



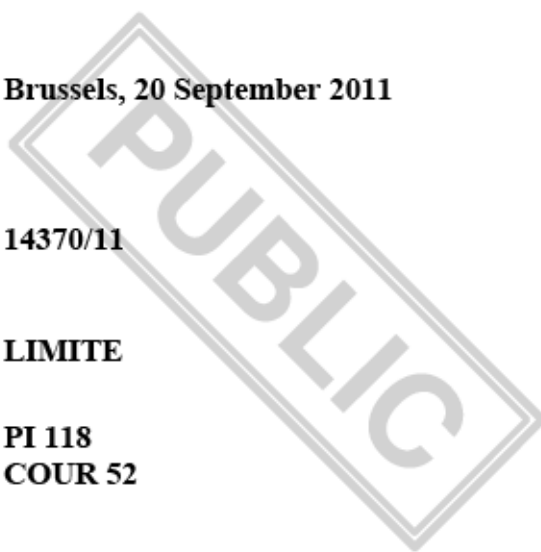
**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from: Presidency
to: Permanent Representatives Committee (Part 1)

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Subject: Preparation for the Council meeting "Competitiveness" (Internal Market, Industry, Research and Space) on 29 - 30 September 2011

- Draft Agreement on the creation of a Unified Patent Court
= Exchange of views

I. INTRODUCTION

1. On 30 May 2011 the "Competitiveness" Council held an orientation debate on the creation of a unified patent litigation system. The discussion took place on the basis of the non-paper presented by the Commission¹ on solutions for a unified patent litigation system, in response to opinion 1/09 of the Court of Justice of the European Union (CJEU). A large majority of Member States endorsed the way forward proposed by the Commission's non-paper and confirmed that the creation of a Unified Patent Court is the only solution that meets the political requirements of the Member States and the expectations of the users of the European patent system.

¹ See Annex II to 10630/11.

They agreed that a Unified Patent Court should be set up by an agreement creating a jurisdiction common to the Member States only. Third states and the EU may not participate in this treaty. Moreover, the agreement has to make sure that the primacy of EU law is respected by the Unified Patent Court, in line with the requirements set out in the CJEU opinion. The Member States confirmed also that the basic institutional architecture of the Unified Patent Court as foreseen and agreed by the Council in 2009 (doc. 17229/09) should be maintained.

2. On that basis, the Hungarian Presidency presented a draft agreement on a Unified Patent Court reflecting the necessary amendments deriving from the CJEU's opinion, on the basis of the 2009 agreement on the European and EU Patent Court².
3. To ensure political steering of the discussions and to enable a parallel work on both strands of the patent package (i.e. the creation of unitary patent protection and the unified patent litigation system), the Presidency decided to assign this task to the Friends of the Presidency Group. So far, four meetings of the Friends of the Presidency Group were held on 11 July, 18 July, 9 September and 16 September.
4. Following the first exchange of views on the draft agreement on a Unified Patent Court, the Presidency identified three types of issues raised:
 - a. **the compatibility of the chosen option with the Treaties in the light of the opinion 1/09 of the CJEU** and in particular, whether the Unified Patent Court is a court common to the Member States and whether the possibility to request preliminary rulings is properly ensured. Another issue which was raised concerned questions on the liability of Member States for damages incurred due to the infringement of Union law by the Unified Patent Court and the possibility for the Commission to launch infringement proceedings against Member States;

² 7928/09

- b. **the compatibility of the draft agreement with the *acquis***, in particular the Brussels I Regulation³;
- c. **comments to the draft agreement as such**, i.e. the individual articles and their drafting e.g. the entry into force clause, the financing of the court, questions on technical judges etc.

