial panels ... supported by national structures ...

This was exactly the opposite of what the users had voted for, namely a decentralized first-instance court system consisting of a reduced number of the *existing, and therefore experienced and specialized*, national patent courts.

While the Commission had originally announced the publication of another Communication after Lahti, with a concrete proposal on the basis of the vote

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of the users in November 2006, the whole machinery in Brussels was now put into reverse. Commissioner McCreevy declared in a press announcement on 5 December that there would be no Communication in the near future, and that he was frustrated that his initiative to set up a simpler system to settle patent disputes had been shelved owing to pressure from France.<sup>16</sup>

It is already surprising that a single country can block the overwhelming vote of 350 user groups and 2,500 submissions with a short paper that until today, more than ten months later, does not contain any concrete proposal and not even an explanation of whether it would be legally possible. Yet even more surprising is that a government is able to do this against the unanimous vote of its *own* industry, its *own* judges and its *own* patent practitioners, and that the Commission immediately obeys and stops all its work.

Commissioner McCreevy, in another speech a few days later,<sup>17</sup> expressed what apparently guided the Commission in the months that followed, when he said: „If we are not able to find more fertile ground for a proposal over the coming months, then we might as well put our energies to better use.“

## VII. The German Presidency and the Commission Communication

Germany took over the EU presidency on 1 January 2007, and was prepared to make a constructive proposal which would have included a mandate for the Commission to cooperate in the work on finalizing EPLA. The German government was, however, condemned to a stand-still for more than three months while the Commission Communication, first announced for November, then for December 2006, was delayed from one month to the next, until it finally arrived on 3 April 2007.<sup>18</sup> It became known that very controversial discussions within the Commission had taken place.

The paper starts with a summary of the Commission Consultation and the hearing of 12 July 2006 in Brussels, which according to the Commission brought about four results:

- the first priority is the high quality of the granted patents;
- users were not in favour of merely striving for a far-reaching harmonization of substantive patent law or mutual recognition;
- the Common Political Approach of 2003 was rejected;
- users voted for the adoption of EPLA.<sup>19</sup>

The three-page paper contained a summary of EPLA („A“), of the French proposal („B“) and a proposal for an alleged „Commission compromise“ („C“).

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Although the Commission pretended that its own proposal „C“ was strongly inspired by the EPLA model, the most important point concerning the courts was based on the French paper, since they should be part of the Community court system „making use of existing national structures“, whatever that means. Over more than three months, during the negotiations in Brussels of the EU Working Party on Intellectual Property, all requests by the German Presidency for more specific information on the meaning of the Commission and the French paper remained unanswered. The Commission had announced an opinion by the legal service on a number of critical points for 1 June, which however never arrived. One can therefore assume that the result was not to the satisfaction of the majority in the Commission.

The Commission must have known that the „compromise“ that it tried to reach between the EPLA and the French paper would be extremely disappointing for everyone,<sup>20</sup> since it did not contain any of the important points voted upon by the users in Brussels regarding the existing national courts<sup>21</sup> and the backbone of EPLA, the optional membership by virtue of which a small number of countries could enact it. The only concrete point one could find, but which nobody had asked for, reads

In the context of a single multinational system of litigation, the parties would not have the option to designate a given regional chamber to handle the case. *The allocation of cases* would be decided by the registry of the court on the basis of clearly defined and transparent rules.

This proposal is unacceptable since it raises serious constitutional concerns in a number of countries with respect to the *legal judge*. And if the parties can no longer choose the court of their preference, competition between the courts would be eliminated, one of the key features that guarantee quality, efficiency, predictability, speed and cost-effectiveness.<sup>22, 23</sup> Also, if a central register allocates the cases, the plaintiff would not even know in what language he has to draft his complaint. This proposal would also be a violation of Regulation 44/2001, since, if the complaint is based on a specific place of infringement which can be proven, and the Registry sends the case

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to a court before which no evidence of infringement has even been brought or cannot be proven, the court would not have jurisdiction. Should the Registry first hear evidence on such points before the complaint reaches a judge? For all these reasons a similar proposal had already been rejected by the EPLA Working Party at a very early stage.<sup>24</sup>

When the requests by the German Presidency concerning more specific information on the proposals in the Commission paper (as well as the French paper) remained unanswered, Germany decided to prepare a questionnaire for the 27 Member States in order to obtain more details about the courts that deal with patent infringement, the number of cases and number of (specialized) judges.<sup>25</sup>


The answers to this questionnaire, which were distributed after the German Presidency as an Annex to a paper under the subsequent Portuguese Presidency dated 12 July 2007,<sup>26</sup> were very interesting:

- ~ 14 countries have less than 10 patent cases per year, and half of them have not had one single case for many years;
- ~ only 4 countries have more than 100 cases per year.

