Europe may be on the move but big battles lie ahead

Although the Community patent now looks to be dead in the water, the signs are that progress could soon be made on both the EPLA and the London Protocol. For this to happen, however, patent owners must seize the moment

In the glacial world that is European patent policy, things may be moving. Caution is, of course, necessary because Europe and patents are never a straightforward combination. Recent statements, however, from senior members of the Commission, as well as from European Patent Office President Alain Pompidou, indicate that something is afoot.

Bad times

For the patent community, 2005 was not the best year Europe has ever had. The dominant issue for the first seven months was the CII Directive, which was finally voted down by the European Parliament in July, after a well-organised and highly effective campaign by those opposed to the legislation surprised many and exposed the lack of will among European companies to make the case for patents (see *IAM*, issue 13, pages 31-33).

While the anti-software patent lobby mobilised a section of public opinion and engaged with MEPs, supporters of the directive were left hamstrung by their lack of political nous and the general apathy from Europe's industrial community. After this debacle, a period of reflection followed. Then at the beginning of 2006, the European Commissioner for Internal Market and Services, Charlie McCreevy, announced a public consultation process on the future of the patent system in the EU (see *IAM*, issue 16, page 6), to be followed by a public hearing in July.

What became apparent during this consultation process, which saw a total of 2,515 submissions from individuals and various interested organisations, was that while support for the principles behind one of the Commission's major IP initiatives – the Community patent – remained strong, those thinking that it was a viable prospect in its current form were almost non-existent. Instead, it was clear that there was significant support for the European Patent Litigation Agreement (the EPLA).

Community patent impasse

Although the idea of a pan-European patent has floated around since the 1960s, it did not become a formal Commission objective until 1999, when a Green Paper was issued which proposed a patent that would be issued by the EPO and valid throughout the EU as a single right. Since that time, however, it has proved impossible to find a consensus on the languages in which applications should be submitted, examined and eventually issued, or on how disputes involving the patent should be dealt with.

The language issue has proved particularly problematic with Commission suggestions that member states limit requirements for translations of claims and other features being blocked time and again. This led many to doubt whether the Community patent would ever see the light of day.

Then last year, to compound these doubts, having seen off the CII Directive, anti-software patent groups turned their attention to the Community patent, stating it could be used as a back-door means to introduce US-style software protection into Europe. Whether they had any grounds for believing this to be the case was not the point; they were promising another long and acrimonious fight. All of a sudden, those who had been urging member states to find a solution to the impasses got cold feet.

"To start a debate about the Community patent now would be like opening a Pandora's box," Francisco Mingorance, a European policy adviser to the Business Software Alliance, said in June. "Looking at the debacle over the proposed law on computer-implemented inventions, a lot of companies fear this could happen all over again but on an even broader scale in a debate about the Community patent." The International Chamber of Commerce agreed. "A revisiting of substantive patent law in the context of the Community patent is not warranted," it stated in its submission to the consultation process.

Moving forward with the EPLA

The Internal Market Directorate General (DG) seems to have got the point. Although in public it is still keen to talk up the Community patent ("I will go for one big last push for the Community patent," McCreevy told the public hearing on 12th July), in private officials are prepared to concede there is little hope of a realistic package emerging – one that would be worth fighting the anti-software patent lobby over. Indeed, McCreevy is even reported to have told journalists after having given his testimony in July that the Community patent was now "on the shelf".

Instead, the Internal Market DG seems to be warming to the EPLA, an agreement aimed at establishing a single court to hear European patent-related litigation, which in the past it has rejected.

A draft of the EPLA has been agreed by officials from a number of member states of the European Patent Convention, including the UK, Germany, France, Sweden, Switzerland and the Netherlands. This envisages the creation of a European Patent Court that would have exclusive jurisdiction to hear cases concerning actual or threatened infringements of European patents, and actions and counterclaims for the revocation of European patents, as long as the defendant were domiciled in a contracting state.

In this way, the infringement and validity of European patents would be litigated in the same proceedings, while any decision to revoke a European patent would be applicable in all contracting states to the EPLA.

In the past the Internal Market DG has been hostile to the EPLA, regarding it as very much a second best to the Community patent, while at the same time casting doubt on its legality under EU law. However, it seems that minds have been changed. In his public hearing testimony, McCreevy described the EPLA as "a promising route" and is reported to have instructed officials to work on taking the project forward.

Furthermore, McCreevy told a committee meeting of the European Parliament in June that he was determined to ensure that Europe's patent system is reformed. "Businessmen, faced with a 21st-century global

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economy, scratch their heads in disbelief when they see us stuck in discussions about language regimes and regional distribution of courts. What they want is a cheaper and reliable patent system. That's why I think we should look at all possible routes forward, be they Community or non-Community initiatives."

