

CEA Position paper on Feasibility study on a patent litigation insurance

CEA reference:	PJ 6007 (07/06)	Date:	06/07/06
Referring to:	Questionnaire by CJA Consultants and meeting with Mr Jackson of CJA Consultants on 23/05/05		
Related CEA documents:	Summary of results on CEA questionnaire on the patent protection regime (<i>annexed</i>)		07/12/05
Contact person:	Jean-Louis Marsaud, Director CEA Gustaaf Daemen, Chairman of CEA's Legal Expenses Insurance Committee	E-mail:	marsaud@cea.assur.org
Pages:	3 (+ 6 (annex))		

| Summary

Before the feasibility study on patent litigation insurance will be presented we would like to communicate our concerns regarding the approach and the focus of the study. We base our comments on the questionnaire produced by CJA Consultants on the framework and possible options of patent litigation insurance as well as a meeting with Mr Christopher Jackson of CJA Consultants on 23 September 2005 which gave us an insight into the considerations:

From our point of view the following aspects need further scrutiny:

| 1. Mandatory insurance scheme

The envisaged model of a mandatory insurance scheme is from our point of view neither apt to solve the existing problems of patent litigation insurances nor will it encourage the development of demand-orientated insurance products. The idea of a mandatory insurance should from our point of view not be considered further.

By introducing a mandatory system it is deliberately accepted that in determining the scope of compulsory insurance cover a flat-rate minimum standard has to be fixed:

- Thus inevitably, over- and underinsurance not adequate to the risk are admitted.
- Moreover, insurance practice is made subject to a multitude of restrictions due to the law imposing compulsory insurance and additional provisions applicable to it.
- Insurance cover can under a mandatory regime only be tailored to a limited extent to the need for protection of the individual company or person.

- Insurance markets need time to be able to develop and adjust patent litigation insurance cover. In contrast compulsory insurance immediately imposes a minimum standard, thus impeding the process of development and as a result preventing wide availability of insurance cover. However, the way to and development of extensive insurance cover cannot be shortened. In any case, due to the unsecured basis for insurance practice, especially the lack of statistics, insurance cover will become considerably more expensive if at all available.

| 2. Lack of statistics and “appetite” of Insurers

Crucial in terms of the development of patent litigation insurance solutions is the lack of statistical material. Although we are not in position to judge what quality of data CJA Consultants were able to obtain since we could not view the material, we must indicate, however, that the Cumberland-Table referred to by CJA Consultants is in no means a sufficient basis for fully significant and relevant data. Especially the estimate of an average premium is from our point of view not significant, least of all without the involvement of potential insurers in the European market. Moreover, the cover of 1.5 million € as proposed by CJA Consultants by far exceeds the rather limited cover which is normally granted in case of legal expenses insurance.

We would also like to point out that a survey undertaken by the CEA in 2004 has shown that legal expenses insurers in the individual Member States do only observe little if not no demand for patent litigation insurance solutions (see document enclosed).

| 3. No involvement of insurers

Unfortunately, we need to remark that in the process of elaborating the study there have been extensive contacts with brokers, patent lawyers and patent offices on existing problems whilst insurers have only be contacted at a very late stage if not even at a too late stage.

Furthermore, for exemplary reasons we would especially like to point out the following aspects: Waiving an individual risk assessment is contrary to fundamental rules of the insurance business and cannot be accepted by insurers. Also, the options described in CJA' s questionnaire show that an insurance product embracing a legal expenses as well as a liability insurance part at least needs to be scrutinised thoroughly. The fact that there are very few such insurance solutions on the market so far makes the close involvement of insurers even more important.

| 4. Already communicated concerns

Already in our position paper in 2003 we have elaborated on our concerns. Primarily we would again draw your attention to the following aspects:

- The envisaged payment of a lump sum of 35,000 EUR for the out-of-court identification of the facts of the case opens a substantial potential for abuse.
- The study of 2003 states that legal proceedings should be covered if there is a 50:50 chance of success. In case of disagreement on this issue who shall be competent to judge on the case?
- A flat premium instead of a premium based on an individual risk assessment is contrary to fundamental rules of the insurance business. In order to make sure that high risks can be covered by the flat premium, this premium will have to be substantially higher than an average premium based on an individual risk assessment.

We ask to keep these aspects in mind when scrutinising the study. Again we would like to emphasise that European Insurers are ready to cooperate with the Commission and other European Authorities to work out feasible solutions for existing problems.

| 5. Conclusions

- 1) A mandatory insurance scheme will not give a right answer concerning patent litigation insurances and will not encourage the development of insurance products.
- 2) On crucial issue concerning patent litigation insurances is the lack of statistical data, which is the key for quantifying the risk and for determining conditions of insurability of the risk.
- 3) Few insurance solutions exist because of few demands in the markets.
- 4) Anyway European insurers would like to be involved in the reflection process and are keen to contribute to finding adequate and affordable solutions.