### VIII. Resolution of the Bundesrat<sup>27</sup>

Only six weeks after the publication of the Commission paper, on 11 May 2007, the German *Bundesrat*, the second Chamber of Parliament in which the German *Länder* are represented, passed a Resolution on the Communication of the Commission.<sup>28</sup> It raised „considerable doubts“ that the Communication would be appropriate to resolve the deadlock in the debate about the patent system in Europe, particularly concerning the court system. The *Bundesrat* urged the German government to

support EPLA and to agree to modifications of the status quo only if they promise a *clear added value* for industry and patent practice in Germany.<sup>29</sup>

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As a general principle, the *Bundesrat* made it clear that it is indispensable to any modification of the court system that regional chambers can be instituted in the Member States, and that there is an option for plaintiffs to call upon the court of the place of infringement, as is foreseen in Regulation 44/2001 on jurisdiction. In this context, the proposal of the Commission to have cases allocated by the central registry of the court raises serious objections.

## IX. Council of Europe


Coincidentally on the same day as the German *Bundesrat*, on 11 May 2007, the Council of Europe also passed a resolution in the form of a Recommendation<sup>30</sup> in the field of IP law, which is a rare occurrence. Under the general heading „Need for a Council of Europe convention on the suppression of counterfeiting and trafficking in counterfeit goods“,<sup>31</sup> one finds the following paragraph on EPLA:

10. The Assembly therefore recommends that the Committee of Ministers:

10.5. urges Member States of the European Patent Organisation to convene a diplomatic conference in order to adopt the European Patent Litigation Agreement and, for those which have not yet done so, to sign and ratify the London Agreement in order to ensure a smooth entry into force of that instrument.

## X. Berlin Conference - „A Europe of Innovation“<sup>32</sup>

Two official conferences on future European patent law were planned by Germany for the six months of its presidency. The first was held in Berlin on 29-30 March 2007, organized jointly by the German Federal Justice Department and the Federation of German Industry (BDI).<sup>33</sup> Commissioner McCreevy was invited as one of the three keynote speakers. It appeared that, although he had still propagated EPLA in autumn 2006,<sup>34</sup> he had lost all

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interest in this topic. He purposely missed the contributions of the preceding two speakers, the German Minister of Justice, Ms. Zypries,<sup>35</sup> and the President of the Federation of German Industry, Mr. Thumann, although in their speeches both had prepared concrete wishes and questions for the Commissioner.<sup>36</sup> He then began his address with the statement that he knew nothing about patent law, and, instead of the 30 minutes reserved for him in the programme, he cut his own speech down to 10 minutes and left the conference immediately afterwards. He was obviously not interested in listening to the discussion of the experts, including a well-informed and very constructive speaker from the European Parliament.<sup>37, 38</sup>

When, in addition, the long-awaited draft of the Commission Communication became known during the conference and participants searched in vain for any traces of the Brussels hearing of July 2006, it was more than obvious that European industry was extremely disappointed about the attitude and the entirely unjustified turn-around of the Commission.<sup>39</sup> This was best expressed by a member of one of the panels at the

Conference when the Vice-President of Air Liquide, Mr. Thierry Sueur, who is Chairman of the IP Committee of the Federation of French Industry and a Member of the Conseil Supérieur de la Propriété Industrielle, gave an apposite example on how the users feel: If he asked his wife where she wanted to spend their next vacation, and she told him it should be „somewhere with palm trees, a warm climate and clear water to swim in“, and he booked a vacation at the North Pole, his wife would feel exactly the same as all the user groups after having been asked by the Commission what their wishes were, and then reading the Communication.<sup>40</sup>

## **XI. Munich Symposium - „The Future of European Patent Jurisdiction in Europe“**

On 25-26 June 2007, i.e. at the end of the German presidency, the second of the official patent conferences took place, this time in Munich, which had

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been organized by the German Federal Patent Court under the slogan „The Future of the Patent Jurisdiction in Europe“. When preparations started in 2006, the Justice Department and Mr. Raimund Lutz, the President of the Federal Patent Court, hoped that it would be possible to discuss the next steps to implement the EPLA, perhaps even to set a date for a diplomatic conference.

I wish to go into some detail of what was discussed there, not only because I assumed a small part in its preparation, but also because a number of people thought - under the impression of the developments over the last few months - that this could perhaps be the last chance to bring together politicians, judges, patent practitioners and users, i.e. industry representatives, before those involved in the discussion over so many years would lose interest.



The venue of the conference was prestigious, namely the City Castle of Munich, the so-called „Residenz“, with more than three centuries of history. Around 300 experts concerned with patent law from the judicial system, public authorities, industry, the academic world and governments from Europe, Asia and the USA came together, which showed the great interest in this topic even outside Europe.<sup>41</sup>

After the welcome address by Mr. Lutz, the organizer of the conference, the Minister of Justice, Ms. Zypries, just like at the conference in Berlin, delivered the introductory speech and gave a detailed history of the six months of the German Presidency in the field of patent law. She recalled the goals of the German government for a court system that guarantees competitiveness, efficiency, speed and legal certainty, and she did not hold back her criticism about the lack of content and precision of the Commission concept that did not allow any comparison with EPLA, which, in her opinion, was the only detailed and widely accepted text available. Her admonition that the discussion could not go on for ever drew particular attention:

We should have the political courage at some point to make it clear that we are unable to overcome in the foreseeable future the different views which have existed for decades. We should then leave the status quo. I can agree on one point with Mr. McCreevy: We are now making the definitively last effort for a Community patent and a uniform patent litigation system.... Patent law is much too important as an innovation tool and for the protection of innovation to allow for decades of uncertainty.

