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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European
Union

Subject: Commission staff working document: Summary of the Impact Assessment
accompanying document to the Proposal for a Council Regulation on the
translation arrangements for the European Union patent

Delegations will find attached Commission document SEC(2010) 797.

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COMMISSION STAFF WORKING DOCUMENT
SUMMARY OF THE IMPACT ASSESSMENT

Accompanying document to the

Proposal for a

COUNCIL REGULATION

on the translation arrangements for the European Union patent

{COM(2010) 350 final}
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SUMMARY OF THE IMPACT ASSESSMENT

The Impact Assessment accompanies the proposal for a Council Regulation on the translation arrangements for the EU patent.

1. PROBLEM DEFINITION

Inventions in the EU can be protected by national patents granted by the European Patent Office (EPO) or national patent offices. There is no unitary patent providing protection across the entire EU. This leads to a fragmented patent system.

Fragmentation is caused by the high costs and complexity of validating European patents in individual Member States which can amount to 40% of the overall costs of patenting in Europe. For instance, a European patent validated in 13 countries is more than 10 times more expensive than a patent in the US or Japan. Patent proprietors therefore usually limit protection to a few EU Member States.

The high validation costs stem from national requirements for filing translations in the official languages of the countries where protection is sought:

- Costs must be paid to specialised patent translators. On average, 85 EUR is charged per translated page for a patent of typical length of 20 pages.
- Fees are charged by patent agents for translation-related services e.g. acting as intermediaries between the proprietor and the national patent offices, management and verification of translations, and ensuring compliance with national laws. These fees vary from around 150 to 600 EUR per validation.
- Official fees are charged by some national patent offices to publish translations, ranging from 25 to 400 EUR.

Examples of typical validation costs for a European patent of 20 pages granted in German are as follows:

- no cost for Germany, France and UK as no validation requirements apply;
- more than 4 500 EUR for 6 EU Member States;
- almost 12 000 EUR for 13 EU Member States.

High validation costs and complexity result in a European patent being validated on average in 5 EU Member States. The average number of validations has decreased over the last 15 years while the number of Contracting States of the European Patent Convention (EPC) has risen from 17 to 37. The validation rate is very high in the 3 largest EU Member States. In 2003, of all patents granted by the EPO, 95% were validated in Germany; 80% in France, and 75% in the United Kingdom. By contrast, less than 40% of European patents are validated in other Member States.

Low validations entail a fragmented system for patent protection in the EU with negative effects on the functioning of the Internal Market. Patent right "borders" are being erected around individual Member States, reducing the commercial value of patented inventions,

impeding cross-border activities and leaving business opportunities unexploited. By contrast, the EU patent would provide protection covering the entire EU.

Some reform to reduce translation costs has taken place. The London Agreement entered into force on 1 May 2008 for 14 EPC Contracting States who have agreed to dispense entirely or partly with translation requirements. In 4 EU Member States (DE, FR, LU, UK), validation costs have been cut entirely. In 6 other Member States (DK, LV, LT, NL, SE, SI), translations of the *claims* must be supplied. However, 17 EU Member States are not party to the London Agreement and require a translation of the entire patent into their official languages. Although the London Agreement has reduced costs, the different validation practices could reinforce selective practices by patent holders. This has undesirable effects on the functioning of the Internal Market:

- The localisation of patent protection in a few Member States risks leading to a concentration of R&D investments and technology transfer. Low patenting activity in other Member States is likely to have a knock-on effect on R&D activity and innovation, particularly affecting SMEs. This reinforces the structural differences within the EU, affecting overall competitiveness.
- In relation to patent enforcement, if goods enter the EU through a Member State where a patent is not in force, the rights holder cannot rely on the EU Customs Code to withhold goods suspected of infringing the patent. These goods can then circulate within the Internal Market.

2. SUBSIDIARITY

The creation of European intellectual property rights to provide uniform protection throughout the EU and associated language arrangements are provided for by Article 118 TFEU. Only the EU is entitled to act to create a uniform EU patent and its translation regime.

