

# The Future of the Jurisdictional Systems for Patents in Europe - Alternatives

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# Outline

- I. History and background
- II. An overview of the options presented thus far
- III. A brief assessment of the various options

# I. History and background

- the Community dimension
- the EPC dimension
- merging the two dimensions?
- identifying the problem
  - layers of protection
  - arguments in support of a supranational judicial system
- objectives and requirements

# I. History and background – the Community dimension

- EPC – a single procedure for granting European patents (1973)
- CPC (1975) + the 1989 agreement with the Protocol on litigation: never entered into force
- the Commission's green paper on the promotion of innovation by patents (1997)

# I. History and background – the Community dimension (cont.)

- proposal for a Council Regulation on the Community patent (August 2000)
- accompanied by two other proposals for Council Decisions on the Community Patent Court and the conferral of jurisdiction (December 2003)
- based on the Council's common political approach of 3 March 2003

# I. History and background – the EPC dimension

- IGCs held in Paris (June 1999) and London (October 2000)
- Working Party on Litigation
- mandate: optional agreement on litigation
- draft agreement (WPL/10/05)
  - European Patent Court to deal with infringement and revocation actions concerning European patents
  - Facultative Advisory Council to deliver non-binding opinions at the request of national courts
- the project is on hold

# I. History and background – merging dimensions?

- public consultation initiated by the Commission:  
questionnaire on the patent system in Europe
- two basic questions:
  - “ – *What advantages and disadvantages do you think [that] pan-European litigation arrangements as set out in the draft EPLA would have for those who use and are affected by patents?*

# I. History and background – merging dimensions? (cont.)

*– Given the co-existence of three patent systems in Europe (the national, the Community and the European patent), what in your view would be the ideal patent litigation scheme in Europe?”*



# I. History and background – identifying the problem

- the “biggest sin”: the patent system is still territorial and national in Europe
- two systems of protection without a Community dimension:
  - the national patent systems
  - the European patent system

# I. History and background – identifying the problem (cont.)

- the national patent systems
  - first layer of protection based on harmonised rules
  - groundwork for other patent systems in Europe
- EPC: the second layer
  - co-existence and interaction with the national patent system
  - a single procedure for granting a bundle of patents having the effects of a national patent
- no third layer so far: no unitary patent for the whole Community

# I. History and background – an inventory of the complaints and arguments

- purely national litigation → multiple litigation is inevitable
- drawbacks of multiple litigation:
  - costly
  - different decisions → legal uncertainty
  - forum shopping

# I. History and background – objectives and requirements

- EPLA – Preamble:

- “– *to promote the uniform application and interpretation of European patent law,*
- *to improve the enforcement of European patents,*  
*and*
- *to enhance legal certainty.”*

# I. History and background – objectives and requirements (cont.)

- common political approach (2003)

*“The jurisdictional system of the Community Patent will be based on the principles of a unitary Court for the Community Patent, securing uniformity of the jurisprudence, high quality of working, proximity to the users and potential users, and low operating costs.”*

## II. An overview of the options presented so far

The options presented thus far:

- the present system;
- the framework established by the Community Patent Convention and its 1989 Protocol (“CPC 1989”);
- the EU Council’s common political approach of 3 March 2003 together with the underlying legislative proposals from the Commission (“CPA 2003”);
- the EPLA;
- the judicial systems developed for the Community trade mark and the Community design (“CTM”).

## II. An overview of the options presented so far

Comparison in respect of the following points:

- institutional and legal framework;
- instances;
- composition of the courts;
- proximity to interested parties – accessibility;
- competence and the role of national courts;
- applicable law;
- ensuring uniformity and respect for Community law;
- language regime.

