

Intellectual Asset Management

International reports



A new IP era in Europe – consensus gentium

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On 8th March 2011 the European Court of Justice concluded that the envisaged agreement creating a European and Community Patents Court was not compatible with the provisions of EU law. *Consensus gentium* ("agreement of the people")?

More or less simultaneously, on 10th March 2011 the EU Competitiveness Council confirmed the enhanced cooperation, while the European Parliament had already consented to the enhanced cooperation with a clear majority on 15th February. *Consensus gentium!*

Thus, the 30-year-old political stumbling block – the question of translation – has been conclusively resolved. While the enhanced cooperation to introduce the Community patent began with 12 of the 27 EU member states, the group now comprises 25 member states (ie, all member states except still persistent and inveterate foes of the Community patent Spain and Italy).

There is no reason to believe that the political process will be stopped at this point based on legal arguments, even if those relate to the creation of the new court system. The momentum appears strong. The European Parliament will confirm the draft law this year, as expected, and ratification should be finalised soon. Thus, 30 years of consultation between EU member states have come to an end; the Community patent is about to be born.

But what to do about the Patents Court? The present draft is incompatible not only with EU law, but also with common sense. If the new court's quality represents an average across the national patents courts in the European Union, there is a risk that the new IP era could spell the end of patent protection in the European Union. This will result from the court's exclusive jurisdiction over established European patents as well as the new Community patents. This exclusivity also means that in order to avoid competition, all the national patents courts – including the "Ivy League" courts– will be phased out simultaneously.

Now is the time for the commission to present a new draft that will enable the new system to extrapolate the expertise gained by the Ivy League patent infringement courts over more than 50 years.

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