



**COUNCIL OF
THE EUROPEAN UNION**

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**PI 165
COUR 70**

NOTE

from: General Secretariat
to: Permanent Representatives Committee (Part 1)
No. prev. doc.: 17120/11 PI 157 COUR 67 + REV 1
Subject: Draft Agreement on a Unified Patent Court and draft Statute
- Draft Declaration for an operational UPC
- Revised Articles 18, 19, 58, 58a, 58d and 59

Following up to the discussions having taken place in the Permanent Representatives Committee on 18 November on the basis of the Note to the Permanent Representatives Committee contained in 17120/11 REV 1, the Presidency is hereby submitting, for discussion on 23 November, the following texts :

- A draft Declaration, to be made by the Contracting Member States upon signature of the Agreement, ensuring that the future Unified Patent Court shall be operational at the moment it enters into force (see Annex I) as referred to in point 8 of the above Note;
- Revised drafts for Articles 18, 19, 58, 58a, 58d and 59 (changes in relation to the previous version set out in 16741/11 are underlined) (see Annex II), which reflect proposals of the Presidency as outlined in the above Note.

DRAFT DECLARATION OF THE CONTRACTING MEMBER STATES

CONCERNING THE PREPARATION FOR THE COMING INTO OPERATION

OF THE UNIFIED PATENT COURT

The Contracting Member States having signed the Agreement on a Unified Patent Court consider that the Agreement should be ratified as quickly as possible and that the Unified Patent Court should become fully operational upon the entry into force of the Agreement without undue delay. To this end, they undertake to use their best efforts and affirm their willingness to start instantly with the preparation for the expeditious establishment of the Unified Patent Court.

The Contracting Member States are determined to ensure that the Unified Patent Court achieves a high degree of efficiency and delivers expeditious and high quality decisions from the outset. With this in mind they think it necessary that all practical arrangements for the proper functioning of the Unified Patent Court are already in place or are duly prepared before the entry into force of the Agreement.

The Contracting Member States intend to set up without any delay a Preparatory Committee which will be composed by their representatives. The Preparatory Committee shall prepare the practical arrangements and set out a roadmap for the early establishment and coming into operation of the Unified Patent Court. It may establish subgroups as appropriate and make use of teams of experts.

The Contracting Member States consider that the Preparatory Committee should in particular organise without delay training of future judges, prepare Rules of Procedure for the Unified Patent Court, prepare the budget of the Unified Patent Court for the first financial year, make proposals for appropriate facilities for the divisions of the First Instance and the Court of Appeal, prepare the election of the members of the Administrative Committee and the adoption of its Rules of Procedure, prepare the election of the members of the Budget Committee and the Advisory Committee, prepare the election of judges and the recruitment of administrative staff.

The Contracting Member States stress that the most urgent task is to organise training for future judges from Member States where there is currently little experience with patent litigation. To this end, the Contracting Member States who have specialised courts dealing with a significant number of patent cases affirm their willingness to offer appropriate training possibilities, in particular internships, for candidate judges from other Member States without any delay. The Preparatory Committee shall draw up an appropriate training plan and provide support for the organisational arrangements.

The Contracting Member States recall the importance of appropriate Rules of Procedure for the Unified Patent Court and of their uniform application, which are vital to guarantee that the decisions of the Court are of the highest quality and that proceedings are organised in the most efficient and cost effective manner. They affirm their willingness to draw up a complete and detailed set of Rules of Procedure before the entry into force of the Agreement. The Preparatory Committee shall complete a first draft of Rules of Procedure on the basis of input of expert judges, lawyers and industry representatives within six months. This draft should be the basis of a broad consultation with stakeholders before it is finalised with a view of an early adoption by the Administrative Committee. The adoption of the Rules of Procedure should be preceded by a consultation with the European Commission on their compatibility with Union Law.

The Contracting Member States emphasize that, for the proper functioning of the Unified Patent Court, it is important that from the outset it has appropriate facilities at its disposal. The Contracting Member States hosting a local, regional or the central division of the Court of First Instance or the Court of Appeal affirm their intention to have the appropriate facilities in terms of premises, furniture, office and IT equipment [and administrative support staff] in place before the entry into force of the Agreement. The Preparatory Committee shall serve as an interlocutor for the host Contracting Member States and provide the necessary support for the organisational arrangements.

The Contracting Member States consider that the fee system of the Unified Patent Court should be straightforward and predictable for the users. Accordingly, the Unified Patent Court should apply a system of fixed fees. The Court should be accessible for parties with limited resources. Thus the court fees should not be set at a high but at a low to intermediate level. Whilst all users of the Unified Patent Court should contribute to its financing, users having more significant economic interests should provide a reasonable and proportionate contribution to the functioning of the Court, on the basis of a complementary value-based fee system applicable above a pre-defined ceiling.

The Contracting Member States recognize that the proper preparation for the coming into operation of the Unified Patent Court relies on their collective effort and on their efficient cooperation. They will act in good faith and use their best endeavours during the preparatory phase to ensure that the Unified Patent Court will work in the most efficient and cost effective way, will deliver judgments of the highest quality and will from the outset gain the trust and confidence of the users of the patent system.

