

## **“Unitary patent” and court system – Lehne: “The time of decision had come”**

**English translation of an interview given by *Klaus-Heiner Lehne*, Chairman of the Legal Affairs Committee of the European Parliament and rapporteur on the Agreement for a Unified Patent Court, to *Catrin Behlau* and *Mathieu Klos*,**

**the German version was published in *JUVE Rechtsmarkt*, no 1/2013, p. 86 ff.\***

*Klaus-Heiner Lehne* is a partner at Taylor Wessing in Düsseldorf and Chairman of the Legal Affairs Committee in the European Parliament. After disputes around the articles 6 to 8, his Committee has cleared the way for the planned EU Patent. With JUVE, he speaks about difficult compromises, the participation of the European Court of Justice in the new patent proceedings and the selfish “worm’s eye view”<sup>1</sup> of many German lawyers.

*JUVE: It seems that the breakthrough for the planned EU Patent has now been achieved. Nonetheless: After numerous political negotiations and compromises, do you still believe in the EU Patent?*

**Klaus-Heiner Lehne:** We will start opening the champagne only after the European Parliament has in fact approved the new patent and after the European Council has finally adopted it. Over time, this project had so many imponderabilities and surprises, so that I am only prepared to believe in its completion once all the signatures have dried.

*The recent decisive compromise proposal of the Council provides for the deletion of the controversial Articles 6 to 8 of the unitary patent Regulation. It is replaced by Article 5a, referring to national law. Please explain this new regulation to our readers.*

The Regulation is based on Article 118 [of the Treaty on the Functioning of the European Union, TFEU]. It is the specific legal basis for intellectual property rights. In order to rely on it, a material legal regulation is necessary, defining the patent claims. The content of the new Article 5a is sufficient in order to fulfill the legal basis, Article 118. Articles 6 to 8 are removed from the Regulation and are written into the Court Agreement instead. In principle, the compromise provides for a reference to the national provisions, thus making them a subject of European law. Furthermore, as a central requirement, it regulates the unilateral applicability of the patent. The British government wanted to keep the European Court of Justice out of the new Patent Court system at all costs and has thus pushed through the deletion of Articles 6 to 8. In my opinion, this cannot be guaranteed completely. As we adopted the reference from the Regulation to the Court Agreement and to the national arrangements into Europe-

an law, I even regard referrals for preliminary rulings as likely. Of course, the European Court of Justice will then also deal with the contents of the Agreement [on the Unified Patent Court] and interpret these.

*Is this a problem for the planned Patent Court?*

First of all, I believe that requests for referrals will be the absolute exception. Even if they happen, the European Court of Justice will try, within the scope of its possibilities, to come to results as quickly as possible. A significant delay of the patent proceedings through the involvement of the European Court of Justice was always the fear of those calling for the deletion of Articles 6 to 8.

*In the Legal Affairs Committee meeting on 11 October 2012, the second rapporteur, Mr Rapkay, has defined two red lines for the European Parliament – an appropriate participation of the European Court of Justice and the safeguarding of the Parliamentary voting rights. Does the compromise really accept these lines?*

The compromise is definitely not the best solution. This would have been a Regulation with the Articles 6 to 8. But according to our experts – and we have asked external and internal experts on this –, Article 5a is sufficient to fulfill the requirements of Article 118. The whole process has taken an eternity anyhow. Now, we need to take responsibility in relation to this question. Against this background, it is justified to accept the second best solution. Otherwise, the project would have been dead for an unforeseeable time.

*And at the same time, the British Prime Minister David Cameron can keep his face in the House of Parliaments and can celebrate the deletion of Articles 6 to 8 demanded by him?*

This was exactly the psychologically difficult moment. On the day after the European summit<sup>2</sup>, Cameron walked into the House of Commons and sold the deletion as a great success. At the same time, we had a situation which was very difficult for the Parliament. At this summit, the Heads of State and Government changed their position in a legislative process which was de facto completed. The European Treaties and Agreements between the institutions do not actually provide for this. Therefore, the Council committed a breach of the Treaties. We had to

\*With many thanks to JUVE Verlag for kindly permitting the translation and its use.

<sup>1</sup> In the German version, the word “Froschperspektive” is used.

<sup>2</sup> Meant is the summit of the European Council in Brussels on 28/29 June 2012.

bring this back into balance. We had very difficult discussions with the British ambassador, the Council, the Commission, the European Patent Office and others. In the end, they led to a draft from the Cypriot Presidency which was discussed informally beforehand. This was again coordinated with the Commission, the British government and us. In the end, at some time there was a text for which all participants indicated: Okay, we could live with this. For the Parliament, I now expect that it will be supported in any case by four groups:<sup>3</sup> Christian Democrats (EPP), Social Democrats (S&D), Liberals (ALDE) and European Conservatives (ECR). This will lead to a rich majority.

***Thus, the compromise allows all sides to save face?***  
Indeed, this is the case.

***In summer, after Parliament denied its consent, the introduction of the EU Patent seemed to have moved beyond reach. Why now this quick compromise?***

It was not that quick, as the Council's decision was in June. We have deliberately waited until the end of the summer break in order to find ways leading out of this difficult situation. On the other hand, we know from experience that such discussions are intensively influenced from external by intensive lobby activities. Another problem were the national bureaucracies. A few days prior to the agreement, there were officials from the national authorities again coming up with several doubts. And for this reason, we always had to look when the Window of Opportunity was open.

***According to practitioners, it has been found too quickly.***

In almost any political project, you can find practitioners saying this is unbalanced or this is not enough. But eventually, there is a time of decision and this time had now come. I think many critics especially from the advocacy simply want to maintain the established structures. This is a common conservative reflex. But: As such, it cannot be that Europe, in an internal common market, does not have a uniform regulation on the central area of patent protection. I am convinced that we will no longer be competitive internationally if we do not create common conditions. Therefore, the unitary patent is without an alternative.

