

Background Note on the European Patent Litigation Agreement (EPLA)

The EPLA will be an *optional* litigation system in which EPC Contracting Parties do not need to participate. In fact, presently only a limited number of States has shown a particular interest in the project, such as D, NL, UK and CH.

The Commission is represented as an observer.

EPLA proposal: content

The EPLA would set up a European Patent Court consisting of a *Court of First Instance*, a *Court of Appeal* and a Registry.

The EPLA Contracting States will designate the European Patent Court as their national court for cases concerning the infringement and validity of European patents, so that *decisions of the Court* will be directly *enforceable* in all EPLA Contracting States without any form of recognition or exequatur.

General provisions in the draft EPLA deal with the burden of proof, production of evidence, prior use, the right of information, witnesses, experts, etc. In that respect the draft EPLA would create a unitary patent enforcement scheme among Contracting States to the agreement.

The *language regime* would be based on the language regime of the EPO (EN, FR and DE). Before the Court of Appeal, the language of the proceedings will always be the language of the first-instance procedure.

The Court has jurisdiction for:

- infringement actions, declarations of non-infringement,
- actions or counterclaims for revocation of a European patent,
- compensation in respect of the protection conferred by a published European patent application,
- and any other action concerning a European patent (if the parties have agreed).

That jurisdiction is exclusive for revocation actions and actions against a defendant domiciled in a state participating in the EPLA.

The European Patent Court has essentially the following powers - it may order:

- the infringer to cease and desist the infringement,
- the destruction of infringing goods or materials used to manufacture infringing goods,
- the payment of damages to the injured party,

- for the infringer to inform the injured party of the identity of any third person involved
- provisional and protective measures, including preliminary injunctions, orders for inspection of property, freezing orders and sequestration. N.b.: national courts retain the right to order such provisional or protective measures as provided for by their national law.

EPLA and the Community Patent (COMPAT) jurisdiction proposals

The first Commission proposal would confer on the Court of Justice formal jurisdiction concerning certain disputes over Community Patents, in particular those concerning alleged infringements of patents and challenges to the validity of patents. The second proposal would establish the Community Patent Court. It also sets up a specialised chamber within the Court of First Instance to hear appeals against the Community Patent Court's judgements. In exceptional cases, a decision of the Court of First Instance could be subject to review by the Court of Justice.

The **main differences with the EPLA** proposal are

1. that the EC proposals do not deal with (national) European patents but with the unitary Community patents
2. that the EC litigation system is mandatory for all 25 EU Member States whereas EPLA would only apply to the adhering EU and non-EU countries
3. that the EC proposals aim at setting up a true centralised jurisdiction and do not foresee in setting up decentralised courts (the draft EPLA could lead to the creation of a maximum of three regional branches of the Courts of First Instance per country).
4. The Community Patent Court would be bound by general principles of Community law, whereas the EPLA court system would in principle be ruled by international law. The grounds for appeal from Community Patent Court to Court of First Instance are more restrictive than the corresponding provisions in the draft EPLA.

The Community Patent Court has (exclusive) jurisdiction for disputes relating to the application of the Community patent: validity; infringements; use of invention after publication of application/right based on prior use invention; interim and evidence-protection measures; damages or compensation; penalty payment in case of non-compliance with decision order; compulsory licences.

Several differences can be identified. For instance, unlike the Commissions proposal, the EPLA proposal contains an explicit provision on the right of information (on the identity of any third party involved in the infringement) and more details on damages. Unlike the EPLA proposals, the Community Patent Court has competences on prior use etc. and on compulsory licences (on the basis of the COMPAT Regulation).

Technically, it is possible that the European patent litigation system, as foreseen in the EPLA proposals, and the Community patent jurisdiction, as foreseen in the Commission proposals,

coexist. EPLA deals with European patents, and the Commission proposals cover Community patents.

However, it is generally understood that it is not desirable to have two pan-European patent jurisdictions. The subject matter of both courts would be different, but there are fears that the coexistence would lead to a diffusion of patent law knowledge which is already fairly scarce. Both courts could also consider each other as “competitors” which not necessarily would take each others decisions into account, to the detriment of legal certainty. From a Community point of view, it should be sufficient that the COMPAT Court gives guidance on patent law in the EU, whether directly in a COMPAT litigation case or indirectly, as more general guidance to EU MS courts dealing with national patents. Moreover, if COMPAT turns into a success, the use of European (national) patents will decrease and the need for a second supranational court becomes even more marginal.