Article 18
Budget of the Court

- (1) The budget of the Court shall be financed by the Court's own financial revenues and at least in the transitional period referred to in article 58 as necessary, by contributions from the Contracting Member States. The budget shall be balanced.
- (2) The Court's own financial revenues shall comprise court fees and other revenues.
- (3) Court fees shall be fixed by the Administrative Committee. They shall consist of a fixed fee, combined with a value-based fee above a pre-defined ceiling. The Court fees shall be fixed at such a level as to ensure a right balance between the principle of fair access to justice, in particular for small and medium-sized enterprises and micro entities and an adequate contribution of the parties for the costs incurred by the Court, recognising the economic benefits to the parties involved, and the objective of a self-financing Court with balanced finances. The level of the Court fees shall be reviewed periodically by the Administrative Committee. Targeted support measures for small and medium-sized enterprises and micro entities might be considered.
- (4) If the Court is unable to balance its budget out of its own resources, the Contracting Member States shall remit to it special financial contributions.

Article 19
Financing of the Court

- (1) The operating costs of the Court shall be covered by the budget of the Court, in accordance with the Statute.

Contracting Member States setting up a local division shall provide the facilities necessary for that purpose. Contracting Member States sharing a regional division shall provide jointly the facilities necessary for that purpose. Contracting Member States hosting the central division or the Court of Appeal shall provide the facilities necessary for that purpose. During the first three years starting from the date of the entry into force of this Agreement, the

Contracting Member States concerned shall also provide the administrative support staff.

- (2) On the date of entry into force according to Article 59(1), the Contracting Member States shall provide initial financial contributions necessary for the setting up of the Court.
- (3) Option A

The contributions by the Contracting Member States shall be calculated on the basis of the number of European patents in force [...] and the number of European patents [...] with respect to which proceedings for infringement or for revocation have been initiated before the national courts in the Contracting Member States, on the date of entry into force of this Agreement, complemented by equal parts borne by each Contracting Member State.

Option B

The contributions by the Contracting Member States shall be determined in accordance with the scale [...] for the distribution of annual renewal fees for European patents with unitary effect applicable at the date of entry into force of this Agreement.

Article 58

Transitional period

- (1) During a transitional period of seven years after the date of entry into force according to Article 59, proceedings for infringement or for revocation of a European patent may still be initiated before the national courts or other competent authorities of a Contracting Member State having jurisdiction under national law as determined by Union law.
- (2) Any proceedings pending before a national court at the end of the transitional period shall continue to be subject to the transitional regime.
- (3) Unless proceedings have already been initiated before the Court, holders of European patents or patent applications granted or applied for prior to the date of entry into force according to Article 59 shall have the possibility to opt out from the exclusive competence of the Court. To this end they shall notify their opt-out to the Registry by the latest one month before expiry

of the transitional period. The opt-out shall take effect upon its entry into the Registry.

- (4) Unless proceedings have already been initiated before a national court, holders of European patents who made use of the opt-out in accordance with paragraph 3 shall be entitled to withdraw their opt-out at any moment. In this event they shall notify the Registry accordingly. The withdrawal of the opt-out shall take effect upon its entry into the Registry.
- (5) Five years after the entry into force of this Agreement, the Administrative Committee shall carry out a broad consultation with the users of the patent system and a survey on the number of European patents with respect to which proceedings for infringement or for revocation are still initiated before the national courts pursuant to paragraph 1, the reasons for this and the implications. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to prolong the transitional period for another seven years.

Article 58a

Ratification, depositing and notification

- (1) This Agreement shall be ratified by the Contracting Member States in accordance with their respective constitutional requirements. Instruments of ratification shall be deposited with [the General Secretariat of the Council of the European Union (hereinafter referred to as "the depository")].
- (2) Each Contracting Member State shall notify the European Commission of its ratification of the Agreement at the time of deposit of its ratification instrument pursuant to Art. 22(3) of Regulation .../... on the enhanced cooperation in the area of the creation of unitary patent protection.

Article 58d

Revision

- (1) Either seven years after the entry into force of this Agreement or once 2000 infringement cases have been decided by the Court, whichever is the later point in time, and if necessary at regular intervals thereafter, a broad consultation with the users of the patent system shall be carried out by the Administrative Committee on the functioning, the efficiency and the cost-

effectiveness of the Court and the patent system's users' trust and confidence in the quality of its judgments[...]. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to revise [...] this Agreement with a view to improve its functioning.

- (2) The Administrative Committee may amend this Agreement to bring it into line with an international treaty relating to patents or Union legislation [...].
- (3) A decision of the Administrative Committee taken on the basis of paragraphs 1 and 2 shall not take effect if a Contracting Member State declares within twelve months following the date of the decision, on the basis of a resolution of its national Parliament that it does not wish to be bound by the decision. In this case, a Review Conference of the Contracting Member States shall be convened.

Article 59

Entry into force

- (1) This Agreement shall enter into force on *[date]* or on the first day of the *[...]* month after the deposit of the last instrument of ratification by *[9]* Contracting Member States in accordance with Article 58a, including the three States in which the highest number of European patents was in force in the year preceding the year in which the Diplomatic Conference for the signature of the Agreement takes place, whichever is the later.
- (2) In respect of any State which is eligible to accede to this Agreement in accordance with the provisions of Article 58b and which subsequently expresses its consent to be bound by it, this Agreement shall enter into force on the first day of the month following the deposit of the instruments of ratification by that Member State.