***Other patent experts criticise a lack of transparency in the discussion of the recent months.***

In my opinion, this is nonsense. There is no legislative procedure which is more transparent than that at the European level. The drafts for the Court Agreement are circulating for years. Whenever a certain progress was made, they were also publicly accessible. It is logical that informal negotiations like the most recent ones do not take place in the large auditorium.

***Is the schedule foreseeing the first grant of an EU Patent for 2014 not overoptimistic, bearing in mind the Federal elections<sup>4</sup> in September 2013?***

The Federal elections are, of course, a problem. But I think that the Agreement [on the Unified Patent Court] is uncontroversial in Germany. This will be more difficult in other states. For example in Poland, there are reservations. However, for the implementation of the patent, a quorum of 13 Member States is sufficient. This must be reached as soon as possible.

***When will the first information on the annuity fees be available?***

Currently, we only define the legal framework. The majority of critical issues, however, relates to the administrative rules which now need to be created by the Administrative panels on the basis of the Agreement [on the Unified Patent Court]. However, I do not have concrete information about when they will conclude their work.

***Practitioners criticize that the new patent will not inevitably be cheaper.***

This is completely true. For this reason, the previous system will be upheld in parallel. Applicants still have the possibility to apply for national patents and EPO bundle patents. So to say, we are simply creating an additional option. However, what does change is the fact that the new court system will be competent for all proceedings with a European dimension.

***How is the Patent Court meant to become operational?***

Of course, this is the next big problem. We need to find acceptable judges and create respective training opportunities. It would make sense if the existing German patent courts would also regard themselves as training courts in the new system. The German judges are prepared for this. As to the composition: All the courts will be composed of judges with different nationalities. This will exclude forum shopping.

***How is the financing of the new court ensured?***

In the end, the local chambers will be financed by the fee income and by the Member States. A country wishing to afford itself a local chamber, will, of course, have to put money on the table.

***In the hope that the chamber will be as profitable as, for example, the Düsseldorf court?***

Exactly. And this will also be the reason why local chambers will only be established where they make sense.

***It appears that the German patent attorneys will be authorized to represent at the Central Court.***

Indeed. But in Parliament, this issue was always controversial. We were always of the opinion that also an attorney at law should be involved. Because in practice, you need the technical as well as the legal side.

<sup>3</sup> The interview was conducted before the hearing and vote in the European Parliament on 11 December 2012.

<sup>4</sup> Referring to the elections for the German Parliament which were taking place in September 2013.

***In the action of Spain and Italy against the EU Patent at the European Court of Justice, the Attorney General has recently postponed the date for the pronouncement of his opinion to 11 December – is this an indicator for the further political decisions in the coming months?***

Obviously, the European Court of Justice did not want to influence the decision of the Parliament.<sup>5</sup> With regard to the course of the oral hearing, we do, however, no longer expect that they will decide in favor of Spain and Italy.

***What are the chances that Spain and Italy will later on participate nonetheless?***

For Italy, I am very optimistic. The situational interests of the Italians are simply that their economy would profit from the unitary patent.

***And Spain?***

I believe this is hopeless. First, Spain has a significantly lower portion of European patents than Italy and secondly, they have a radical language reflex. Thirdly, in Spain there is the additional particularity that their patent attorneys essentially do not earn their money with the enforcement of patents, but with translations. They appear to have an incredibly influential lobby with a tremendous influence at all levels of politics, even up to the royal house.

***Which impact will the EU Patent and the new Patent Court have on the strong patent location Germany?***

The long term development is difficult to predict. Of course, due to the fact that there will be the Central instances as well as four German local chambers, an impairment of the dominant position of Düsseldorf cannot be excluded. But Germany will remain a very important patent venue. Apart from that, the importance of the national courts is maintained for all national patents.

***There will be four chambers in Germany – has this already been decided?***

No, not yet. Germany has up to four. And I suppose that the Government will exploit this scope. In any case, there will be Düsseldorf, Mannheim and Munich.

***What do you answer to concerned attorneys who expect a concentration as regards big cross-border actions and are afraid of losing their business?***

A certain weakening of the German forum can, as I said, not be excluded. But I also think that the German courts, in terms of quick and cost-effective decisions, are still more attractive than other courts. As to court fees, we may need to match with other countries. However, the advantages, for example of Düsseldorf, are maintained also under the new system. The court here is easily accessible. Additionally, large parts of the industry are situated in its periphery. Within the framework of possibilities offered by the local chambers, these positive factors can continue to be useful.

***But how can the new patent and the court system work if the practitioners do not believe in them?***

There are also practitioners which regard this as a reasonable development, among judges as well as among lawyers. However, there are also those with a “worm’s eye view”<sup>6</sup> from the local perspective. These people say to themselves: Everything is running smoothly and we have a good living here. But there is also the “bird’s eye view” from the European or Global perspective. We simply have a need for action here, this is clearly seen especially by the industry. I always ask critics what we could have done better. As the only argument it is then brought forward: Keep the European Court of Justice out. In every new system, there are certain imponderabilities and risks. But this step is now inevitable.

*The interview was conducted by Catrin Behlau and Mathieu Klos. The German version of the interview was published in the German legal magazine JUVE Rechtsmark<sup>7</sup> no 1/2013, p. 86 ff.*

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<sup>5</sup> The Plenary vote took place on 11 December 2012 as well.

<sup>6</sup> In the German version, the word “Froschperspektive” is used.

<sup>7</sup> More information at [www.juve.de](http://www.juve.de).