As a voluntary agreement, only those countries that wish to be bound by the EPLA need to sign up, although in practice the endorsement of Germany, the UK and France takes care of Europe's three biggest markets: this will increase certainty for patentees and also reduce the costs of pan-European litigation. An added attraction is that because this is an agreement between contracting states of the EPC, there is no need for any green light from EU member states or the European Parliament. Something which should, in theory, mean the EPLA avoids much of the acrimonious debate that surrounded the CII Directive.

Protocol progress

But the EPLA is not the only initiative that looks like moving forward. Also at the July public hearings, EPO chief Alain Pompidou stated that he believed the French government was now ready to ratify the London Protocol and predicted that it would do so before the country's May 2007 elections.

Under the Protocol, member states of the EPC which share an official language with the EPO, ie English, French and German, would not require any translation of European patents in one of their official languages. Other countries, meanwhile, would have to choose one of the official languages of the EPO as a "prescribed language", in which European patents would be translated, although they would also retain the right to require translation of the claims in one of their official languages. It is estimated that should the Protocol come into force, it would cut the cost of translations in Europe by 50%.

A number of countries have ratified the Protocol, but it cannot come into force without the sign-up of France, the UK and Germany. And although the latter two have given it the green light, France has been reluctant up to now, citing concerns about the effect the Protocol would have on the French language and its role in the dissemination of scientific knowledge (in 2001, for example, the European Parliamentary Regional Assembly of the Francophonie (French-speaking countries) passed a resolution rejecting the Protocol).

France coming off the fence and agreeing to ratification would be a major step towards the Protocol coming into force and good news for all companies that patent inventions in Europe.

Obstacles ahead

So for European patentees, the signs are promising. But it would be wise to remember that nothing has yet been agreed. And, this being Europe, nothing is guaranteed. It looks certain that the Community patent is now a dead duck and so attention shifts to the Protocol and the EPLA.

Of the two, the Protocol looks to be the most likely to progress quickly as its aim is one that everybody shares – a much cheaper patenting process in Europe. That said, language can be an emotive issue in France and there is no guarantee that with elections looming the Protocol will not be seized on as an issue in the run-up to polling day. In addition, even if France does ratify, that does not guarantee the Protocol will come into force, as a minimum of eight EPC member states must accede before it does. So far, this number has not been reached.

But with France on board, it will just be a matter of time for the Protocol. More problematic is the future of the EPLA. Here, there are bigger issues to confront. These include exactly how the new system will function and how much it will cost. More significant, however, is that the anti-software patent lobby has decided that the EPLA is yet another back-door attempt to introduce software patents into Europe and, as a result, is now beginning to organise in opposition to it.

Although McCreevy's Internal Market DG may be getting more relaxed about the desirability and legality of the EPLA, this does not guarantee that other parts of the Commission will be equally sanguine; while strong lobbying could begin to make the whole issue less comfortable for individual member states.

A sign of things to come is the pressure that is beginning to be put on McCreevy himself. The Irish former politician has been identified by veteran anti-software patent campaigner Florian Müller as a driving force behind legislation in Ireland exempting companies from paying tax on revenue generated by patents. This, Müller says, led Microsoft and other US high-tech businesses to locate some of their operations in the country. It is a familiar line of attack: to align those supporting patent reform with US multinationals – the big, bad beast in the eyes of many Europeans.

Organise and fight

If there is to be real progress on restructuring Europe's patent system in the next year, much of the credit should go to organisations such as the EPO and UNICE, which have lobbied ceaselessly for the Protocol and the EPLA; frequently – and shamefully – without any kind of significant back-up from the vast majority of those that file for patents in Europe. The Community patent may be dead but to have got to a position where both the Protocol and the EPLA could come into force has been a remarkable effort.

However, it looks like the real battle, especially with regard to the EPLA, could be about to begin. Given the proven effectiveness of the anti-software patent lobby, there can be no doubt that things are going to turn nasty.

The anti-software patent lobby has taken on itself the task of opposing any initiative which could in some way be construed as an attempt to introduce software patents into Europe. While much of its thinking is flawed and its tactics are often malicious, it is very good at what it does. Newspapers can be expected to carry articles criticising the EPLA, there will be a great deal of viral, web-based lobbying aimed at influencing policy makers and the public, and, should they prove necessary, there will be demonstrations and petitions as well.

If European patent owners are really serious about reform, they now must get involved in the decision-making process like they have never been involved before. They will have to give time and money to ensure that potential change is seen through to reality and that the case for patents is made effectively not only in Brussels and national capitals, but also in the media.

For a start, it should be emphasised on a continuous basis that there is a lot more to patenting in Europe than software: countless industries need cheap, predictable patents of high quality and the anti-software lobby should not just be handed a *de facto* veto that prevents this from happening. What European patentees cannot do is just to rely on the EPO and the heroic but chronically under-resourced UNICE to make the case on their behalf. Is it too much to hope that European industry will realise this and provide the support necessary? The answer, unfortunately, could well be yes.