3. OBJECTIVES

On 3 March 2010, the Commission adopted the Europe 2020 strategy setting out 3 mutually-reinforcing priorities: smart, sustainable and inclusive growth. The first of these requires strengthening knowledge and innovation as drivers for future growth. A key element here is improving the framework conditions for businesses to innovate, including the creation of a single EU patent and a specialised patent court. By providing for uniform protection of patent rights in the Internal Market, the EU patent will improve conditions for R&D investments, particularly in regions with below average innovation activity. This should facilitate reaching the 3% target of GDP invested in R&D affirmed by Europe 2020.

Stakeholder consultations, particularly the broad consultation on the future patent policy in Europe in 2006, have shown that the creation of the EU patent should add value alongside national and European patent systems. Patent protection should be more accessible for all European businesses, including SMEs. Translation arrangements must therefore be:

- (i) cost-effective (ensuring competitiveness with patent systems in other major world economies),

- (ii) simplified (balancing the needs of innovative businesses for technological information with costs),
- (iii) legally secure (avoiding uncertainty from translations having legal effect).

4. POLICY OPTIONS AND ANALYSIS OF THEIR IMPACTS

4.1. Introduction

All options analysed are based on the following principles:

1) Central filing of translations and electronic publication. On grant of the patent, any translations required should be filed centrally at the EPO, who will be in charge of the electronic publication of the EU patent and any translation of the claims. This alone will bring considerable cost reductions and simplification compared to the current situation.

2) Automatic machine translations. Automatic machine translation (AMT) programs for patent documents will complement manual translations supplied on grant. This will improve the dissemination of technological information for researchers and give the EU patent a multilingual character. AMT will enable access to patent applications for users when they are published by the EPO. Automatic machine translations would be free of charge for information purposes only having no legal effect.

3) Full translation in case of dispute. In the case of a dispute relating to an EU patent, the patent proprietor shall provide, at his expense and at the request of an alleged infringer, a full translation into an official language of the Member State in which the alleged infringement took place or in which the alleged infringer is domiciled. It is estimated that less than 1% of all patents become subject to litigation.

4) Reimbursement of costs. An application for an EU patent may be filed in any language. Where this language is not an EPO official language, a translation must be provided within a time period for the application to be processed. For applicants residing or conducting their main business in a Member State that does not have an official language in common with the EPO, the costs of translation shall be borne by the system.

The following options are explored in the Impact Assessment report:

Base-line scenario – no proposal on translation arrangements for the EU patent.

Option 1 – EU patents are processed, granted and published in English.

Option 2 – EU patents are processed, granted and published in one of the 3 EPO working languages; claims are translated into the other two working languages.

Option 3 – EU patents are processed, granted and published in one of the 3 working languages of the EPO; claims are translated into the 4 other most commonly spoken EU languages.

Option 4 – EU patents are processed, granted and published in one of the 3 working languages of the EPO; claims are translated into all official EU languages.

The analysis of the policy options concentrates on the main economic impacts of translation arrangements for the EU patent. This covers the users of the patent system (overall and SMEs), innovators in general, patent information users and professional services related to translations.

4.2. Base-line scenario

If the Commission does not propose a regulation for translation arrangements for the EU patent, it can never come into existence. This would take the opposite approach to the Council Conclusions of 4 December 2009 and the Europe 2020 Strategy. This option would fail to address the high costs caused by translation and validation requirements in the current European patent system. It would also maintain the fragmentation of the system, impeding the functioning of the Internal Market.

Lower translation costs might result from more Member States acceding to the London Agreement. Even if all Member States acceded to the London Agreement, costly language arrangements for the European patent would persist due to translations of patent claims still being required by national laws.

4.3. Option 1

This option would use English as the language of proceedings for the EU patent and require no further translations. Impact on a significant proportion of users of the patent system in Europe would be positive. Those filing European patent applications in English would no longer have to translate claims into French and German at the time of grant. However, Option 1 would have a negative impact on many users currently filing European patent applications in French and German. Around 48% of all applications originating from Europe are filed in French or German at the EPO.