CEA reference:	Annex to doc PJ 6007 (07/06)	Date:	06/07/06
Referring to:	Questionnaire by CJA Consultants		
Related CEA documents:	CEA questionnaire on the patent protection regime		PJ 4002 (03/04)
Contact person:	Jean-Louis Marsaud, Director CEA	E-mail:	marsaud@cea.assur.org
Pages:	6		

CEA Questionnaire on the patent protection regime - Summary of results

11 countries replied to the questionnaire circulated in March 2004 [doc. PJ 4002 (03/04)]:

Austria
Belgium
Switzerland
Germany
Denmark
Spain
France
Greece
Italy
Netherlands
United Kingdom

I. NATIONAL LAWS

All countries refer to specific texts governing patent protection and indicate the existence of a national patent registration office. Each national body has links with the European patent registration office.

COUNTRY	NATIONAL laws
AU	Specific texts: Laws (for example: Law on patents, on the protection of brands and models). Österreichisches Patentamt (national office). Public body with links to the European patent registration office
BE	Specific texts: Law of 28 March 1874 on inventions. Royal order of 2 December 1986. Office for industrial property reporting to the SPF Economie. Public body with links to the European patent registration office.

CH	<p>Specific texts: Federal law on patents of 25 June 1954. Order relating to patents of 19 October 1977. Federal law on the status and tasks of the Federal Institute for Intellectual Property of 24 March 1995.</p> <p>Federal Institute of Intellectual Property (Bern) (www.ige.ch). Public body with links to the European patent registration office.</p>
DE	<p>Specific texts: Law on patents, costs of patents, decree on registering patents. Deutsches Patent - und Markenamt (Munich, national office). Public body with links to the European patent registration office.</p>
DK	<p>Specific texts: The Law on patents contains details as to the written request, the preliminary test, the appeal, new claims, requirements with regard to inventions...</p> <p>Patent -og Varmaerkestyrelsens organisation (national office, www.dkpto.dk). Public body supervised by the Economics Ministry with links to the European patent registration office.</p>
ES	<p>Specific text: Ley de Patentes y Marcas (Law on patents and brands). Oficina de patentes y marcas (national office). Public body with links to the European patent registration office.</p>
FR	<p>Specific texts: Laws. INPI: National Institute for Industrial Protection. Public body with links to the European patent registration office.</p>
GR	<p>Specific texts: Law 1733/1987 (OJ A/171/1987). Industrial Property Organisation. Public body supervised by the Development Ministry with links to the European patent registration office.</p>
IT	<p>Specific texts: Royal Decree (29 June 1939). Convention on European patents (1973). European Design Act (2002). UIBN: Ufficio Italiano Brevetti/Marchi + Società Italiana Brevetti. Public body (Ufficio) and private bodies (Società) with links to the European patent registration office.</p>
NL	<p>Specific text: Rijksoctrooiwet (Patent Act). Bureau voor de Industriële Eigendom (Bureau for Industrial Ownership). Public body with links to the European patent registration office.</p>
UK	<p>Specific texts: Patent and Copyright Law. National patent office. Public body with links to the European patent registration office.</p>

II. SITUATION OF THE MARKET IN RELATION TO THE LEGISLATION ON PATENT PROTECTION

Austria, Belgium, Spain and Greece say that there is no demand from undertakings for insurance products concerning patent protection.

The other countries indicate a weak demand mainly covering legal expenses insurance.

In France and Denmark, the demand covers also liability.

Italy indicates that demand extends in addition to property insurance which is also the case in France.

Concerning insurance products, only Belgium, Denmark, France, the United Kingdom and Italy mention their existence.

Belgium, Denmark and France indicate that these products are offered by brokers in the framework of LE insurance.

In the United Kingdom and Italy, insurance products are also offered by insurance companies.

The different responses show that the demand from undertakings covers areas other than insurance properly so-called, such as assistance with the patent registration procedures, legal advice and responsibility for court cases resulting from patent law problems.

Finally, all countries indicate that undertakings use specialist legal consultants to resolve problems linked to patent protection.

COUNTRY	SITUATION of the market in relation with patent protection
AU	No demand for insurance products covering patent protection problems. No insurance product. Non-material property insurance is excluded from the general conditions applicable to models (ARB 1994). Specialised legal consultants.
BE	No demand for insurance products for patent protection. Products offered by brokers in the framework of LE insurance. Demand from undertakings: assistance with patent registration procedures and legal advice. Specialist consultants.
CH	Demand for insurance products strong a few years ago. Concerned LE. Today, demand almost non-existent. No insurance products on the market. Demand from undertakings: assistance for patent registration procedures, legal advice and responsibility for costs of court cases resulting from patent law problems. Specialist legal consultants.
DE	Demand for insurance products low and relatively recent (last two or three years). Concerns more precisely LE. No specific product. Demand from undertakings: legal advice and assumption of legal costs. Specialist consultants.

