Resolution

by

the Nordic Associations for the Protection of Industrial Property

on

the Draft *Agreement on the European Union Patent Court (WD 11270/08)*

The Nordic Associations for the Protection of Industrial Property (the Nordic Associations) have consistently supported initiatives to improve the existing judicial system for resolving patent disputes in Europe. The present system, where European patents are litigated solely in national courts, is ineffective and costly, and the lack of harmonisation risks resulting in diverging outcomes in identical, parallel actions regarding the same patent.

The Nordic Associations therefore welcome the efforts by the European Commission and several presidencies to create a judicial system for European and Community patents. However, the present Draft *Agreement on the European Union Patent Court* (Working Document 11270/08), which was discussed at the XXIX meeting of the Nordic Associations in Stockholm 25-26 August 2008, is based on principles that are not acceptable for transferring the adjudication of civil patent disputes to a common European patent judiciary for the following reasons:

- The ECJ must not become an appeal instance in the European patent litigation system. First, this would prolong the time for resolving the dispute between the parties, which is unacceptable in commercial litigation. Second, the present task of the ECJ is of a nature fundamentally different from that of a civil court, and the procedure is inappropriate for deciding patent cases. Finally, a future litigation arrangement must be open also for non-EU member states such as Norway and Iceland, as foreseen in the present draft. For such countries it would create constitutional difficulties to transfer judicial authority to an EU court.

- The present draft does not provide for all panels of judges in the first instance having the same composition and qualifications, which is indispensable to safeguard that decisions are taken with the same efficiency and reliability in all cases. For example, the participation of technically trained judges in all cases and divisions is not guaranteed by the draft provisions. Therefore, the system as a whole would not provide sufficient legal certainty, which is unacceptable for decisions having far-reaching, cross border effects.

- As the provisions on the allocation of cases are presently drafted, they give the patentee opportunities for forum shopping. This means that the interests of the patentee and the alleged infringer are not adequately balanced.

- A further example of inappropriate balancing of interests is that the draft opens for so called “bifurcation” of cases. Hence, infringement and validity issues may be decided by separate divisions of the first instance despite the fact that the scope of protection is relevant for both issues. By splitting these issues, the draft system opens for different interpretations of the claims in the various proceedings.

The Nordic Associations appreciate the continued efforts by the European Commission and the present and upcoming presidencies in order to reach a workable system. However, present proposal needs to be redrafted on the above points, which are fundamental to create a high quality judicial system for European and Community patents.

Done in Stockholm at the event of the XXIX Nordic Meeting (NIR-Möte) on 25-26 August 2008 by the Co-operation Committee for Denmark (attorney at law Peter-Ulrik Plesner), Finland (appeals court judge Antti Mietinen), Iceland (associate professor Rán Tryggvadottír), Norway (attorney at law Amund Brede Svendsen) and Sweden (professor jur. dr, dr *h.c.* Marianne Levin)