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NOTE

from : General Secretariat of the Council
to : Permanent Representatives Committee (Part I)

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Subject : - Draft Council conclusions on an enhanced patent system in Europe
- General approach on the proposal for a Council Regulation on the Community patent

A. INTRODUCTION

On the basis of an extensive public consultation, the Commission concluded in April 2007, in its Communication on enhancing the patent system in Europe, that action should be undertaken to improve the patent system in Europe. The two main pillars of such action would consist in the creation of a unified patent litigation system and the creation of a Community patent.

Under all successive presidencies since then, the preparatory bodies of the Council have been examining the legal instruments for the realisation of this objective, i.e. an international mixed agreement for the setting up of a single jurisdiction for disputes related to both Community and European patents and a Regulation on the Community patent. Amendments to the European Patent Convention, to the extent necessary for the Community patent to become operational, have also been discussed.

On 28/29 May 2009 the Council took note of a progress report and instructed its preparatory bodies to continue work both on the patent litigation system and on the Community patent with a view to finding solutions enabling the Council to reach agreement in both areas as a matter of urgency.

On 25 June 2009, the Council decided to submit to the European Court of Justice (hereinafter "ECJ") a request for an opinion on the compatibility with the EC Treaty of the envisaged Agreement creating a Unified Patent Litigation System, as contained in 7928/09 (hereinafter "Draft agreement").

The Presidency considers that it is time for the Council (Competitiveness) on 3/4 December 2009 to give a strong signal to the interested parties that progress has been achieved on this very important file by adopting a general approach on the Community Patent Regulation and a set of Council conclusions on the main characteristics of the enhanced patent system. The draft texts prepared by the Presidency to that effect are contained in Addenda 1 and 2 to this Note. The main outstanding issues are analysed in part B below.

A number of delegations had a general reservation on the draft Council conclusions, in particular on the part thereof concerning the European and Community Patents Court (hereinafter ECPC), considering that, as a matter of principle, it would be premature for the Council to adopt conclusions on the ECPC while the request regarding the compatibility of the envisaged litigation system with the EC Treaty is still pending before the ECJ.

In response, the draft Council conclusions, as proposed by the Presidency, clarify that the conclusions on the main features of the ECPC should form the basis of the overall final agreement and are without prejudice to the request for an opinion of the European Court of Justice and conditional on that opinion. It is furthermore stated that the conclusions would have to be revisited, should the ECJ confirm the fundamental legal concerns of some delegations concerning the creation of the ECPC and its envisaged overall architecture as reflected in these conclusions.

With the entry into force of the Lisbon Treaty the adoption of the language arrangements for the Community patent will be regulated by a separate legal basis requiring a special legislative procedure (Article 118, second subparagraph TFEU). The Presidency considers that the translation arrangements will need to be provided for in a separate regulation addressing that specific issue. Therefore, translation arrangements should no longer form part of the draft Regulation on the Community patent.

It is commonly acknowledged by delegations that this issue constitutes an indispensable part of the creation of the Community patent. Wording has therefore been introduced in the draft Regulation (Article 61) clearly stating that the future entry into force of the Regulation on the Community patent would be made dependent upon a prior unanimous agreement within the Council on the separate regulation on the translation arrangements.

B. MAIN OUTSTANDING ISSUES

a) The revision clause concerning the composition of panels and counterclaims for revocation

The composition of the panels, points 9 and 10 of the draft Council conclusions, and the so called “split” jurisdiction, point 13, are issues that have been extensively discussed.

According to point 19 of the draft Council conclusions the Mixed Committee shall have the power, after a certain number of years have elapsed and a sufficient number of cases has been decided, to terminate or modify the provisions with regards to the composition of the panels and the split jurisdiction, on the basis of a report drawn up by the Commission. Point 20 sets out what main objectives the Commission should consider in its report.

Some delegations maintain a reservation on point 19 of the draft Council conclusions, considering that this confers broader amending powers on the Mixed Committee than the draft Agreement. There are also different opinions among delegations on the level of detail with regard to the Mixed Committee’s possibilities to modify the relevant provisions.

The Presidency acknowledges these different views among the Member States. However, the Presidency believes that the flexibility with regard to the counterclaims for revocation in point 13 and the efficient availability of experience under points 9 and 10 could serve as a basis for a compromise. It should also be noted, as stated above, that the Council conclusions provide for a possibility to review the functioning of the composition of the panels and the treatment of counterclaims for revocation after a necessary period of reflection. The Presidency has endeavoured to set out the right level of detail for the revision. Furthermore, the Presidency wishes to provide the Mixed Committee with balanced amending powers, sufficient for a streamlined procedure but within a limited and foreseeable scope.

b) Setting the level of renewal fees and the distribution key

The draft Council conclusions provide that the power to set the level of annual renewal fees for Community patents and the key according to which part of these fees shall be allocated to each Member State lies with the Select Committee of the Administrative Council of the European Patent Organisation. The Select Committee shall be exclusively composed of representatives of the European Community and its Member States. This Committee shall have exclusive competence to adopt and amend rules relating to the level of renewal fees for Community patents, as well as determine the above mentioned distribution key.

Some delegations are of the view that such politically sensitive decisions should be addressed within the Council of the European Union.

In order to accommodate these concerns the Presidency have inserted wording in the conclusions clarifying that the position to be taken by the European Community and the Member States in the Select Committee would need to be determined within the Council.

c) Enhanced partnership

The section of the draft Council conclusions entitled "Enhanced partnership" provides for a series of measures aimed at establishing a synergy between the European Patent Office (hereinafter EPO), entrusted with the task of handling applications for and granting European Patents, and the central industrial property offices of Member States of the European Patent Convention. The aim of the Enhanced Partnership is to enhance the efficiency of the patent granting process and to avoid duplication of work.

A number of delegations maintain a reservation on this section, considering that the Enhanced Partnership should encompass further work-sharing arrangements, in particular providing a right for central industrial property offices, meeting commonly accepted quality standards, to conduct searches on behalf of the EPO.

The Presidency acknowledges that some Member States would prefer further work-sharing arrangements, but it should also be noted that a large majority of Member States support the Presidency proposal. Furthermore, some delegations have signalled that they could not accept further steps in this regard. Under these circumstances, the Presidency maintains that the current text represents a viable middle ground.

C. CONCLUSION

The Permanent Representatives Committee is invited to examine the compromise proposals made by the Presidency with a view to reaching an agreement at the Competitiveness Council meeting on 3/4 December 2009 on a set of Council conclusions and on a general approach on the draft Regulation for a Community patent.