Report on CEIPI Conference „Towards a European Patent Court" held at the European Parliament, Strasbourg, 16–17 April 2010

This was a well-timed conference, aptly titled in that the focus was on the draft proposal for a European Patents Court (EEUPC) to hear patent cases when the European Union EU Patent comes into force. It is worth recalling here that the EEUPC will apply to both patents granted under the EPC (European patents) and under the European Union (EU Patent) regime. Further, Art. 17 of the draft proposal sets up a mediation and arbitration Centre, the seat of which is yet to be decided.This will provide an alternative forum to the court, to assist parties to resolve their differences without recourse to litigation as such.

CEIPI had assembled a high-powered roster of speakers. *epi* was a sponsor together with INPI and the University of Strasbourg. In addition our President, Kim Finnilä was invited to chair Sessions dedicated respectively to the topics of Entry into force, opting out and transitional period, and Representation, while Walter Holzer was the main speaker on the topic of Representation before the EEUPC.

Some 300 delegates attended, a very good turn out reflecting the importance of a European Patent Court to the success of the project of providing an EU-wide patent.

Opening addresses were given by Catherine Trautmann, MEP and former Minister of Culture and Communication, and Alain Beretz, President of the University of Strasbourg.

The main thrust of Madam Trautmann's address, which was carried forward throughout the conference, was that the EU needs an EU patent to foster EU social and economic development, and therefore an EEUPC is

needed to provide for development of an homogeneous EU patent jurisprudence. Indeed she added that the setting up of a European Union patent system must be a priority of political discussion within the EU. She added that after some 35 years of stalemate there was now real hope that progress can be made.

M. Beretz reminded the audience that CEIPI was founded in 1963, and that CEIPI, as part of the University of Strasbourg, had a big role in supporting the daily work of those practising in IP, and that this role is fulfilled by the excellence of its faculty. CEIPI must remain a leading IP research institute in the EU and as such play a leading role in innovation via IP research. He went on to say that CEIPI could also play a major role in training judges for the EEUPC.

The Chairman, M. Le Theule, Director of the Centre for European Studies, Ecole Nationale d'Administration, set the scene in reminding the audience that the European Parliament is now part of the co-decision procedures with the EC.

Dr. Christophe Geiger, Director General of CEIPI then spoke, outlining the history of the project for the granting of an EU patent. The project started in 1973, leading to the Luxembourg Convention of 1975, but this never entered into force as it was not ratified by some Member States. A draft regulation for a (Community) patent was published in 2000, there was political agreement in 2003, but the project failed because of issues such as language. From 2007 all agreed that progress was needed, that the EPO and EU should work together, and that an EU patent without an EEUPC was unthinkable.

There was a need to take account of the EPLA and after further discussion, the European Council of Ministers published on 4 December, 2009, the first draft of its proposal for a single EU patent and EEUPC.

The question of compatibility with EU law was addressed to the ECJ by the Council, their report is expected towards the end of this year. (There will be a public hearing in Luxembourg on 18 May, 2010, to discuss the link between the EEUPC and the ECJ).

Dr. Geiger concluded that the draft agreement provides a good basis on which to go forward, and that CEIPI via this conference and its research would bring together individuals and institutions who have so far contributed to the EU patent project which would provide a new legal article in the European Union.

Among the speakers from the practical side of the debate, Thierry Sueur, Vice President, Air Liquide, and Chairman of the Patents Working Group of Business Europe, said that now was an important time for the EU Patent, but the road is still a long one to travel and we are only at the beginning. He had three messages for the law makers:

1. Focus on the EEUPC, this must work for there to be meaningful EU Patent protection;
2. Always think of EU industries and their interests;
3. Focus on the desired solution, and CEIPI should take the lead in educating and awareness.

A good many of the speakers expressed the view that as the draft EEUPC is directed to the users, there was more chance of achieving a successful conclusion than if the draft was purely concerned with political matters. The proposal is for local, regional and central seats at first instance and a central single Court of Second instance. The Central first instance court would hear direct, i.e. non-counterclaim applications for revocation, but all the courts could hear all possible aspects of a case, namely infringement, validity, proprietorship, compulsory licenses, contracts/licences , etc.

One speaker expressed the view that the proposal was already too narrow in concentrating on patents, rather than EU IP in general.

The Court will have a pool of both legal and technical judges from which to draw, from all over the EU. There were various discussions on how the judges would be selected, an interesting presentation on this being given by epi member, Axel Casalonga, who noted that the pool of judges would comprise full time „legal" judges and part-time technical judges. In local regional divisions of the Court at first instance, a party can ask for a technical judge to be appointed or the case can be transferred to the Central Division, which has a mandatory technical judge on the panel of three judges appointed to the Central Division.

He concluded that a complex case needed a technical judge on the panel, whether the issue was validity, or infringement, (or both), it being remembered that the divisions at first instance can hear both validity and infringement in the one court, like for example in France and the UK under their respective national court systems.