Some of the other contributions can be mentioned below.



Ms. Fröhlinger, the new Director for industrial and intellectual property within GD Internal Market said that the only fault EPLA has is that not enough Member States are willing to join, in view of the qualified majority which the Commission defines as a condition. In her opinion, the necessity to involve the EU is not a matter of the *acquis* but a question of *competence*

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for this field of jurisdiction. Ms. Fröhlinger then discussed different court models, among them a jurisdiction system like the one for the Community trade mark with a reduced number of national courts which would have jurisdiction in each Member State for issues of validity as well as infringement.<sup>42</sup>

Lord Justice Jacob of the English Court of Appeal made it clear that a system where the courts would become part of the Community court structure would not fulfil the wishes of users for a simple, affordable and predictable system. With the experience in trade mark law as an example, one could not expect a promising result when entrusting the more complicated subject matter of patents to Community courts. While the ECJ, according to Lord Jacob, did good work in other areas of law, for IP rights it would be the wrong choice. He also emphasized that practically all judges at the Venice Judges Forum had overwhelmingly supported EPLA.<sup>43</sup> He opposed the Commission's view that EPLA is incompatible with the laws of the EU,<sup>44</sup> citing the ECJ case *Dior v. Evora*<sup>45</sup> where the Court of Justice had dealt with the supra-national Benelux Court. The outcome of the case was that the ECJ stated: „There is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.“ He summarized the views of industry and practitioners by stating that „there is no point in changing unless we can produce something better“.<sup>46</sup>

Justice Prof. Meier-Beck, of the patent chamber of the German Federal Supreme Court, emphasized the need for efficient and harmonized case law in the field of patents. He pointed to the contradictory policy of the Commission in the field of licensing where it has changed from a *central* competence towards a *decentralized system*, yet practically at the same time is pushing to *centralize patent jurisdiction*, although it is well known that the number of cases in patent law probably exceeds licensing cases by a factor of 500%. As far as future patent litigation is concerned, Prof. Meier-Beck pointed out that it would be a long route to achieve harmonization by way of mutual

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recognition of legal rules among the courts. He warmly recommended EPLA<sup>47</sup> as the ideal basis to achieve quality, predictability and harmonization of case law.

Mr. Robert van Peurse, Vice-President of the District Court of The Hague and, like Prof. Meier-Beck, a member of the drafting team of the EPLA procedural rules at the Second Venice Judges Forum in 2006, commented on the new Commission proposal to organize the patent litigation system similar to the Community trade mark. He questioned whether this could have the consequence that, by virtue of negative forum-shopping, alleged infringers would choose the least experienced

regional court in order to request the revocation of European patents. He also contradicted the Commission's view that, in order to adopt EPLA, the Member States would necessarily need a qualified majority, so that even a smaller number of countries could enact EPLA.

Several non-European judges who had been invited as speakers mentioned interesting details of their own court systems, which could also help to make the right choice for the procedure and the architecture for a European court system.

Judge Mimura of the Japanese Superior Court for Intellectual Property - which is the second instance for all infringement and revocation cases coming from the High Court - reported that the court works with technical experts who support the judges in preparing cases, so that no technical judges are necessary and expert opinions are very seldom ordered by the court. Judge Rader of the Court of Appeals for the Federal Circuit (CAFC) gave an overview of his court, which for more than 25 years has acted as the central appeal court for all patent infringement and revocation cases, as well as appeals coming from the USPTO. Judge Rader explained that the quality of the decisions by generally non-specialized judges in 95 district courts is primarily due to a very thorough instruction of the first-instance judges by the attorneys, not only in their briefs, but primarily by way of expert witnesses of the parties, who are cross-examined before the judge and the jury over several days or even weeks. He admitted that the cost of such proceedings<sup>48</sup> is enormous, but in the US this is regarded by the majority of users as a necessity to achieve justice. It was particularly interesting for the discussion in Europe that Justice Jian Li of the Chinese Supreme Court used practically the same arguments for the institution of specialized patent chambers in China as the arguments in Europe for EPLA, namely to achieve judicial efficiency, consistency, predictability of decisions, speed and cost-effectiveness.<sup>49</sup> On one of the panels, Mr. Sueur contrasted China, Japan and

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the USA with Europe: those three countries have all defined and developed national IP strategies for all fields of IP protection and enforcement which is entirely lacking in Europe,<sup>50</sup> as can be seen by Prof. Meier-Beck's licensing example: in Europe nobody seems to be interested in a common strategy.

On the second panel, Dr. Wichard, who had participated on behalf of the German Justice Department in the negotiations in Brussels during the German presidency, reported that it had been impossible during all this time to obtain any clarification of the very vague concepts in the Commission paper and the French paper. The German government is still strongly supporting EPLA as the only solution for European patents in order to maintain quality and speed as well as cost-effectiveness in Europe, and one would certainly not „change for less“.