II. KEY ISSUES

- 5. With the aim to improve the draft agreement on a Unified Patent Court and in particular in order to respond to the first type of issues raised on **compatibility of the chosen option with the Treaties in the light of the opinion 1/09 of the CJEU**, the Presidency tabled the revised draft agreement on a Unified Patent Court⁴ on 2 September. Further changes to the revised draft agreement were introduced on 15 September 2011⁵. The revised draft agreement on a Unified Patent Court with changes up to article 14d, has been elaborated in close cooperation with the Council Legal Service and the Commission.
- 6. In order to strengthen the obligation to respect the primacy of Union law, article 14a was amended and now states that the Unified Patent Court shall apply Union law in its entirety and respect its primacy. Article 14b refers now to Article 267 TFEU as the basis for preliminary ruling requests by the Unified Patent Court in order to ensure the proper application and uniform interpretation of Union law.
- 7. The revised draft agreement on a Unified Patent Court clarifies that the Unified Patent Court will be a court common to Member States and through entrustment of exclusive jurisdiction in respect of European patents with unitary effect and European patents designating one or more Contracting Member States, part of their judicial order, and thus subject to the same obligations under Union law as any national court (recital 7 of the Preamble and article 1).

³ Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

⁴ 13751/11

⁵ 13751/11 COR 1

8. In line with the opinion 1/09 of the CJEU and the principle of sincere cooperation the revised draft agreement on a Unified Patent Court contains better guarantees for the protection of individuals' rights in case of infringements of Union law committed by the future Unified Patent Court by improving the rules on the joint and several liability of Member States for damages (article 14c) and their responsibility for the actions of the Unified Patent Court (article 14 d and recital 9 of the Preamble).
9. A useful contribution to the discussion on the future architecture of the Unified Patent Court was made by the Netherlands, Belgium and Luxemburg in their non-paper Reflections on the Benelux Court of Justice presented to the Friends of the Presidency Group on 9 September 2011 which offered a comparison of the characteristics of the Unified Patent Court and the Benelux Court of Justice.
10. The aforementioned changes introduced to the draft agreement on a Unified Patent Court by the Presidency gained a large support of the Friends of the Presidency Group.
11. As regards **the compatibility of the draft agreement with the *acquis***, the Commission has carried out an analysis of the relevant *acquis* and presented a non-paper to this end ⁶.
12. The Commission is of the view that the relationship between the Brussels I Regulation and the draft agreement on a Unified Patent Court should be clarified by inserting a clause in the Brussels I Regulation which ensures the compatibility of both instruments. In addition, the Commission finds it desirable to clarify in the Brussels I Regulation how its rules apply when the Unified Patent Court is seized or when a judgment given by the Unified Patent Court must be recognised and enforced in non-participating Member States.
13. The Commission notes that the issue of combined application of the draft agreement on a Unified Patent Court and the Lugano Convention could be brought for discussion to the Standing Committee under the latter.

⁶ 14191/11

14. It does not appear to the Commission that issues of compatibility with other Union instruments would arise. Nevertheless, the Commission suggests that further changes to the revised draft agreement on a Unified Patent Court in line with Commission comments should be made and that the technical analysis of each of the provisions of the revised draft agreement should continue. It is also clear to the Commission that many procedural matters will need to be regulated in the rules of procedure, which need to comply with the relevant Union legislation. The Commission considers that the draft agreement on a Unified Patent Court should clearly provide for this and foresee a mechanism how such compliance with the *acquis* may be ensured.
15. Changes to the revised draft agreement on a Unified Patent Court resulting from the Commission analysis of the impact on *acquis* as well as further changes responding to **comments on the agreement as such** will be presented by the Presidency to the Friends of the Presidency Group following the "Competitiveness" Council meeting on 29 - 30 September 2011.

III. CONCLUSION

16. The Presidency considers that the revised draft agreement on a Unified Patent Court contains the necessary elements to comply with the opinion 1/09 of the CJEU and provides for the biggest possible clarity on the institutional structure of the future Unified Patent Court. The implications of the draft agreement on the *acquis* as presented by the Commission provide, in the opinion of the Presidency, a useful and exhaustive input to the ongoing work.
17. **The Permanent Representatives Committee is invited to take note of the information from the Presidency on the state of play which will be subsequently submitted to the "Competitiveness" Council on 29/30 September 2011 for an exchange of views between Ministers.**
18. **The "Competitiveness" Council on 29 - 30 September 2011 will be invited to provide political guidance to further work with a view to reaching a political agreement on the patent package by the end of this year.**