Option 1 would change the existing EPO 3-language regime for EU patent applications. All written and oral communication for grant and opposition proceedings at the EPO would be in English. Companies currently applying for European patents in French or German would have to experience significant changes to make EU patent applications. By removing the flexibility of the current system enjoyed by many EU businesses, Option 1 could impact on the global competitiveness of European industry, especially for SMEs. The EU patent may therefore not bring the expected benefits as its use could be low among European companies currently not using English at the EPO.

Other groups affected, including patent information users and providers of professional services related to translations, would be negatively impacted. Only translators with English as a mother tongue would benefit as all applications and procedural documents for EU patents would be in English.

4.4. Option 2

This option corresponds to the current regime under the EPC with proceedings in one of 3 working languages. On grant of the EU patent, the patent proprietor would provide the EPO with a translation of the claims into the other two working languages. The claims translations would not have any legal effect.

Impact on users of the patent system would be positive. All translations and validation requirements after grant would be removed, bringing significant cost reductions and

simplification. Translation costs would be about 680 EUR per patent. This corresponds with the minimum cost of the claims translations filed on granting a European patent. Unlike Option 1, Option 2 would not affect the language regime of the EPC.

This option would result in benefits for most groups, including all users of the patent system as well as SMEs, innovators in general and patent information users. Only providers of translation-related professional services would be negatively affected by removing translation requirements after grant.

4.5. Option 3

Before grant of the EU patent this option follows the current regime for European patent applications. On grant, the claims would be translated into the 4 other most commonly spoken EU languages (i.e. the other 2 EPO working languages and the 2 other most spoken EU languages, namely Italian and Spanish).

Option 3 would have a positive impact on users of the patent system in Europe with significant simplification and cost reductions. Direct translation costs would be about 1 360 EUR per patent.

Option 3 results in higher costs for the applicants per patent, but remains affordable to users of the patent system and innovators in general. Patent information users would be positively affected by the availability of claims in the most spoken EU languages. Professional services providers would experience a negative impact, but less than under Option 2.

4.6. Option 4

Option 4 corresponds to the Common Political Approach of 3 March 2003. The EU patent would be processed, published and granted in one of the 3 EPO working languages. On grant, the patent proprietor would supply a translation of the claims into all required official EU languages.

This option would create an EU patent with high translation costs, counterbalancing the benefits of a single EU title. Translations of the claims into the other 20 languages currently required by EU Member States would be about 6 800 EUR per patent.

Stakeholders have unequivocally rejected the Common Political Approach due to the unsatisfactory translation arrangements. Patent users, in particular SMEs, clearly state that this option for the EU patent would be too expensive. They would need to submit and manage numerous translations over a limited time period. Furthermore, decisions affecting the unitary character of the EU patent would have to be made, for instance, when a translation into one language is not filed.

Notwithstanding these inconveniences, if the translations were available very early, patent information would be more accessible in many European languages. Providers of professional services related to translations would also benefit provided such an expensive EU patent is used. There may also be insufficient numbers of specialised patent translators for certain languages.

5. COMPARING THE OPTIONS

Although Option 1 appears to be a simplified and cost-effective solution, it would result in a significant change to the current EPO system providing flexibility in procedural languages. A change to English-only could make the majority of European applicants (using French or German) reluctant to apply for an EU patent.

Option 2 would therefore be more appropriate as it maintains the successful pre-grant linguistic regime of EPO. This option is also cost-effective, simplified and legally secure.

The 5 language system of Option 3 would be equally simplified and legally secure as Option 2, but with higher direct translation costs, it would be much less cost-effective.

By requiring the translation of claims into all EU official languages, Option 4 would put considerable financial costs and risks on users of the system. It would not be cost-effective, simplified, or legally secure.

6. MONITORING AND EVALUATION

The EU patent aims to improve the conditions for innovation in Europe. Innovation activity is measured by INNO-Metrics, comprising the European Innovation Scoreboard (EIS) and Eurobarometer. The Europe 2020 Strategy also commits to developing a new indicator to track innovation.

The EU patent should coexist alongside the European and national patent systems. Patenting levels published by patent offices should therefore be monitored to ensure that these options meet the needs of innovators including the translation arrangements.