Another speaker suggested that recruitment to the pool of Judges could be from members of the Boards of Appeal of the EPO even though those members do not adjudicate on infringement matters.

In the following session „Jurisdiction as regards subject matter", it was observed that the EEUPC does not handle arbitration. In this case, the view was that the EEUPC could suggest to the parties that arbitration might be a sensible option in a particular case – reference to Article 17 (above).

Thomas Jaeger, a researcher at the Max Planck Institute, reminded the audience that the draft EEUPC proposal was modelled on the EC Enforcement Directive of 2004, but there are differences, for example, the enforcement directive is biased towards the right-holder, whereas the EEUPC is more balanced, for example in consideration of removal of an infringing feature from the alleged infringing product. Also the EEUPC looks to find cross-border solutions being a unitary court, but it could not reconcile diverging decisions of the EPO and ECJ.

Another speaker, Michel Abello, a French lawyer, went through the procedure which is designed to provide a decision from the Court in about a year, the decision being handed down within 6 weeks of a hearing which itself should be scheduled for 1+ day(s) (but not running into weeks).

Turning to the next session, „Territorial Jurisdiction and Applicable Law", Jean-Christophe Galloux, a Professor at University of Paris and President of IPRI said that the draft gave thought to the law applicable, and that the Agreement should have been drafted by experts in international private law.

Another speaker, (Pierre Veron, a lawyer) observed that a patentee can under Article 15 of the draft now chose where an infringement action should be heard, possibly to the detriment of the defendant. It is also to be remembered that a decision on validity will be EU wide. Another speaker, Eskil Waage, lawyer, EC DG Internal Market, asked whether the EEUPC will enhance the perceived trend to centralisation in national courts, and will a Judge of a national court, who is in the pool of Judges, simple change hats when sitting in the EEUPC? Further, where there is little patent litigation in a group of countries, can they set up a regional division, which itself could have several seats within the region?

Keiran Bradley, head of the Legislation Unit of the European Parliament's Legal Service, talking to the link between the EEUPC and the ECJ, said that the new court would have to respect common European law as laid down by the ECJ. In other words, the court would take into account directly applicable EU law while basing its decision on the Agreement setting up the court. He observed too that there are also „missing links" in that the draft makes no reference to the European Charter, or to Human Rights legislation, both of which could have a bearing on a patent infringement case. He also observed that not all the judges in the pool would necessarily be from within the EU.

Hubert Legal, Director, Legal Service of the Council of the European Union and former Judge of the CFI, noted that the Council of the EU does not have a set position on the subject, and all the Member States agree that the opinion awaited from the ECJ will have a determining influence on the setting up of the EEUPC. He reminded the audience that the General Court, (formerly the CFI), has decided on appeals from OHIM, but that Trade Marks are different from patents so a specialised EEUPC is required for the latter.

On the same topic, Anne-Sophie Lamblin-Gourdin, Associate Professor, University of Nantes, referred to the autonomy and primacy of EU law over national law.

Continuing the theme Hanns Ullrich, Professor Emeritus, visiting Professor, College of Europe, Bruges, mentioned that the EEUPC will be the instrument by which the EU will be able to develop its own patent policy. However, if the court delivers what are perceived „bad" decisions, litigants might well revert to the EPC and national litigation procedures.

Our President, Kim Finnila, had the honour of chairing the next session, namely „Entering into Force, Opting Out and Transitional Period". He noted that there will be a transitional period of five years during which patent cases can be tried in the EEUPC or national courts. The possibility of opting out was only possible for patent proprietors or applicants and had to be notified to the Registrar of the Court up to one month before the end of the transitional period.

Vincenzo Scordamaglia, Honorary General Director of the European Council, observed that the draft agreement was a technical text from the European Council, and as such it was the exclusive responsibility of the European Union. The EU will join the EPC when the European Patent comes into force. Five years after entering into force, contracting parties not in the EU can join the EEUPC if there is unanimous approval. In that sense the EU and the four EFTA countries are bound by the Lugano Convention. As regards consultation it is proposed that the Member States of the EU, NGO's and the member States of the EPC will be consulted. There is no legal basis in the Lisbon Convention to force the Member States of the EU to accede. It is hoped that at least one EFTA country will accede to the Agreement, but if none does so the Agreement will have to be re-negotiated.

Dieter Stauder, lawyer, former Director of the International Section of CEIPI, noted that most patent litigation cases nationally are settled before a Hearing, (95 % in the UK, greater than 50 % in each of France and Germany). The role of Judges is to try to get a result and should assist the parties in trying to find a solution to their differences, and the aim of the parties should be to work with the Judges to achieve this end.