As a representative of the country that in the meantime has taken over the EU presidency, Mr. Campinos, the President of the Portuguese Patent Office, supported the French paper, emphasizing that it also allows for a decentralized system with harmonized rules of procedure and a centralized appeal court. He also supported the need for specialized judges, although he did not indicate where such judges would come from.

Mr. Batistelli, Director-General of the French Patent Office, explained the French position, suggesting that when the French paper speaks of „specialized judicial panels ... supported by national structures“ national judges could work part-time as Community judges. When he was asked whether he believes that the Member States would be ready to send their best judges from their national courts to a European judiciary, his answer was - in contrast to the text of the French paper - that indeed the regional courts or regional chambers of the European court system proposed by France should be identical to the existing national courts, probably with additional foreign judges and possibly technical assistants.

Mr. Nooteboom of the Commission to whom the same question was addressed was more cautious and did not want to confirm Mr. Batistelli's interpretation of the French paper and the Commission proposal, but left it for future discussions as to what the concrete courts would look like. He nevertheless emphasized that he could not imagine that the Member States in Europe would be ready to accept the failure of this important project and called it a „*blamage*“ if indeed a common solution could not be reached.

Speakers from industry deplored the enormous delays in the discussion process. Ms. Annika Ryberg from Sweden, based on her long experience with multinational litigation, described the present situation as very burdensome. Companies that have to take recourse to litigation have to carefully select, train and instruct separate litigation teams for each country, which

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also includes the choice of local experts, and plan each case by taking into account the different time frames of courts, specific procedures and particularities of each country.

Dr. Langfingler, of BusinessEurope and head of the IP Department of BASF, confirmed what some of his colleagues from industry had already said before that the turn-around by the Commission has led to a new evaluation of the situation. He agreed that, if there will not be a satisfactory solution in the near future, industry will not be interested in endless further discussions; a solution that would not be an improvement would simply not be used. Although industry very much wishes for a European litigation system, in case of a choice between the present situation and a cheap compromise he would rather leave things as they are.<sup>51</sup>

## **XII. Evaluation of the Commission Policy over the Last Seven Years**

The policy of the Commission in the field of patent law over the last seven years which was intended to reach the goals of the Lisbon Agenda can only be called *an entire failure*. One must assume that Europe's competitors are very happy about this result. If one considers the entire period of the discussion on a European patent court of more than 40 years, in less than half the time other countries, like the USA, Japan and China, have founded a new central court of appeal,<sup>52</sup> reorganized the structure and jurisdictional competence of the patent courts,<sup>53</sup> or even built up an entirely new patent court system for the whole country.<sup>54</sup> Only Europe still stands where it stood 40 years ago. There *must* be something wrong with its approach, since solutions can be found not only in the countries mentioned, but even in Europe itself, which have in turn partly been adopted in other regions. What are the reasons for failure?

An analysis might start with the answers of the Member States to the questionnaire during the German Presidency about the number of patent cases and the patent structures.<sup>55</sup> The fact that there are basic differences between groups of countries with respect to patent activity must have long been known to the Commission, but now it has probably become clear to everybody why the strategy of the Commission, which consisted in forcing the growing number of Member States into a *common litigation system*, could never succeed:

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- Why would any country without patent litigation, or with only a few cases per year, have an *interest in establishing a patent court* and paying for judges who have no work?
- Why would or should such a country take any interest in discussing and voting on details of a court system *without any knowledge and experience* about how such a system should function?
- If the patent system guarantees technical and thus economic progress, one of the main goals of the Lisbon Agenda, why would anybody want to *prevent* those countries that believe in the patent system, which are at the same time the largest *contributors to technical progress*, and which have invested in their patent offices and their court systems, from improving their systems to the benefit of all others?
- How can the Commission justify the fact that its representatives have been *trying to block for more than seven years* the intended improvement of the present patent system with the excuse that the countries without an interest in a patent court system *must* also participate, even *against their will*? It must have been clear to everybody that such a plan would fail because of the necessary majority or even unanimity in the Council.

The mistakes of the Commission in its strategy and legal thinking become evident here:

- Instead of developing and propagating solutions that would have severely worsened the present situation (e.g. the Common Political Approach of 2003), the Commission should have invested its legal skills in the field of Community law in the goal of making a success of a system like EPLA.
- Instead of trying to find majorities *against* EPLA, the Commission should have *supported* the EPLA project and should have explained the benefits and necessity of a better patent system to countries less experienced in patent law.
- Instead of creating unreasonable *competition* between the Community patent and

EPLA, the Commission should have worked at improving the *competitiveness* of the European Union as a whole vis-à-vis third countries and making the patent system in Europe stronger.<sup>56</sup>

– Who invented the *credo* that a court system which is obviously most needed by only a small number of countries must be *communitarized* with the clearly foreseeable consequence of the last 40 years that it will never happen or will be dramatically diluted?<sup>57</sup>

– Perhaps the Commission, instead of investing time and resources in preparing legal opinions in order to intimidate countries, should rather have worked for a better patent litigation system like EPLA, and for this

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purpose should have asked its legal service to find a way *how EPLA could be achieved* in view of the alleged legal obstacles in the Council.<sup>58</sup>

The Commission has waged an unnecessary political campaign, causing enormous damage to European industry, which has indirectly been admitted by the Commission itself in its Communication of 29 March-3 April 2007:

The fragmented single market for patents has serious consequences for the competitiveness of Europe in relation to the challenges of the US, Japan and emerging economic powers such as China. *The EU lags behind the US and Japan in terms of patent activity....* The Commission believes that in today's increasingly competitive global economy, it is not sustainable for the EU to lose ground in an area as crucial for innovation as patent policy.

