# Part II.

# Predicted consequences

## EU-EPLA is not about patent litigation

The general public argument for the Court is that it would unify divergent court interpretations of a patent in different member states and reduce the costs for multiple litigation. But the figures show that multinational litigation is of minor importance. We find few cases of trinational litigation. The only showcase of divergent litigation interpretation on national grounds *Epilady* is ancient. The new court is also advocated as a path to the community patent and an anti-Torpedo-measure8. In reality EU-EPLA drives the entry cost barriers for litigation up and is a solution for rare cases of large companies that can afford patent litigation and professional patent litigation companies ("patent trolls"). The current patent litigation system strongly discriminates against small and medium enterprises which primary business is not patent enforcement. A more expensive system for cross-border litigation would not improve this situation.

## EU-EPLA is about validating EPO practice

The new central court is staged to approve expansive reforms on subject-matter by case law such as the illegitimate granting of software patents by the European Patent Office (EPO). The new court is tailored to be as independent as the EPOs infamous Technical Boards of Appeal. The new Court also minimizes the political risk of influence from national governments and strongly centralizes powers. The Portuguese EU-EPLA is all about validation of Software and Business Method Patents. It attempts to overcome discomfort of national judges about the abusive legal interpretations of the European Patent Convention, Art 52, by the European Patent Organization including teaching such as the infamous "further technical effects".

## Technocratic win

The Council discusses a patent court that reflects the interests of patent technocrats and patent attorneys, but not European businesses and inventors. Member States are recommended to assess the compatibility of the current model with the EU Treaties (including the new revision agreed in Lisbon recently) to include centralized jurisdiction for European and community patents. The EU-EPLA requires prior EU harmonization of national substantive patent law or will run into delicate legal difficulties. The German model of separation of litigation and validation drives costs up and favors patent holders. An important matter is the role of technical judges as part of the court. Legal judges would guarantee for judicial independence and legal quality of rulings.

On a longterm perspective the parallel governance of the European patent system means that one institution needs to give way. Sooner or later it will be necessary to dismantle the European Patent Organization and let an European Union Innovation agency and parliamentarian institutions overtake its role. EU-EPLA blocks the transformation process and strengthens the institutional influence of the European Patent Organization that is not part of the Union and governed by technocrats cushioned against business reality.

## Parliament disengaged

EU-EPLA is staged to validate software patents without parliamentarian deliberations that take

account of a diversity of political views, stakeholders and economic impact assessments which simply cannot be addressed in courts proceedings. Democratic decisions add legitimacy. It would be appropriate to stress that unclarity in substantive law calls for a legislative clarification first. Divergent national court practices are not bad *per se* as they hint to European legislative harmonization needs. Cynically spoken it seems patent institutions *lost confidence* in politics and now want their own *trusted* court. It is worth to examine the political economics of the October EU-EPLA in terms of trusted judges, technical experts and validity decision-making.

In the field of software the European Commission refuses to propose a new directive that would keep the software service sector safe so that software authors can trade their copyrighted works without any risks of EPO software patents. Parliament has no right of proposal but made very clear in the past debates that it seeks changes to the status quo. This example illustrates the 'constitutional' inability of the legislator to stop institutional malpractice and its reliance on the Commission. Thus also in other matters of substantive patent law the European legislator would yield influence over substantive patent law while it further remains to be prejudiced by patent technocracy. Given the lack of compromise, procedural trickery and deceptive drafting during the software patent debate the EU-EPLA court is a potential threat to parliamentarian democracy, on the national and the European level.

# Part III.

# Annex

## The US Court of Appeals of the Federal Circuit

The USA has experimented with a central patent court. In 1982, the US Congress put all patent litigation into a single court called the Court of Appeals of the Federal Circuit (CAFC). This is how the US CCIA (Computer & Communications Industry Association) described the effects of CAFC9:

> The Federal Circuit has:
>
> * Lowered the threshold standard of patentability
> * Encouraged extortionate demands and settlements
> * Eliminated virtually all limits on patentable subject matter
> * Endowed issued patents with an unjustifiably high presumption of validity
>
> [CAFC] has made patents more potent, easy to get, easy to assert, and available for a virtually unlimited range of subject matter. As shown in the 2002 joint Department of Justice/Federal Trade Commission (FTC) hearings, this has led to over-patenting, portfolio racing, opportunism, extortionate settlements, and failure of the public disclosure function. As the final FTC report, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, makes clear, the ill effects have been borne disproportionately by the ICT sector.

## ECJ outside of patent law

Hartmut Pilch (FFII e.V.) was saying last 2 May 2007:

> "I don't think EU joining EPC would automatically mean that ECJ can intervene on substantive patent law questions.
>
> If there is a ECJ above the EPJ, then probably only for very special questions relating to areas outside patent law, such as EU treaties, and it would not be accessible to the litigating parties but only to the EPJ itself or maybe to the Commission, member states and the European Parliament."

