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NOTE

from :	Belgian delegation
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This document summarises the aspects referred to by the Belgian delegation at the meeting on 29 and 30 October 2001 regarding the EC's accession to the European Patent Convention. The Belgian delegation's contribution was based on a study carried out by Professor Govaere of the University of Ghent on behalf of the Ministry of Economic Affairs concerning the institutional aspects of the EC's accession to the European Patent Convention.

When examining the impact of the Community's exclusive internal and external competence with regard to Community patents, a distinction should be drawn between – on the one hand – the effect of the exercise of the Community's competence regarding patents on Member States' powers, and – on the other hand – the consequences of the EC's accession to the European Patent Convention for the Member States' national legal systems.

a. Effect of the exercise of the Community's competence regarding patents on Member States' powers

The Community patent is a new Community unitary title of industrial property which will offer uniform protection to its holder throughout Community territory. This subject-matter is covered by the EC's internal competence. Once the Regulation on the Community patent is adopted, the EC, on the basis of the theory of implicit competence [1], will have exclusive powers over international matters concerning the Community patent [2]. The Community patent system will exist alongside the national patent systems and the European patent system.

The question is what form the respective competences will take within the framework of the European Patent Convention – in particular, whether they will be exclusive or shared – with regard to both national patents and the Community patent. It should be stressed that the AETR principle applies here too, inter alia in view of the fact that there is no longer a place for a national external competence if commitments assumed by Member States might affect or detract from the meaning of the Community rules. [3] Hence this case-law is not restricted to Community legislation

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1 According to established case-law of the Court of Justice, the Community's competence to enter into international commitments is not based solely on the express attribution of powers by the Treaty, but can also flow implicitly from the Treaty's provisions (this is referred to as the theory of implicit powers, or sometimes as the theory of parallelism of powers). According to the AETR judgment, an external exclusive competence can be derived from an internal Community competence if internal legislation has come into being in the area concerned, and if such legislation could be affected or its meaning detracted from in the event that an agreement is entered into by the Member States rather than the Community. In Opinion 1/76, it is also stated that previous exercise of the internal competence is not an absolute prerequisite for the exercise of an external competence. By way of exception, that external competence can also be derived from the internal competence if external Community action is necessary in order to realise the EC's objectives, which – as explained in Opinion 2/92 – cannot be achieved by means of autonomous legislation. Pursuant to the theory of implied competence, the Community thus has an external exclusive competence for provisions relating to the national and the European patent where Community rules exist. This implies that, as long as patent legislation is not fully harmonised, both internal and external competences are divided between the Community and the Member States with regard to the national and the European patent. However, this division of competences is subject to change as it depends on the extent to which EC harmonisation measures are realised.

2 See also point 2.3.4. of the proposal for a Council Regulation on the Community patent, COM (2000) 412.

3 CJ, 31 March 1971, 22/70 *Commission* v *Council* (AETR), ECR [1971] 263, paragraph 22; CJ, 19 March 1993, Opinion 2/91 *IAO*, ECR [1993] I-1061, paragraph 9. A national external competence does indeed exist if both the EC rules and the relevant international agreement lay down minimum standards: see CJ, 19 March 1993, Opinion 2/91 *IAO*, ECR [1993] I-1061, paragraphs 13-21.

implementing a Community policy, but applies to all Community rules regardless of the area to which they relate. [4] This is particularly important for Community rules concerning intellectual and industrial property rights as such rules are not laid down within the framework of a Community policy. [5] In Opinion 1/94 [6] it was expressly stated that the doctrine of implicit competence also applies to Community measures which have come into being on the basis of Article 100A of the EC Treaty (now, after amendment, Article 95 TEC) and Article 235 of the EC Treaty (now Article 308 TEC). With specific regard to intellectual and industrial property rights, the Court stated that there can be no question of powers being reserved for the Member States (and which would therefore be assigned exclusively to them) as the Community is clearly authorised to adopt harmonisation measures relating to such matters in order to prevent distortion of the internal market. [7] Consequently, the Member States may not, without the consent of the Community institutions, enter into any commitments relating to the national patent or the European patent which might affect or detract from the meaning of the Community harmonisation rules concerning national patents (pursuant to Article 95 TEC) or the Regulation on the Community patent (pursuant to Article 308 TEC). [8]