This acknowledgement is even more surprising as the Commission has done, and still does, everything to prolong this situation, since it has already delayed the work on EPLA for four years.<sup>59</sup> The contribution of one of the panelists at the Munich Symposium, one of the most experienced litigators in the UK, Mr. Kevin Mooney, is indeed to the point: he remarked that it would be interesting to know who the advisors of politicians were who told them that they should vote against EPLA.<sup>60</sup>

The discussion about a European litigation system and a Community patent is a good - or rather bad - example of where the proverbial frustration with „Brussels“ comes from. In 2005, Commissioner McCreevy already complained:<sup>61</sup> „Five years have now passed since the Commission presented its proposals for a Community patent to the Council and the Parliament, and there is still no agreement.“

Today, nearly seven years have passed with hundreds of proposals for improvement of the Community patent by the users, while the Commission has not changed an iota of the partially unfeasible ideas found in its text.<sup>62</sup> Is it acceptable that those who are in charge of writing a legal text like the Community Patent Regulation, containing solutions which will not work in practice, such as rules about the language of proceedings and the proposal of Community judges for patent litigation, have admittedly never attended a





single patent hearing, and therefore do not know how a day-long discussion on claim features, possibly with experts, would work? Such a procedure cannot be compared with a discussion of purely legal questions in Luxembourg, as Lord Jacob asserted.

There is understanding among users that there is no simple solution to some of the questions, and many people would indeed not like to be in the shoes of some of the responsible Commission officials. Yet the Commission must at least know where it stands and what it wants to achieve, and here the worst approach was the one-sided refusal of the Commission to cooperate with countries that are in favour of EPLA and its threats even to take them to court.

Europe will not work - in any area - if *the search for compromises* remains the only feasible basis of policy-making,<sup>63</sup> while the rest of the world always chooses *the best solution*. It will not work if some countries, like Germany, with much experience in patent law and with the professional enthusiasm of judges and patent practitioners - but also through trial and error - have developed and refined over decades a nearly perfect system<sup>64</sup> that is widely accepted as well functioning,<sup>65</sup> while other Member States are not only unwilling to adopt any system at all - which is their uncontested right -, but some of them are also trying to obstruct plans for improvement, for reasons that are difficult to understand.

In the meantime, Member States should have become aware that, under the EPLA rules, countries with regional courts or chambers, like Germany, would receive foreign judges as members so that these judges „can learn by doing“ how cases are heard in the most experienced courts. It is by no means certain that, with foreign judges and due to other modifications of the present German procedure, EPLA will work as smoothly as German patent litigation today. And many practitioners, tired of the unreasonable requests which water down EPLA, would rather maintain the status quo. But a sufficient number of countries - including their judges(!) - are ready to give it a try.<sup>66</sup> So why create so many difficulties for those who have worked hard for so many years to put a working text on the table that is ready for a final round at a diplomatic conference? Who has a serious reason to oppose such



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an agreement? If it is true that *where there is a will, there is a way*,<sup>67</sup> can it be hoped that those who do not have the will could refrain from obstructing the work of others?<sup>68</sup>

It is difficult to understand the logic behind the strategy of delay and opposition that one finds in the French paper. Nobody who is a serious wine lover in Germany would challenge the unmatched quality and taste of French red wines. Therefore, nobody would dare to suggest that France should close all vineyards around Bordeaux and Nuits-Saint-Georges and move winegrowing to the Black Forest. Nobody would suggest either that wine pressing should become a Community competence and all château owners be replaced by officials from Brussels who until now were in charge of the milk quota in the Community. Who would still drink French wine afterwards, particularly if the purchasers were additionally „allocated“ by a central agency in Brussels to places where they were supposed to purchase not the wine of their choice, but what the central agency was willing to provide?

It should, even *must*, become the duty of the EU Commission to lead the discussion in such an important field as an honest moderator where countries can ask for objective advice. The Commission *must* work with more transparency<sup>69</sup> and it *must* become more independent from national governments. At the same time, it *must* engage more independent advisors where it lacks competence and experience. It is also unacceptable to misuse the legal service as an opinion-producing machine in order to justify poor political decisions. Legal opinions of low quality, which make it obvious that the result was prescribed by the one who ordered it, do not help to improve the credibility of the Commission.

