



**COUNCIL OF
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NOTE

from:	Presidency
to:	Permanent Representatives Committee (Part 1) / Council
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Subject:	Draft Agreement on the creation of a Unified Patent Court - Preparation of the Competitiveness Council on 5 December 2011

I. INTRODUCTION

1. On 29 September 2011, the Competitiveness Council held an exchange of views on the creation of a unified patent litigation system, in particular on the compatibility of the draft Agreement with the EU legal order. The Presidency concluded that delegations seemed sufficiently reassured in this respect and announced that it would continue working with a view to reaching political agreement on the patent "package" by the end of the year.
2. In the course of October and November 2011, the Presidency organised numerous technical meetings to further elaborate the text of the draft Agreement. A 3-day long drafting session in Warsaw on 12-14 October was followed by meetings of the "Friends of the Presidency" group on 18 and 27 October and 14 November.

In parallel, on 11 October, 9 November, 16 November, 21 November and 30 November, five informal trilogues were held on the regulations implementing enhanced cooperation in the area of unitary patent protection, addressing also the European Parliament's draft own-initiative report on a jurisdictional system for patent disputes.

3. The Commission made a commitment to present the necessary amendments to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) in early 2012 in order to ensure the compatibility of the draft Agreement with Union law.
4. Whilst the text of the draft Agreement has been thoroughly discussed and elaborated at technical level, there remain a set of issues that require political consideration and decision at the next meeting of the Competitiveness Council.

II. ISSUES TO BE DISCUSSED BY MINISTERS AT THE COMPETITIVENESS COUNCIL ON 5 DECEMBER 2011

A) ISSUES RELATING TO THE CREATION OF THE UNIFIED PATENT COURT

The Presidency considers that the following issues need the attention of Ministers. Ministers should discuss these items with a view to reaching a global compromise on the Agreement creating the Unified Patent Court.

1. The seat of Central Division of the Court of 1st Instance, the seat of the Court of Appeal with the Registry and the seat of the Patent Mediation and Arbitration Centre

The Presidency has received the following proposals for the seats of the Unified Patent Court: central division: Germany proposes Munich, France proposes Paris and the United Kingdom proposes London as a location of Central Division. As regards the Court of Appeal, the Presidency has received a proposal from Luxembourg. Ireland and Slovenia have signalled their interest in hosting the Patent Mediation and Arbitration Centre.

2. The financial contribution of the Member States hosting a local division, a regional division, the central division of the Court of 1st Instance or the Court of Appeal

The Presidency proposes that the host Member State provides for the necessary facilities (premises, office equipment including IT equipment) and, for the initial period during which the Court is not self financing, provides and pays also for the administrative support staff.

3. Other financial contributions of the Member States

While the objective should be that the Unified Patent Court becomes self financing over time, financial contributions will be required in the setting up phase. The Presidency proposes two options for the calculations of these financial contributions and their repartition among Member States.

Option A: contributions based on the number of European patents in force and the number of European patents litigated in the Member State concerned, combined with an equal contribution from all Member States.

Option B: contributions based on the scale for the distribution of renewal fee income from European patents with unitary effect.

4. Language of proceedings

While the principal should be maintained that the language of proceedings of a local division can be changed only with the agreement of both parties, the Presidency proposes as a matter of compromise that a party can address a request to the President of the Court who can change the language of proceedings for reasons of convenience and fairness to the parties.

5. Actions to be brought to the central division.

Some Member States would like to enhance the role of the central division and give parties the choice to bring actions from infringements concerning a number of Member States before the central division instead of bringing them before a local or regional division. Other Member States are opposed to this. The Presidency proposes as a compromise to give parties the choice to bring an infringement action before the central division if the defendant is domiciled outside the European Union.

6. Number of ratifications required for the entry into force

There is general agreement that the Unified Patent Court should enter into force once a minimum number of Member States have ratified the Agreement. A number of Member States feel that the number of 9 Member States, as initially envisaged, is too low. The Presidency proposes as a matter of compromise that the number should be fixed at 13 Member States.

7. Transitional period

Many users of the patent system advocate having a longer transitional period for "classical" European patents without unitary effect during which actions can still be brought before the national court. Some Member States see problems with this. The Presidency proposes to fix the transitional period for an initial duration of 7 years and to foresee the possibility of prolongation for a maximum of up to a further 7 years.

8. Revision clause

Many users of the patent system have argued for a broader range of provisions, which can be reviewed by the Administrative Committee in order to improve the functioning, efficiency and cost effectiveness of the Unified Patent Court and the quality of its judgements. Some Member States argue that such a review should require unanimity in the Administrative Committee, others fear that unanimity may render a necessary review too difficult. The Presidency proposes as a compromise to maintain the three quarter majority for a review decision of the Administrative Committee but to give Member States the possibility to reject a review on the basis of their relevant internal decision making procedures.

