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NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	5438/26; WK 1337/1/26 REV 1
Subject:	Supplementary Protection Certificates (SPCs) – Discussion paper

I. Introduction

Following the preliminary exchange of views held at the IP Working Party on 21 January 2026 on a newly envisaged model (presented in doc. 5438/26) that aims at responding to the objections of the Council Legal Service (CLS) on the choice of Article 118 TFEU as a legal basis for the unitary SPC proposals, the Presidency continued the exploratory discussions with CLS on the legal feasibility of relying on Art 114 TFEU as a means to achieve effects which might to a certain extent be similar to those sought in the unitary SPC proposals.

As a summary of those exploratory discussions, which also took account of the Member States' comments (WK 1337/2026 REV 1), the Presidency can share with delegations the following elements for further discussion.

This overview is not to be understood as a Presidency proposition on the matter. It is rather an attempt of providing a basis for an open exchange of views on which elements of the newly envisaged concept delegations see merit in pursuing and elaborating further.

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II. 'European SPC'

The newly envisaged model of a European SPC system aims to simplify procedures as much as possible, while retaining some key features of the unitary SPC. Building on key features of the recast proposals such as a single application, centralised examination and centralised grant, this new model entails the central grant of a new title – a 'European SPC' – which can, depending on the level of harmonisation and design of the system, benefit from a central revocation procedure, a centralised register and a central system for the collection of (reduced) renewal fees.

1. Definition of the title

Considering the idea of the newly envisaged model presented in doc. 5438/26 further and taking into account Member States' comments, the exploratory discussions after the last Working Party indicated the legal feasibility to create a title on EU level ("European SPC") under Article 114 TFEU, provided that it is effectively a bundle of national rights that are harmonised to a certain extent. A European SPC, as envisaged under this model, would be granted as a European title by a central authority but would – upon validation at the national patent office (NPO) – take effect nationally in each Member State designated in the application. Where the basic patent is a unitary patent, the protection conferred by the European SPC, as regards its scope, should correspond to the rights and limitations applicable to that patent.

2. Application for a European SPC

The application for a European SPC would be based on the same European patent:

- A unitary patent (UP) for the 18 UP Member States; and
- Classical European patent(s) for (some of) the remaining non-UP Member States.

3. Designation of Member States for which SPC protection is sought

For the application/designation, under Article 114 TFEU, two options could be envisaged:

- **Option A - Mandatory joint designation:** When the underlying basic patent is a unitary patent, all UP Member States would have to be jointly designated in the SPC application *(added value compared to the recast proposals)*. For non-UP Member States, the designations would remain individual, meaning that the applicant can chose which/how many of the non-UP Member States are designated in the application. The mandatory joint designation of all UP Member States will result in the harmonised effects set out in point 5(a) below.

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- **Option B - Flexible designation**: Applicants would be able to choose whether to designate only one/some of the UP Member States individually or all UP Member States jointly. The harmonised effects set out in point 5(a) below would apply only in the case of joint designation. For non-UP Member States, the designations would remain individual and again be left to the choice of the applicant in the same way as described under option A.

Question:	Given that the level of harmonisation and overall added value of the envisaged model will depend on the option selected above, delegations are invited to express their views on which of the two approaches better achieves these objectives and should therefore be pursued further.

4. Examination and grant of a European SPC

As already sketched out in doc. 5438/26, under this model the SPC protection would be obtained through a centralised application procedure where:

- The applicant files a single application designating those Member States where protection is sought;
- The application undergoes a centralised examination (as currently envisaged in the recast proposal);

- The designated central authority [TBC] would assess the conditions of the application and in the event of a positive assessment, the designated central authority would grant a European title that would then take effect nationally in the territory of the Member States designated in the application.

On this basis, the national patent offices (NPOs) of the Member States designated in the application would validate nationally the certificate for their respective territory.

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5. Effects

To achieve the objectives of the newly envisaged model, the Regulation should provide for certain harmonised effects for a European SPC:

(a) Actions for declaration of invalidity (SPCs based on UP)

In cases where a European SPC is based on an underlying unitary patent and that patent is revoked, it would be possible to provide in the Regulation for the declaration of invalidity of the European SPC to take automatic effect in all Member States in which the unitary patent has effect.

This would require inserting a specific provision in the Regulation providing that, where a European SPC is based on a unitary patent, any decision of the Unified Patent Court on an action for declaration of invalidity concerning a European SPC will extend to all SPCs based on the same unitary patent. Such provision in the Regulation would have to be complemented by a corresponding amendment to the UPCA.

(b) Other actions (all SPCs – based on UP and classical European patents)

- The action would be limited to the territory of the respective Member State, in which the European SPC is in effect.

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- The action could cover all the Member States in which the European SPC is in effect, based on further harmonisation in the Regulation.

(c) Transfer

Any transfer of property could only take effect nationally.

6. Remedies and Appeals against the European SPC

- For UPCA Member States: The system of remedies would have to comply with the COREPER guidance of 29 May 2024;
- Non-UPCA Member States: pending the choice of the central authority, the remedies under national law would apply.

III. Conclusion

Delegations are invited to share their views on the elements of the newly-envisaged model outlined above in the upcoming IP Working Party meetings.

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