As far as EPLA is concerned, the Commission should seriously reconsider its strategy as long as this is still possible, particularly as far as the alleged necessity of a vote in the Council is concerned:<sup>70</sup> Why is it necessary to pull everybody on board a vessel that sails on the high sea of patent law if some prefer to wait and see whether the boat might not sink? Is not optional membership one of the best and objectively necessary features of EPLA, which all users have underlined again and again? What is wrong if only those countries join that have extensive experience in patent litigation, which are best able to test the system, and which are even prepared to spend their own

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money on it (or in fact their users' money), while all other countries can watch and wait what happens?<sup>71</sup>

A *Community patent* is also important, and even a necessity for Europe. But seven valuable years have also been wasted here, because the opposition of the Commission to EPLA and its resistance against expert advice concerning the present text have made any progress in this field impossible. It now appears that with EPLA the chance for a Community patent will rise, and without EPLA there might never be a Community patent. If there is still a chance for success, the Commission must

- drastically change its strategy;
- convince the two groups of countries to do what is really best for the Community, namely that a few countries go ahead with EPLA;<sup>72</sup>
- lend its assistance to circumvent possible legal obstacles to EPLA, perhaps by examining the *Dior v. Evora* decision of the ECJ;<sup>73</sup>
- agree with the potential EPLA countries on dates for final talks about the EPLA text and fix a date for a diplomatic conference;
- and do all this very fast.<sup>74</sup>

Industry is certainly not willing to waste another year in fruitless discussions. If nothing happens, it will be better to drop EPLA and the Community patent for good - sooner rather than later. The Community patent will be even more difficult to adopt politically because the involvement of all Member States is indeed necessary. But the Community patent should be easier to discuss, when Member States have experience of how EPLA operates. Therefore, if EPLA is not achievable, it would be preferable to maintain the status quo and not even to start on an overhaul of the

Community Patent Regulation. None of the Member States and nobody in the Commission will be willing and able to prepare any paper that could even come close to the detailed content of the EPLA draft. Therefore it must be feared that participants will grow tired of continuing discussions on one small item after another - and no end in sight.

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<sup>1</sup> Commissioner McCreevy, 29 November 2005, before the European Parliament Legal Affairs Committee.

<sup>2</sup> Commissioner McCreevy, Helsinki, 8 September 2006, before the ECIFIN Council.

<sup>3</sup> More than 2,500 comments and statements were received by the Commission.

<sup>4</sup> The preliminary results of the survey can be downloaded from a Commission website, at [www.ec.europa.eu/internal\\_market/indprop/patent/hearing\\_en.htm](http://www.ec.europa.eu/internal_market/indprop/patent/hearing_en.htm).

<sup>5</sup> Speech by Commissioner McCreevy, Strasbourg, 28 September 2006, before the European Parliament, full session; similarly, speech by Commissioner McCreevy of 11 September 2006, in Helsinki.

<sup>6</sup> In addition to Justice Canivet, the speakers among the judges were Mr. Lutz, President of the German Federal Patent Court, Ms. Pézard of the Paris Court of Appeal, and Judge Pumfrey of the London High Court, now at the Court of Appeal.

<sup>7</sup> A concept which would exchange the national courts for Community courts.

<sup>8</sup> Communication from the Commission to the European Council (Informal meeting in Lahti, Finland, 20 October 2006), Brussels, 12 October 2006, COM(2006) 589 final, „An innovation-friendly, modern Europe“.

<sup>9</sup> <http://www.ipeg.com>.

<sup>10</sup> The working committee consisted of the following judges: Jacob (English Court of Appeal), Meier-Beck (German Federal Supreme Court), Pézard (Paris Court of Appeal), von Peursem (The Hague District Court), Scuffy (Italian Supreme Court), Willems (EPO), and five attorneys of the EPLAW board: Franzosi (IT), Hoyng (NL), Mooney (UK), Pagenberg (DE), and Tilmann (DE). The formulated rules were afterwards adopted and signed by the full conference of European judges.

<sup>11</sup> See for press reactions **Bodoni**: „Europe’s top judges agree on rules for first EU patent court“, Bloomberg New York, 6 November 2006; **Tait**, „Patent Court to cut time and cost of lawsuits“, Financial Times, 7 November 2006.

<sup>12</sup> The result is published as an Annex to this article, see *also* the signed version of the Resolution, at [www.eplaw.org/](http://www.eplaw.org/).

<sup>13</sup> The paper reflects this surprise: „The adoption of the EPLA project relatively quickly and with minimum debate does not reflect the reality of the negotiations.“ Insiders suspect however that the whole manoeuvre had the goal of obtaining whatever advantages possible for the French language within the European patent system.

<sup>14</sup> With the title „A Community Judge for the European Patent“, it refers to Art. 225a of the EC Treaty.

<sup>15</sup> This was later explained by the author of that paper, **Guillaume**, as a centralized Community jurisdiction, see Gazette du Palais, 21 December 2006.

<sup>16</sup> Frankfurter Allgemeine Zeitung and Financial Times, 6 December 2006.

<sup>17</sup> Pan-European Intellectual Property Summit in Brussels on 7 December 2006.

<sup>18</sup>Communication from the Commission to the European Parliament and the Council, COM (2007) of 3 April 2007 (165 final).

<sup>19</sup>The overwhelming support of 95% was not mentioned.

<sup>20</sup>The press commented, **Emma Barraclough**, „Commission’s patent proposals fuel frustration“, MIP, London.

