



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 November 2009

16114/09

**PI 123
COUR 71**

NOTE

from :	Presidency / General Secretariat of the Council
to :	Council (Competitiveness)
No. prev. doc. :	16113/09 PI 122 + ADD 1
Subject :	Enhanced patent system in Europe - Adoption of Council conclusions

A. INTRODUCTION

On the basis of an extensive public consultation, the Commission concluded in April 2007¹ that action should be undertaken to improve the patent system in Europe. Such action should consist of the creation of a unified patent litigation system and the creation of a Community patent.

Work in the Council's preparatory bodies has been focusing since then on the legal instruments needed for the attainment of these objectives.

¹ Commission Communication entitled "Enhancing the patent system in Europe", doc. 8302/07.

In the meantime, the Lisbon Treaty has provided a new, specific legal basis² for the creation of unitary intellectual property titles within the European Union. While, according to the new legal basis, unanimity is still required for deciding on the language arrangements for such titles, all the other aspects thereof may as of 1 December 2009 be decided upon by qualified majority.

Taking account of these developments and the significant progress achieved so far within the Council's preparatory bodies, the Presidency has decided to submit to the Council (Competitiveness) on 4 December 2009, for adoption of a general approach, a draft Regulation on the European Union patent (hereafter referred to as "EU patent")³, as contained in 16113/09 ADD 1, as a first step towards the establishment of an Enhanced patent system in Europe. The translation arrangements for the EU patent shall have to be decided upon through a separate regulation at a later stage.

At the same time, the Presidency has also decided to submit to the above mentioned Council a set of conclusions on the main features of the envisaged unified patent litigation system, as well as on the arrangements related to the renewal fees and their distribution for the EU patents and on a system of Enhanced Partnership between the European Patent Office and central industrial property offices.

While the majority of delegations have expressed their broad agreement with the conclusions contained in the Addendum to this Note, a number of issues are still outstanding. The two main outstanding issues are analysed under Part B below. Other issues raised by delegations in the Council's preparatory bodies are summarised in Part C.

² Art. 118 TFUE.

³ According to the Lisbon Treaty, the European Community is replaced by the European Union; therefore, the term "Community patent" has been replaced by "European Union patent."

B. MAIN OUTSTANDING ISSUES

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

The draft Council conclusions provide (point 38) that the power to set the level of annual renewal fees for EU 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 Union and all its Member States. This Committee shall have exclusive competence to adopt and amend rules relating to the level of renewal fees for EU patents, as well as to fix 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 has inserted wording in the conclusions clarifying that the position to be taken by the European Union and the Member States in the Select Committee when deciding for these issues would need to be determined within the Council of the European Union at the same time as the EU Patent Regulation is adopted.

The Presidency believes that this compromise formulation guarantees that the decisions on the level of renewal fees and on the distribution key will remain subject to political guidance by the relevant EU organs.

b) Enhanced Partnership

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

Some delegations maintain a reservation on this section, considering that the Enhanced Partnership should encompass further partnership 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 large majority of delegations, however, has called upon the Presidency to maintain the present delicate balance of the text and to refrain from extending the scope of the currently provided partnership arrangements.

In an effort to strike a compromise, the Presidency has proposed in point 47 that the position of the EU and its Member States on the implementation of the Enhanced Partnership should be determined within the Council of the European Union at the same time as the EU Patent Regulation is adopted. Under these circumstances, the Presidency maintains that the current text represents a viable middle ground.

C. OTHER ISSUES RAISED BY DELEGATIONS

In the course of the discussions, delegations have also expressed doubts as to the timing of drawing Council conclusions on the litigation system pending the procedure before the European Court of Justice, on the appropriateness of differentiating as regards the composition of panels and the share of competence amongst the various first instance divisions, on the notion of technical judges, on the arrangements concerning the languages of proceedings of the European and EU Patents Court (EEUPC), on the majority required in the Mixed Committee to amend the agreement, as well as on the criteria retained for setting the level of renewal fees for the EU patents.

Furthermore, one delegation, supported by one other delegation, has proposed general wording concerning the features of the translation arrangements for the EU patent to be added to point 36. Three other delegations are opposed to such an addition.

D. CONCLUSION

The Council is invited to resolve the outstanding issues set out in this Note and to agree on the draft Council conclusions contained in the Addendum to this Note as part of an agreement on a package deal for an Enhanced patent system in Europe.