B) THE LEVEL OF RENEWAL FEES FOR THE PATENT WITH UNITARY EFFECT, AND THEIR DISTRIBUTION AMONG MEMBER STATES

The Presidency considers that another issue which is closely linked to the Unified Patent Court and its financing is the level of renewal fees and their distribution among Member States. There are two different options under consideration. Option A is essentially based on the number of European patents in force and litigated in the Member States concerned (combined with an equal contribution). Option B by contrast foresees that the financial contributions of Member States should be based on their share of the renewal fees. In order to properly assess this latter option it is necessary to have a better understanding of, and some consensus on, the renewal fees. The draft regulation on unitary patent protection contains the relevant criteria, which should ensure that unitary patent protection is attractive for industry, in particular SMEs, while at the same time providing a fair share to those Member States which currently have a low income from fees. Even though the level and distribution of the fees is to be decided by the Select Committee at a later stage, it is important to consider these issues together with the financing of the Unified Patent Court as an integral part of the patent package.

III. CONCLUSION

The Committee of the Permanent Representatives is herewith invited to take note of the issues which will be submitted for discussion by Ministers at the Competitiveness Council on 5 December.

DRAFT DECLARATION OF THE CONTRACTING MEMBER STATES

CONCERNING THE PREPARATION FOR THE COMING INTO OPERATION

OF THE UNIFIED PATENT COURT

The Contracting Member States having signed the Agreement on a Unified Patent Court consider that the Agreement should be ratified as quickly as possible **without prejudicing their national ratification procedures, including as appropriate their constitutional and parliamentary requirements**, and that the Unified Patent Court should become fully operational upon the entry into force of the Agreement without undue delay. To this end, they undertake to use their best efforts and affirm their willingness to start **promptly** with the preparation for the expeditious establishment of the Unified Patent Court.

The Contracting Member States are determined to ensure that the Unified Patent Court achieves a high degree of efficiency and delivers expeditious and high quality decisions from the outset. With this in mind they think it necessary that all practical arrangements for the proper functioning of the Unified Patent Court are already in place or are duly prepared before the entry into force of the Agreement.

The Contracting Member States intend to set up without any delay a Preparatory Committee which will be composed by their representatives. The Preparatory Committee shall prepare the practical arrangements and set out a roadmap for the early establishment and coming into operation of the Unified Patent Court. It may establish subgroups as appropriate and make use of teams of experts.

The Contracting Member States consider that the Preparatory Committee should in particular organise without delay training of future judges, prepare Rules of Procedure for the Unified Patent Court, prepare the budget of the Unified Patent Court for the first financial year, make proposals for appropriate facilities for the divisions of the First Instance and the Court of Appeal, prepare the election of the members of the Administrative Committee and the adoption of its Rules of Procedure, prepare the election of the members of the Budget Committee and the Advisory Committee, prepare the election of judges and the recruitment of administrative staff.

The Contracting Member States stress that the most urgent task is to organise training for future judges from Member States where there is currently little experience with patent litigation. To this end, the Contracting Member States who have specialised courts dealing with a significant number of patent cases affirm their willingness to offer appropriate training possibilities, in particular internships, for candidate judges from other Member States without any delay. The Preparatory Committee shall draw up an appropriate training plan, **covering all relevant areas of law including competition law**, and provide support for the organisational arrangements.

The Contracting Member States recall the importance of appropriate Rules of Procedure for the Unified Patent Court and of their uniform application, which are vital to guarantee that the decisions of the Court are of the highest quality and that proceedings are organised in the most efficient and cost effective manner. They affirm their willingness to draw up a complete and detailed set of Rules of Procedure before the entry into force of the Agreement. The Preparatory Committee shall complete a first draft of Rules of Procedure on the basis of input of expert judges, lawyers and industry representatives within **three** months. This draft should be the basis of a broad consultation with stakeholders before it is finalised with a view **to reach agreement on it well before the end of the ratification procedures**. The adoption of the Rules of Procedure should be preceded by a consultation with the European Commission on their compatibility with Union Law.

The Contracting Member States emphasize that, for the proper functioning of the Unified Patent Court, it is important that from the outset it has appropriate facilities at its disposal. The Contracting Member States hosting a local, regional or the central division of the Court of First Instance or the Court of Appeal affirm their intention to have the appropriate facilities in terms of premises, furniture, office and IT equipment and administrative support staff in place before the entry into force of the Agreement. The Preparatory Committee shall serve as an interlocutor for the host Contracting Member States and provide the necessary support for the organisational arrangements.

The Contracting Member States consider that the fee system of the Unified Patent Court should be straightforward and predictable for the users. Accordingly, the Unified Patent Court should apply a system of fixed fees. The Court should be accessible for parties with limited resources. Thus the court fees should not be set at a high but at a low to intermediate level. Whilst all users of the Unified Patent Court should contribute to its financing, users having more significant economic interests should provide a reasonable and proportionate contribution to the functioning of the Court, on the basis of a complementary value-based fee system, **proportionate to the economic value of the case at stake in the specific procedure**, applicable above a pre-defined ceiling. **The fee system should provide adequate and specific tools to ensure proper access for small and medium sized enterprises to the Unified Patent Court, especially in relation to cases of high economic value.**

The Contracting Member States consider that the availability of supplementary protection certificates for pharmaceutical and plant protection products should be ensured in accordance with Regulation 469/2009 and Regulation 1610/96, for which the Commission should present proposals in due to time and as necessary.

The Contracting Member States recognize that the proper preparation for the coming into operation of the Unified Patent Court relies on their collective effort and on their efficient cooperation. They will act in good faith and use their best endeavours during the preparatory phase to ensure that the Unified Patent Court will work in the most efficient and cost effective way, will deliver judgments of the highest quality and will from the outset gain the trust and confidence of the users of the patent system.