The transfer of the competence of the Member States to the EC in accordance with the theory of implicit powers is therefore inherently evolutionary in nature as it goes hand in hand with the adoption of internal measures. This implies that, if the Community has not yet taken any internal measures, the Member States are in principle authorised to act and hence conclude international

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4 CJ, 31 March 1971, 22/70 *Commission* v *Council* (AETR), ECR [1971] 263, paragraphs 17 and 22. Confirmed in CJ, 19 March 1993, Opinion 2/91 *IAO*, ECR [1993] I-1061, paragraph 10.

5 The only reference to intellectual and industrial property rights in the EC Treaty is contained in Article 30 TEC, which lays down exceptions from the principle of the free movement of goods.

6 CJ, 15 November 1994, Opinion 1/94 *WTO: GATS and TRIPs*, ECR [1994] I-5267, paragraphs 88-89.

7 CJ, 15 November 1994, Opinion 1/94 *WTO: GATS and TRIPs*, ECR [1994] I-5267, paragraph 104.

8 CJ, 19 March 1993, Opinion 2/91 *IAO*, ECR [1993] I-1061, paragraphs 25-26. It should be noted that, in Opinion 1/94, the Court stated that "complete" harmonisation leads to exclusive competence: see CJ, 15 November 1994, Opinion 1/94 *WTO: GATS and TRIPS*, ECR [1994] I-5267, paragraph 96; in Opinion 2/91, the Court clarified what is meant by "affect Community rules". The Community rules do not necessarily have to conflict with the relevant provisions of the agreement. Rather, the word "affect" should be interpreted more broadly. This would cover a situation in which Member States enter into international commitments outside the framework of the Community institutions in an area largely covered by Community rules which have been introduced gradually with a view to even fuller harmonisation.

agreements. However, such competence is subject to restrictions on two levels: on the one hand, it is only of a transitional nature; on the other hand, Member States are in any case still bound by their Community obligations when assuming international commitments. [9]

Unlike the adoption of the Regulation on the Community patent, the EC's accession to the European Patent Convention will not in itself have any significant influence on Member States' competence. The theory of implicit powers applies irrespective of the EC's accession to that Convention. If the Community has exclusive competence for a specific subject-matter, it must be able to exercise its external powers through the intervention of the Member States even if it is not or cannot become a member of an international organisation. This implies that, even if the Community does not accede to the European Patent Convention, it must be able to exercise in full its external exclusive competence pursuant to the Regulation on the Community patent. The Member States will become a mere set of instruments for the EC. Furthermore, the Court of Justice has stressed on numerous occasions that where the subject-matter of an agreement falls partly within the exclusive competence of the Community and partly within that of its Member States (e.g. the European Patent Convention), it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. [10] According to the Court, such cooperation is all the more necessary in view of the fact that the Community cannot itself accede to an international agreement but must do so through the medium of the Member States. [11] That obligation to cooperate can be expressed in concrete terms via an internal agreement between the Community and the Member States. The obligation to cooperate arises from the requirement of unity in the international representation of the Community [12], and may be enforced with reference to Article 10 TEC [13]. Pursuant to Article 10 TEC, Member States are obliged to facilitate the achievement of the Community's tasks and to abstain from any measures which could jeopardise the attainment of the objectives of the Treaty.

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9 CJ, 14 July 1976, Joined Cases 3, 4 and 6/76 *Kramer*, ECR [1976] 1279, paragraphs 39-40. With regard to commitments relating to intellectual and industrial property rights, see footnote 5 above.