The Portuguese Presidency did not explain the mechanisms by which the ECJ will be able to interpret substantive patent law. In fact, its move to push for an EU litigation system is like putting the horse before the car: current EU law is silent about substantive patent law, expect for the biotech directive. The question of substantive patent law has to be clarified before any discussion on litigation can happen.

ECJ is not accessible for private parties to defend themselves, as it is not competent for disputes between private parties.

The Portuguese proposal mentions that only the Advocate general can request the ECJ on points of law. Compared to the american CAFC-SCOTUS mechanism, it denies the right of a party to appeal to the ECJ. It also carries the risk that if the Advocate General is dependent of the patent system, it can deny a request to appeal for important questions such as limits of patentability. Parties in the

United States has the right to petition the Supreme Court independently of the mind of captive patent judges. This appeal mechanism has recently been used by the Supreme Court to correct some low-patentability-requirements thresholds created by the captive court of CAFC.

This attitude of those patent captive courts is mentioned here:

> Dear Mr. Josefsson,
>
> You are absolutely correct: The EBA is the highest law-making body within the EPO system, and all basic questions should be referred to it. This is in Art. 112 EPC. Contrary decisions of a Swedish court and a TBA of the EPO must be referred to the EBA. However, in practice this does not happen. This is so because the EBA rarely confirms the decision below, and the judges of the TBAs think this reflects badly on their work. **We have exactly the same problem in Germany where the Senates of the Federal Patent Court should refer basic questions to the BGH but do not do this**. You might read a commentary on Art. 112 EPC.
>
> With kind regards,
> Hans Raible

# Parliament resolution on Future European Patent Policy

The European Parliament resolution on European Future Patent Policy (12 Oct 2006) set a clear agenda for future talks about a patent judiciary:

> whereas there has been growing concerns about undesirable patents in various fields and about a lack of democratic control over the process by which such patents are granted, validated and enforced.
>
> & as regards the EPLA, considers that the proposed text needs significant improvements, which address concerns about democratic control, judicial independence and litigation costs.

It also demanded

> that all legislative proposals should be accompanied by an in-depth impact analysis related to patent quality, governance of the patent system, judicial independence and litigation costs.

# Dr. Langfinger (Business Europe): consent as legal base

Report: Wie geht es weiter mit der europäischen Patentgerichtsbarkeit, BPatG Symposium, Panel 2

> Als Rechtsgrundlage kämen je nach Konstruktion unterschiedliche Vorschriften des EG-Vertrages in Betracht. Zu verweisen sei auf die Artikel 225 a, 229 a, 308 EG-Vertrag. Letztlich sei dies jedoch nicht die entscheidende Frage. Wenn zwischen den Mitgliedsstaaten Einigkeit über die Schaffung einer europäischen Patentgerichtsbarkeit erzielt werde, sei nicht zweifelhaft, dass auch eine Realisierung unter dem EG-Vertrag möglich sei.

in English:

> Depending on the design requirements different provisions of the EC Treaty come into consideration. We refer to the articles 225, 229 a, 308 EC Treaty. Ultimately, however,

this is not the crucial issue. If the member States get mutual consent on the establishment of a European patent judiciary, it is without doubt that a implementation under the Treaty provision would be made possible.

# Danger of Democratic interference

Responses from David Rosenberg and Tim Frain focussed on shared concerns, their primary worry being that politics would obstruct the quality of decisions made under the new system.

Source: L. Mathias report from AIPPI conference, Dec 5[10]

"The main topic was the EPLA. Almost everyone there declared in favour of the EPLA and we were told that the judges were uniformly in favour. The villains were seen as the politicians."

Source: PATENTEPI report, "The Future of the Patent Jurisdiction in Europe" Munich, 25th and 26th June 2007[11])

# Froehlinger (COM) explains the regional central court

Dr Froehlinger addressed whether the proposed Community patent jurisdiction required seats in all member states. She said that the Commission intends through financial incentives to encourage regional chambers. The need for physical proximity could be reduced by video conferencing and chambers could be peripatetic. She added that judges in the UK have confirmed that the UK, Ireland and the Benelux countries are discussing plans for a regional chamber. She countered criticism that local chambers inevitably lack experience, relying on training and the use of a multinational pool of judges.