## II. An overview of the options presented so far

Institutional and legal framework:

CPC 1989: a Community convention concluded by the Member States

CPA 2003: Community legislation (Regulation + Decisions; Articles 308, 225a and 245, 229a of the EC Treaty)

EPLA: international law instrument (Article 149a EPC 2000)

CTM: Community legislation (Article 308 of the EC Treaty)



## II. An overview of the options presented so far

Instances:

CPC 1989: national courts acting as Community patent courts + a Common Appeal Court

CPA 2003: Community courts only (CPC+CFI), but for a transitional period: national courts

EPLA: European patent courts only + Facultative Advisory Council

CTM: national courts acting as CTM courts

## II. An overview of the options presented so far

### Composition:

CPC 1989: national courts (and their territorial jurisdiction) to be specified by Member States – Common Appeal Court: appointment by common accord of the Governments (qualifications required for appointment to judicial office + experience in patent law)

CPA 2003: 7 judges (high level of legal expertise in patent law) of the CPC ← unanimous Council decision; technical experts to assist judges

## II. An overview of the options presented so far

Composition (cont.):

EPLA: appointment by the Administrative Committee – international panels – legally and technically qualified judges

CTM: list of CTM courts (with their territorial jurisdiction) to be communicated by MSs

## II. An overview of the options presented so far

Proximity and accessibility:

CPC 1989: same proximity as in the case of national patents

CPA 2003: the seat of the CPC is to be at the CFI, with the possibility of hearings in other MSs

EPLA: seat – not yet selected; regional divisions might be set up

CTM: same proximity as in the case of national trade marks

## II. An overview of the options presented so far

Competence, the role of national courts:

CPC 1989: Community patent courts: infringement, threatened infringement, declaration of non-infringement, actions related to provisional protection, counterclaims for revocation; Common Appeal Court: effects and validity of Community patents + some EPO decisions; national courts: other actions, including those relating to compulsory licenses

## II. An overview of the options presented so far

Competence, the role of national courts (cont.):

CPA 2003: infringement, declaration of non-infringement, invalidity, counterclaim for a declaration of invalidity, provisional protection, prior user's rights, compulsory licenses, damages and compensation, provisional or protective measures; national courts: transition period – thereafter: only actions other than those listed

## II. An overview of the options presented so far

Competence, the role of national courts (cont.):

EPLA: actual or threatened infringement, declaration of non-infringement, counterclaims for revocation, provisional protection; national courts: provisional and protective measures, provisional seizure of goods as security

CTM: infringement, threatened infringement, declaration of non-infringement, counterclaims for revocation or invalidity, actions relating to pre-registration acts; national courts: other actions

## II. An overview of the options presented so far

Applicable law:

CPC 1989: CPC 1989 + national law

CPA 2003: CPC+CFI: the Council Regulation on the Community patent; transitional period – national courts: their national law, too

EPLA: substantive patent law provisions of the EPLA and the EPC, plus national patent law provisions implementing the EPC; FAC: “*national patent law harmonised with them*”, too

CTM: CTMR + national laws



## II. An overview of the options presented so far

Ensuring uniformity and respect for Community law:

CPC 1989: a complex mechanism (involving the ECJ) to ensure uniform interpretation and application of the law relating to Community patents + no provision of the CPC 1989 can be invoked against the application of the EC Treaty

CPA 2003: centralised and unitary court system to “*secure uniformity of the jurisprudence*”

## II. An overview of the options presented so far

Ensuring uniformity and respect for Community law  
(cont.):

EPLA: EPLA – no conflict with Community law;  
preliminary rulings by the ECJ at the request of the  
European Patent Court, with effect only in EU MSs

CTM: preliminary rulings by the ECJ at the request of  
national courts acting as CTM courts

## II. An overview of the options presented so far

The language regime:

CPC 1989: national procedural rules – Community patents available in one of the official languages of each Member State

CPA 2003: in the official language of the MS where the defendant is domiciled (with some other options) – translation of all claims into all official EU languages

## II. An overview of the options presented so far

The language regime (cont.):

EPLA: only EPO languages

CTM: national procedural rules – all official publications and all entries in the CTM Register: in all official EU languages

# III. A brief assessment of the various options

- a conceptual change: „user” to be re-defined
- fair and balanced approach
- an alternative to CPA 2003: the judicial system for Community trade marks and designs?
- preliminary rulings by the ECJ (Art. 234 EC Treaty) to ensure uniform interpretation
- impact studies are needed
- the competitiveness argument – revisited
- EPLA: the FAC regime would suffice

# Sources of information:

<http://patlaw-reform.european-patent-office.org>

<http://www.european-patent-office.org/epo/epla/index.htm>

<http://www.mszh.hu/English/hirek/2006>

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Thank you for your attention.