10 CJ, 19 March 1993, Opinion 2/91 *IAO*, ECR [1993] I-1061, paragraph 36; CJ, 15 November 1994, Opinion 1/94 *WTO: GATS and TRIPS*, ECR [1994] I-5267, paragraph 108; CJ, 19 March 1996, C-25/94 *FAO*, ECR [1996] I-1469, paragraph 48.

11 CJ 19 March 1993, Opinion 2/91 *IAO*, ECR [1993] I-1061, paragraph 37.

12 CJ, 19 March 1993, Opinion 2/91, *IAO*, ECR [1993] I-1061, paragraph 36; CJ, 15 November 1994, Opinion 1/94 *WTO: GATS and TRIPS*, ECR [1994] I-5267, paragraph 108.

13 CJ, 19 March 1996, C-25/94 *FAO*, ECR [1996], I-1469, paragraph 48.

b. The consequences of the EC's accession to the European Patent Convention for the Member States' national legal systems

The fact that, unlike the exercising of the internal EC patent-granting competence, the EC's accession to the European Patent Convention will not in itself have any significant influence on Member States' competence does not mean that the EC's accession to the European Patent Convention will have no effect whatsoever on the Member States. The case-law on the TRIPs Agreement [14] shows that the effect of the European Patent Convention may well have consequences for the Member States' respective national legal systems. The European Patent Convention is still an agreement under public international law. Its effect (precedence, direct effect, interpretation) with regard to the national legal systems is governed by the relevant constitutional provisions of the Member States, and can therefore vary from one Member State to another. If the EC accedes, the European Patent Convention will become a mixed agreement. [15]

It is established case-law of the Court of Justice that Member States are no longer free to treat mixed agreements in the same way as other international agreements concluded solely by the Member States. According to the Court, Member States which are parties to mixed agreements fulfil an obligation not only in relation to the non-member country concerned, but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. [16] Agreements concluded by the Community, from the coming into force thereof, form an integral part of Community law. [17] This implies that such agreements are subject to the EC principles relating to precedence, direct effect and uniform interpretation by the Court. The same reasoning is applied to mixed agreements, or at least to those parts of such agreements which fall within the EC's competence. Member States' constitutional provisions concerning the effect of international agreements on national legal systems will therefore no longer be applicable [18] to those parts of the European Patent Convention for which the EC has exclusive competence.

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14 CJ, 16 June 1998, C-53/96 *Hermès*, ECR [1998] I-3603; CJ, 14 December 2000, C-300/98 and C-392/98 *Parfums Christian Dior*, not yet published.

15 It could be argued that this will also be the case if the EC does not accede, but is still considered to have exclusive competence in part or in whole, whereby the Member States act as instruments of the EC (see footnote 8 above). However, there has hitherto been no case-law in that connection.

16 CJ, 26 October 1982, 104/81 *Kupferberg*, ECR [1982] 3641, paragraph 13.

17 CJ, 30 April 1974, 181/73 *Haegeman*, ECR [1974] 449, paragraph 5.

18 CJ, 26 October 1982, 104/81 *Kupferberg*, ECR [1982] 3641, paragraph 14.

According to established case-law [19], the Court of Justice is competent to interpret international agreements concluded by the EC. Whether this means that the Court of Justice is competent to interpret all provisions of mixed agreements, including those for which the Member States remain competent, remained unclear until the recent case-law of the Court concerning the TRIPs Agreement. [20] The TRIPs Agreement is a good model for the European Patent Convention (in its future form) as it constitutes an existing mixed agreement concerning intellectual property rights. The Court of Justice stated that it is competent to interpret a provision of a mixed agreement where that provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law. It is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly by the authorities of the Member States and by the Community, whatever the circumstances in which it is to apply. [21] However, only the EC Court of Justice is able to guarantee such a uniform interpretation. Any other solution would mean the national courts being competent to interpret a provision on one occasion and the Court of Justice being competent to interpret the same provision on the next occasion, depending on the case. [22] From this it can be deduced that the Court of Justice has exclusive competence to interpret all the provisions of a mixed agreement falling within the scope of Community law, regardless of national or EC application.