<sup>21</sup>This has always been one of the corner-stones of EPLA, see Document WPL/SUB 24/01 of 6 November 2001; Observations by Expert to WPL/SUB 20/01 and WPL/SUB 21/01.

<sup>22</sup>This has been clearly recognized by stakeholders, see Mr. Schlemmer, a representative of the German SMEs, at the Munich Symposium; the US and now China also allow the free choice of courts, see the contributions of Judge Rader of the US CAFC, as well as Justice Jian Li of the Chinese Supreme Court, in their presentations at the Munich Symposium, see below at XI. and [www.bpatg.de/bpatg/symposium/symposium.htm](http://www.bpatg.de/bpatg/symposium/symposium.htm).

<sup>23</sup>The free choice between several competent courts must be distinguished from the „bad“ form of forum shopping where parties misuse procedural rules in order to delay proceedings by choosing the slowest or least experienced court and thereby obstruct justice. Competition between courts is created however by choosing the most experienced and best predictable court.

<sup>24</sup>See UNICE Paper: WPL/SUB 6/01, Munich, 30 March 2001: „An arbitrary allocation of cases reflecting capacity is not acceptable in UNICE’s view“; and further Doc. WPL/9/99, rev. 1, of 25 May 2000, at 22; WPL/SUB 8/01 of 3 April 2001; WPL/SUB 10/01, Minutes of the 3rd meeting of the Sub-Group of the Working Party on Litigation (The Hague, 4-6 April 2001).

<sup>25</sup>Doc. 8566/07.

<sup>26</sup>See Annexes to the Working Document of the Portuguese Presidency, Council of the European Union, Brussels, 12 July 2007, 11622/07 PI 35, „Towards an Enhanced Patent Litigation System and a Community“.

<sup>27</sup>On 7 March 2006 the *Bundesrat* had already made a Resolution urging the adoption of EPLA which should allow for jurisdiction at the place of infringement and cross-border competence, Drucksache 209/06.

<sup>28</sup>Drucksache 244/07 of 11 May 2007.

<sup>29</sup>A condition that was perhaps meant as a reminder to Commissioner McCreevy, who had expressed this condition six months earlier in nearly the same words, Strasbourg, 28 September 2006, European Parliament Plenary Session: „We will only succeed if we can demonstrate that what we propose will have added value compared to the status quo“.

<sup>30</sup>Recommendation 1793 (2007).

<sup>31</sup>Assembly debate on 20 April 2007 (18th Sitting) (see Doc. 11227, report of the Committee on Economic Affairs and Development, rapporteur: Mr. Schreiner). Text adopted by the Assembly on 20 April 2007 (18th Sitting).

<sup>32</sup>The EPO conference „Patents are the future“ on 18-19 April 2007 should also be mentioned, which this author, however, could not attend. It must be mentioned that Angela Merkel gave a remarkably patent-minded speech and, mentioning the result of the Commission consultation with 2,500 responses to the Questionnaire, confirmed that Germany „won’t settle for a half-hearted compromise“, and with reference to EPLA she said „where there is a will, there is a way“.

<sup>33</sup>Under the title „A Europe of Innovation - Fit for the Future?“

<sup>34</sup>Speech at Informal ECOFIN Council - IPR Conference Helsinki, 8 September 2006: „The level of participation in the consultation exercise exceeded my most optimistic expectations.... It is clear from the consultation that stakeholders reject the current Community patent deal on the table - the 2003 Common Political Approach.... The EPLA offers a unified jurisdiction for these patents. I believe this is a goal worth pursuing. It would offer valuable cost savings and increase certainty in regard to patent applications“.

<sup>35</sup> See for the speeches <http://www.bmj.bund.de/files/-/2065/>.

<sup>36</sup> *Id.*

<sup>37</sup> Sharon Bowles, MEP.

<sup>38</sup> Further speakers were the Deputy Director General of WIPO, Mr. Gurry, the President of BusinessEurope, Mr. Seillière, and the President of the EPO, Mr. Pompidou.

<sup>39</sup> In December 2006, Pan-European Intellectual Property Summit, Brussels, 7 December 2006, Commissioner McCreevy had still told the representatives of industry and all other users present: „What you told us in the consultation must be repeated at home to all those who are involved in the decision-making process in your capitals“. The Commission must have forgotten the hearing in Brussels entirely when drafting the Communication.

<sup>40</sup> Mr. Konteas, the spokesman of BusinessEurope said in an interview: „The whole point of the exercise was that the EU asked users what they wanted and we gave them answers. If [the proposal] takes us in another direction then one has to wonder what the point was of asking us in the first place“; see also the President of BusinessEurope, Mr. Seillière, at the Berlin conference, at <http://www.bmj.bund.de/files/-/2065/>.

<sup>41</sup> See for the speeches and summaries of the panel discussions the „contributions“ section at [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>42</sup> The same proposal also came later from Mr. Nootboom on the second day.

<sup>43</sup> Citing additional experts on the question like Sir Francis Jacob, as the former Attorney General of the ECJ, as well as Prof. Arnulf, he came to the conclusion that there could be no legal problem, see **Jacob & Arnulf**, 2007 EIPR 209.