DK	Weak and recent demand for insurance products based on liability and LE. Insurance products offered by brokers in the framework of LE insurance. Demand from undertakings: assistance with patent registration procedures and assumption of costs in the event of court cases concerning patent law problems.
ES	No demand for insurance products for problems regarding patents. No specific product. Demand from undertakings: assistance with registration procedures and legal advice. Specialist consultants.
FR	Weak demand for insurance products for patent protection. Concerns cover for property, liability and LE insurance. Insurance products offered by brokers in the framework of LE insurance. Specialist consultants.
GR	Non-existent demand for insurance products. Non-existent insurance products. Specialist consultants.
IT	Demand for insurance products very weak and recent. Covers property insurance and LE. Insurance products offered by insurance companies. Demand from undertakings: assistance with registration procedures and assumption of legal costs. Specialist consultants.
NL	Weak demand for insurance products. Covers essentially LE insurance. No specific insurance product. Demand from undertakings: assumption of legal costs.
UK	Weak demand for insurance products covering LE. Insurance products offered by insurance companies and brokers. Demand from undertakings: assistance with registration procedures, advisory activity and assumption of legal costs. Specialist legal consultants.

III. POTENTIAL DEVELOPMENT OF THE MARKET

Only the United Kingdom thinks that the development of products linked to patent protection will be an interesting market for LE insurance.

The main reasons put forward by the other countries are generally the difficulties in assessing the risk, specific knowledge required in this area, the costs of claims and the risk of systematic legal proceedings.

Spain, Greece, Italy and The Netherlands also speak of a lack of demand.

Switzerland says that the de facto monopoly of lawyers specialising in the patent field is also an obstacle.

Denmark indicates that if the question of LE insurance was to be raised, we should also raise the existence of liability or business interruption insurance, including cover for development costs, future benefits, etc.

Austria says that the development of these products must be linked to the establishment of tax incentives.

France states furthermore that attempts to market products in LE were made ten years ago. But they were not successful. LE insurers consider that the defence costs which they could offer in their cover would be largely inadequate compared with the real cost of certain cases.

Only the United Kingdom thinks that the development of products in patent protection should be linked to the implementation of a compulsory insurance system.

Austria and Spain feel that the development of these products should be linked to tax incentives.

Finally, Austria, Germany, the United Kingdom, Greece, Italy and The Netherlands think that patent protection must be limited to the European Union.

Only Spain thinks that this protection should be extended beyond the European Union.

COUNTRY	POTENTIAL DEVELOPMENT OF THE MARKET
AU	Development of products linked to patent protection would not be an interesting market for LE insurance. Reasons: difficulties in assessing the risk, very specialised area requiring very specific knowledge, risk of major claims costs, risk of systematic legal proceedings. Development of products must be linked to tax incentives. Protection limited to the European Union
BE	Uninteresting market for LE insurance Reasons: difficulties in assessing the risk, risk of substantial claims costs, risk of systematic legal proceedings (anti-selection) No compulsory insurance system or tax incentives
CH	Uninteresting market for LE insurance. Reasons: difficulties in assessing the risk, very specialised area requiring specific knowledge, risk of substantial claims costs, risk of systematic legal proceedings, de facto monopoly of lawyers specialised in patents. No compulsory insurance or tax incentives. No protection limited to the European Union or protection extended beyond the EU
DE	Uninteresting market for LE insurance. Reasons: difficulty in assessing the risk, very specialist area requiring very specialised knowledge, risk of substantial claims costs, risk of systematic legal proceedings. No system of compulsory insurance or tax incentives. Protection limited to the European Union.
DK	Uninteresting market for LE insurance. Reasons: difficulties in assessing the risk, very specialist area requiring highly specialised knowledge. No compulsory insurance system.

ES	<p>Uninteresting market for LE insurance. Reasons: difficulties in assessing the risk, very specialist area requiring very specialised knowledge, risk of substantial claims costs, risk of systematic legal proceedings, lack of demand. Systems of tax incentives. Protection extended beyond the European Union.</p>
FR	<p>Partly interesting market for LE insurance. Reasons: difficulties in assessing the risk, very specialised area requiring specific knowledge, risk of substantial claims costs, cost of systematic legal proceedings.</p>
GR	<p>Uninteresting market for LE insurance. Reason: lack of demand. No insurance system or tax incentives. Protection limited to the European Union</p>
IT	<p>Uninteresting market for LE insurance. Reasons: difficulties in assessing the risk, very specialist area requiring specific knowledge, risk of substantial claims costs, risk of systematic legal proceedings, lack of demand. No insurance system or tax incentives. Protection limited to the European Union.</p>
NL	<p>Uninteresting market for LE insurance. Reasons: difficulties in assessing the risk, very specialist area requiring specific knowledge, risk of substantial claims costs, risk of systematic legal proceedings, lack of demand. No insurance system or tax incentives. Protection limited to the European Union.</p>
UK	<p>Interesting market for LE insurance. But: difficulties in assessing the risk, very specialist area requiring specific knowledge, risk of substantial claims costs, risk of systematic legal proceedings. Compulsory insurance systems. Protection limited to the European Union.</p>

*