Any reasoning to the contrary would imply that the Court is not competent to interpret the provisions of a mixed agreement falling wholly outside the scope of Community law. The Court clearly rejected such reasoning in Cases C-300/98 and C-392/98 [23], considering itself nevertheless competent to interpret Article 50 of the TRIPs Agreement in those cases too.

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19 Established case-law since CJ, 30 April 1974, 181/73 *Haegeman*, ECR [1974] 449.

20 CJ, 16 June 1998, C-53/96 *Hermès*, ECR [1998] I-3603, paragraphs 32 and 33; CJ, 14 December 2000, C-300/98 and C-392/98 *Parfums Christian Dior*, not yet published, paragraph 35.

21 CJ, 16 June 1998, C-53/96 *Hermès*, ECR [1998] I-3603, paragraph 32.

22 J.H. JANS, Note re the Hermès judgment, Case C-53/96 *SEW* 1999, p. 221.

23 CJ, 14 December 2000, C-300/98 and C-392/98 *Parfums Christian Dior*, not yet published.

The Court's competence to interpret international agreements means not only that the Court can interpret substantive law provisions of such agreements, but also that it can establish the precedence and direct effect of such agreements. [24] Hence the Court stated in Cases C-300/98 and C-392/98 that, in a field to which TRIPs applies and the Community has already legislated, as was the case with the field of trade marks, the uniform EC approach regarding direct effect and precedence must apply [25]. On the other hand, in "a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law". With regard to such a provision, the Court stated that Community law consequently does not require (though nor does it exclude) that a Member State's national legal system should accord individuals the right to refer directly to such a provision, nor does it oblige courts to apply that provision on an official basis.

With regard to the European Patent Convention, the Court will therefore have exclusive competence to interpret the provisions applicable both to Community patents and to those European patents which represent a combination of national patents. Provisions which apply solely to European patents but in respect of which harmonisation exists at Community level will also fall within the scope of the Court's exclusive competence. In this respect it is essential that the Court's interpretation is binding on the national court which has requested the preliminary ruling [26] and on all other national courts. [27] The Court's competence to interpret means that it can also rule on the precedence and direct effect of the European Patent Convention in Member States' national legal systems. In future, therefore, the European Patent Convention, by analogy with the TRIPs Agreement, should be subject partly to the EC principles concerning precedence and direct effect and partly to Member States' constitutional laws concerning the effect of international agreements

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24 CJ, 26 October 1982, 104/81 *Kupferberg*, ECR [1982] 3641.

25 CJ, 14 December 2000, C-300/98 and C-392/98 *Parfums Christian Dior*, not yet published, paragraphs 47-48. Previously, the Court had decided that the provisions of the WTO Agreement were not such that they created rights for individuals to which such individuals could refer directly before the national courts under Community law (CJ, 23 November 1999, C-149/96 *Portugal* v. *Council*, ECR [1999] I-8395). However, the absence of any direct effect does not apply to all mixed agreements (CJ, 5 February 1976, 87/75 *Bresciani*, ECR [1976] 129; CJ, 26 October 1982, 104/81 *Kupferberg*, ECR [1982], 3641). The Court must decide separately for each agreement whether or not it has direct effect.

26 CJ, 24 June 1969, 29/68 *Milch-, Fett- und Eierkontor v. Hauptzollamt Saarbrücken*, ECR [1969] 165, paragraph 2.

27 CJ, 29 January 1975, 68/74 *Alaimo* v. *Préfet du Rhone*, ECR [1975] 109.

on the national legal system, depending on whether or not the EC has already legislated internally with regard to patents. This would imply that all the provisions of the European Patent Convention which also apply to the Community patent would in any case be subject to the EC principles concerning precedence, direct effect and uniform interpretation by the Court of Justice.