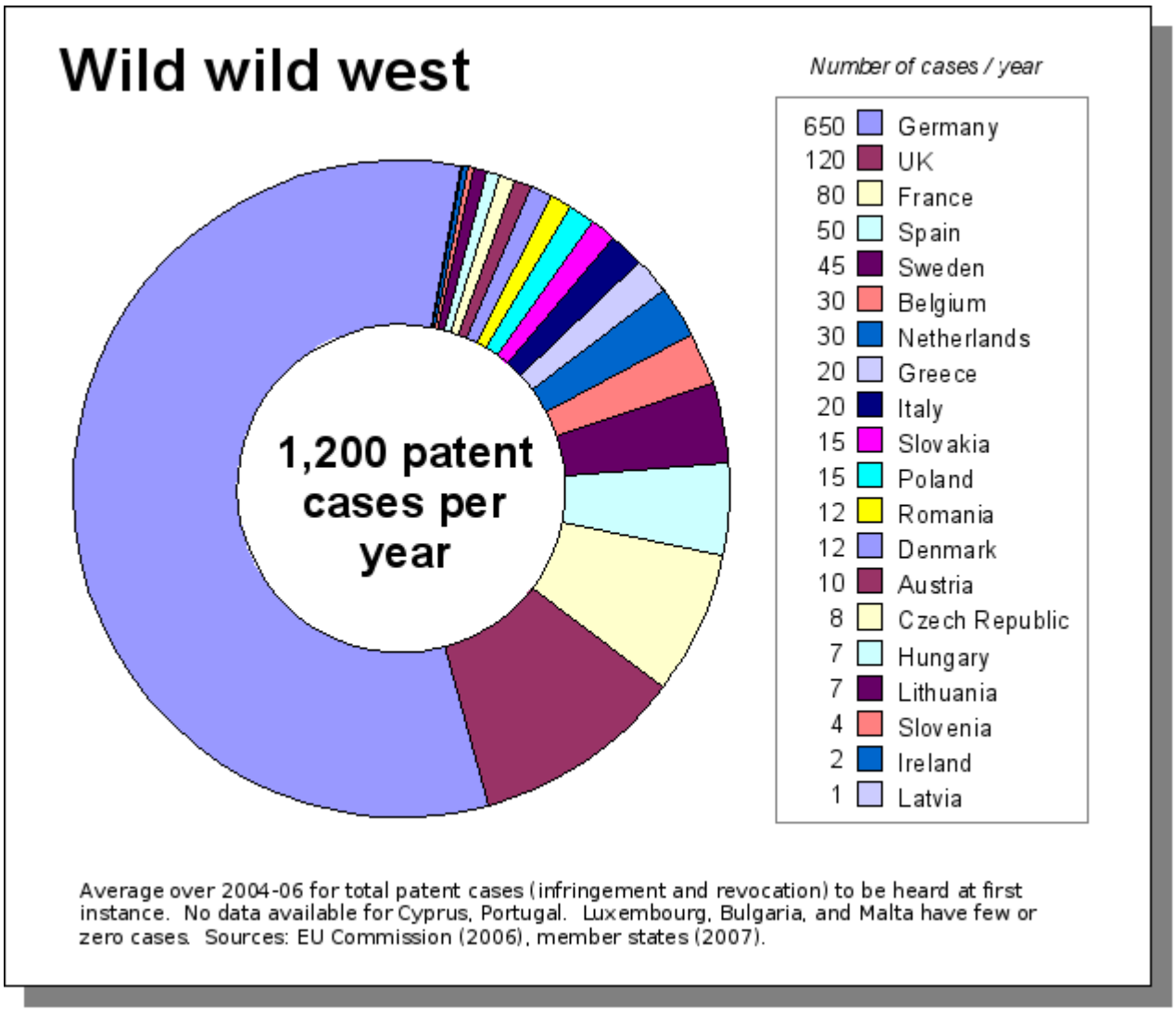
&

Lastly Dr Froehlinger addressed the controversial issue of bifurcation. The Commission s aim is to introduce choice and flexibility into the system and she insisted that there would be no imposed bifurcation of validity and infringement proceedings.

Source: L. Mathias report from AIPPI conference, Dec 5[12]

# Patent litigation: empirical data

Today patents are litigated in very few EU member states. Multinational litigation hardly occurs.




Footnotes

1. Gaster at Friedrich Ebert Stiftung, Der effektive Schutz geistigen Eigentums, Nov 1 2007
2. http://register.consilium.europa.eu/pdf/en/07/st11/st11622.en07.pdf
3. http://register.consilium.europa.eu/pdf/en/07/st13/st13675.en07.pdf
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5. http://register.consilium.europa.eu/pdf/en/07/st14/st14492.en07.pdf
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10. L. Mathias:Patent Litigation in Europe: the Commission Communication and the EPLA is this the last chance? http://ipkitten.blogspot.com/2007/12/last-chance-for-pat-lit-reform-in.html
11. http://216.92.57.242/patentepi/data/epi_03_2007.pdf
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