<sup>44</sup> It seems that on this point the EU Commission has changed its language. At the meeting of the Administrative Council of the EPO on 27 June 2007, which also sat as the EPLA Working Party, Ms. Fröhlinger, representing the EU Commission repeated that EPLA is not incompatible with Community legislation, but the countries are simply not competent to conclude EPLA since it belongs in a domain of mixed competence, so that the EU must be involved.

<sup>45</sup> ECJ, C-337/95, [1997] E.C.R. I-6013, para. 21, 29 IIC 43 (1998).

<sup>46</sup> This is also the view of SME's, see Mr. Schlemmer, [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html), at 2; and even Commissioner McCreevy said in a speech in Strasbourg on 28 September 2006 before the European Parliament: „We will only succeed if we can demonstrate that what we propose will have added value compared to the status quo“.

<sup>47</sup> See for his list of requirements, Munich Symposium, [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html), at 3.

<sup>48</sup> \$2 million for the first instance per party is the minimum.

<sup>49</sup> For the same reason China has instituted a system of special chambers all over the country, see Justice Jian Li, Munich Symposium, [www.bpatg.de/bpatg/symposium/symposium.htm](http://www.bpatg.de/bpatg/symposium/symposium.htm), at 3.

<sup>50</sup> Same remark by the President of BusinessEurope, Mr. Seillière, who urges the Member States to take their responsibility seriously, conference in Berlin, at <http://www.bmj.bund.de/files/-/2065/>.

<sup>51</sup> See the same argument by Mr. Sueur at the Munich Symposium, Panel 1.

<sup>52</sup> See Judge Rader, Munich Symposium, at [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>53</sup> See Judge Mimura, Munich Symposium, at [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>54</sup> See Justice Jian Li, Munich Symposium, at [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>55</sup> See *supra* note 26.

<sup>56</sup> Internal quarrels within the Commission have apparently prevented this, and seven years have been lost without the *slightest* progress towards the Lisbon Agenda.

<sup>57</sup> See Munich Symposium, at 5, where Mr. Grossenbacher calls the plan of the Commission to include all Member States „a less ambitious aim“, [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>58</sup> Commissioner McCreevy, at the Pan-European Intellectual Property Summit in Brussels on 7 December 2006, called on Member States to be active and not „counter-active“; but the Commission sided with its counter-active partners in its latest Communication.

<sup>59</sup> The EPLA Working Party decided on 20 November 2003 in its Closing Statement (WPL/6/03 Rev.1): „The Working Party is conscious of the fact that the establishment of a litigation system for existing European patents is being paused, in view of the work being done by the European Union to introduce a Community patent with a judicial system of its own“.

<sup>60</sup> See [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>61</sup> In a speech before the European Parliament Legal Affairs Committee on 29 November 2005.

<sup>62</sup> See for only a few areas of criticism, **Pagenberg**, 34 IIC 281 (2003); *id.*, 34 IIC 535 (2003).

<sup>63</sup> See for the frequent calls for a „good compromise“, Commissioner McCreevy: „But a good solution will require compromises from all involved“, speech at Pan-European Intellectual Property Summit, Brussels, 7 December 2006, see also interview citation December 2006-January 2007, at [www.managingip.com](http://www.managingip.com).

<sup>64</sup> Prof. Meier-Beck called it „nearly ideal“ at the Munich Symposium; similarly Mr. Schlemmer also emphasized the positive attitude of judges towards patents, see [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>65</sup> It has even been adopted in part by countries outside Europe, *cf.* the references to German practice by Judge Mimura from Japanese practice, as well as Justice Jian Li from Chinese practice, at [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>66</sup> See for the report on the Resolution of patent judges at the First Venice Forum of Judges, **Pagenberg**, 2006 GRUR Int. 35.

<sup>67</sup> Commissioner McCreevy, Pan-European Intellectual Property Summit, Brussels, 7 December 2006; similarly Prof. Meier-Beck at the Symposium in Munich.

<sup>68</sup> But part of the problem here also lies with the Commission, since nobody knows whose will counts in Brussels. Unfortunately there are always small groups of people within the Commission where everybody cooks his own soup, and the recipes sometimes come from obscure sources.

<sup>69</sup> It is unacceptable that such important projects are being delayed again and again and then torpedoed within the Commission for reasons unknown to the outside world.

<sup>70</sup> See Ms. Fröhlinger, Munich Symposium, [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html), at 3.

<sup>71</sup> See Mr. Grossenbacher, Munich Symposium, [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html), at 6.

<sup>72</sup> Same view as Mr. Seillière, BusinessEurope, Berlin conference, at <http://www.bmj.bund.de/files/-/2065/>.

<sup>73</sup> ECJ, C-337/95, [1997] ECR I-6013, para. 21, 29 IIC 43 (1998); see the contribution by Lord Jacob, Munich Symposium, at [www.bpatg.de/bpatg/symposium/symposium.html](http://www.bpatg.de/bpatg/symposium/symposium.html).

<sup>74</sup> Mr. Seillière, President of BusinessEurope, also emphasizes that time is of the essence, see Berlin conference, at <http://www.bmj.bund.de/files/-/2065/>.