Stefan Luginbühl, lawyer, International Legal Affairs, EPO, noted that during the transitional period of five years an action could be brought before national courts or any other competent authority. If proceedings are however, started before the EEUPC, then they must continue in that Court. The EU has a wish for the EU Patent to enter into force by 2015 so there will be a long lead time which could result in multiple litigation and diverging decisions on the same patent. In addition, forum shopping would probably continue. Moreover, if a party opts out, there is no possibility to opt back in; defendants have no say in the matter if the patentee does opt out. He suggested that opt out should be dispensed with, with a longer transitional period, say up to 10 years.

Jacques Raynard, Professor, University Montpellier, added his voice to the view that IP law is becoming more and more involved with EU law, and that there must be a strong link between the EU Patent and the EEUPC and EU law.

(A speaker from the floor advised the audience that the EU pharmaceutical industry has already made a sectoral request to opt out of the EEUPC).

It was also observed that opt out can be on a patent by patent basis, so a patentee could chose whether or not to opt in or opt out for any particular patent in its portfolio.

The next session, also chaired by Kim Finnila „,Representation before the Court" produced lively presentations from Walter Holzer, *epi* member and former *epi* President, and also co-ordinator of the CEIPI-*epi*, „Course on Patent Litigation in Europe", and Patrice Vidon, *epi* member and President of CNIPA.

According to the Agreement, parties before the EEUPC can be represented by a lawyer or by a European Patent Attorney holding an EU litigator's certificate. Walter Holzer put forward a strong case for European Patent Attorneys to able to represent a party before the Court, noting that the EPLA did not limit representation to lawyers and already granted right of audience to European Patent Attorneys. He noted too that European Patent Attorneys also had a technical as well as a legal background, making them well-suited for patent cases.

Article 28 of the Agreement also enables representation by Patent Attorneys having a European Union Litigator's Certificate but does not set out any rules for obtaining it. Walter Holzer then cited the CEIPI/*epi* Course on Patent Litigation in Europe, which has been running successfully for the last seven years and which leads to the granting of a University diploma for successful candidates, suggested that the diploma could be the basis for the EU Litigator's Certificate, and also suggested that CEIPI would be prepared to provide the curriculum for the Certificate to the EU.

Patrice Vidon added that since the Central Division and Appellate Divisions were to have technical Judges, it was only logical that EPA' should have a right of audience as a complement. He urged that the EU should not be afraid of the right of patent attorneys to act as representatives before the EEUPC.

„Language of Proceedings" had a session to itself. Bertrand Warusfel, Professor, University of Lille2, observed that this was an important question, particularly as there could be a language of the proceedings before the EEUPC which was different from the language of the patent in suit. This could prejudice one of the parties, particularly on appeal, as the language of the second instance would the language of the first instance proceedings.

Peter Meier-Beck, President and Judge of the Bundesgerichtshof , confirmed that there would be different possible choices of language, depending on the seat of the Court of First Instance, the language of the patent, and the nationality of the parties.

Vincent Cassiers, researcher, Catholic University of Louvain, said that the language regime could deter SME's which would not be in the interests of the EU. SME's must have access to the judicial system and that access should not be prejudiced by having to defend a case in a non-mother tongue, particularly if forum shopping is engaged in by a financially stronger adversary.

Francis Ahner, and *epi* member, mentioned that languages used in the EP patent would be those of the EPO.

The final session was a presentation on „Agenda and Prospects" given by Margot Froehlinger, Director, EC, DG Internal Market, Direction D: Knowledge-based Economy. She said that she expects that after the oral hearing at the ECJ on the 18th May 2010 that Court will deliver its opinion on the EEUPC which she had a feeling would be favourable, perhaps with some conditions, for example that the EEUPC should not revert to the forum set up under the EPLA.

The draft Agreement is the only way forward, particularly as it will result in the granting of an EU patent. Once the ECJ opinion is received, the EC will commence negotiations. There could well be a diplomatic conference in the second half of 2011. The granting of EU patents and the setting up of the EEUPC would then follow by 2015/2016. In addition to consultations with interested parties the EC will carry out feasibility studies on inter alia training courses, Judges, languages, EU litigator's certificate, translators and interpreters.

The EU litigator's certificate is important for SME's and it is also important that European Patent Attorneys can acquire the certificate and represent clients in the court.

Finally, Ms Froehlinger gave her view that the inception of the EU patent and EEUPC will make an important contribution to European integration.

Following the sessions, a final report on the conference was given by Michel Vivant, Professor, Paris Institute of Political Studies, „Sciences PO". He thought the conference was a success, concentrating as it did on the practical aspects of the proposed system while covering a rich mixture of topics from language to competence of Judges and Representatives. It also gave constructive suggestions to the legislators as to how the draft Agreement could be progressed.

I hoped the foregoing gives a flavour of the conference which had stellar speakers on all the topics reflecting on the importance of the subject for the development of the European Union. CEIPI is to be congratulated on its foresight and initiative in hosting such a topical meeting, putting it all in place within four and a half months of the Council draft of the 4th December 2009. Where there is a will there is a way!

T. Johnson,
Editorial Committee
Reporter