



**COUNCIL OF
THE EUROPEAN UNION**

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PROGRESS REPORT

from: Presidency
to : Council (Competitiveness)
No. prev. doc 8992/08 PI 23
Subject : Enhancing the patent system in Europe

I. INTRODUCTION

1. Following the Conclusions adopted by the Competitiveness Council on 4 December 2006 and the European Council on 8 and 9 March 2007, on 4 April 2007 the Commission submitted a Communication on enhancing the patent system in Europe (8302/07).
2. On the basis of this Communication, the Working Party on Intellectual Property (Patents) has been discussing how to set up a new, single European Union patent litigation system for both the European and future Community patents. Progress reports were submitted to the Permanent Representatives Committee in June 2007 (10710/1/07) and to the Competitiveness Council in November 2007 (15162/07). Following a constructive exchange of views, the Council took note of the progress report and instructed its preparatory bodies to continue work on the patent litigation system, with a view to resolving the outstanding issues, and to resume discussions on the Community Patent, with a view to making equally rapid progress in that area.

3. In line with this mandate from the Council and building on the progress made under the previous Presidencies, the Slovenian Presidency has continued discussions on the more technical aspects of the patent litigation system by suggesting specific solutions to the main outstanding issues. The aim of the Slovenian Presidency was to move from the general debate on the architecture and main features of the litigation system to a more detailed discussion of the future legal instrument. Five meetings of the Council Working Party (25 January, 15 February and 2, 8 and 25 April) were devoted to discussions on the patent litigation system based on a series of Presidency working documents (5245/08, 5954/08 and 7001/08), which have led to a preliminary set of provisions for the future legal instrument creating the European Union patent litigation system (7728/08). The preliminary set of provisions was discussed throughout April and, on the basis of those discussions, delegations were supplied with a more comprehensive and revised version of the text of the future legal instrument (9124/08), which will be the subject of discussions at the Working Party meetings on 28 May and 11 June.
4. The Slovenian Presidency has also resumed work on the Community patent and has suggested possible solutions for the main outstanding issues, i.e. the translation arrangements and the distribution of revenue from the renewal fees for Community patents. To this end, the Presidency forwarded two working documents to Member States (6985/08, which was discussed in the Working Party on 12 March, and 8928/08, which includes a table illustrating the suggested criteria for the distribution of renewal fees, discussed in the Working Party on 15 May). In addition, a revised version of the proposal for a Regulation on the Community patent, aligned on the text of the future legal instrument for the patent litigation system, was submitted to Member States for discussion at a future meeting of the Working Party.
5. The purpose of this report is to inform the Competitiveness Council of the progress achieved so far as a basis for an exchange of views at its meeting on 29 and 30 May 2008.

II. PROGRESS ACHIEVED SO FAR

6. Considerable progress has been achieved on both the patent litigation system and the Community patent, thanks to the positive and constructive attitude shown by delegations throughout the discussions. While some delegations would prefer to keep progress on patent litigation separate from that on the Community patent, others are of the opinion that consensus should be reached on both areas simultaneously. Therefore it would seem that a future political agreement would be difficult to achieve in the absence of a "package" deal covering both the patent litigation system and the Community patent. Accordingly, the Presidency sought to advance work on both in parallel.
7. As regards the patent litigation system, while there appears to be broad agreement on the overall structure, there are also issues which need to be further discussed in more technical detail. These include, in particular, the composition of panels at first instance, the language of proceedings, the jurisdiction for counterclaims for invalidity, transitional arrangements, the modalities for granting the Court of Justice the power to review judgments handed down by the appeal instance, and the funding of the system. The essence of this progress is reflected in working document 9124/08.
8. In response to a request by the Presidency, the Council Legal Service presented orally to the Working Party on 8 April 2008 its preliminary views on the type of legal instrument suitable for creating the envisaged patent litigation system. It was noted that for an international agreement to be concluded by the Community and the Member States (as well as third countries) it would be advisable to request the opinion of the Court of Justice.
9. As regards the Community patent, discussions focused on the two main outstanding issues, i.e. translation arrangements and the distribution of revenue from renewal fees. It is felt that an agreement on these two issues would considerably facilitate an overall agreement on the Community patent Regulation. There was broad agreement that in the interest of the users of the patent system, in particular SMEs, the cost of the Community patent must be affordable.

10. As regards the translation arrangements, it was noted during an initial round of discussions in the Working Party that a majority of delegations would welcome the idea of exploring solutions making use of automated translation systems. Building on those discussions, the Presidency recently submitted a new working document (8928/08), part I of which contains additional suggestions for the translation arrangements aimed at further facilitating access to the patent system for SMEs and, at the same time, safeguarding the legitimate interests of third parties.

11. As regards the distribution to national patent offices of part of the revenue accruing from renewal fees for Community patents, the Presidency suggested identifying the appropriate criteria to be used in order to establish a distribution key. To this end, in part II of the above mentioned working document, the Presidency put forward a number of new suggestions taking into consideration the size of the market, the level of patent activity and the improvement of access of SMEs to the patent system. Discussions on these issues are still ongoing.

III. CONCLUSION

12. The Presidency considers that the progress achieved so far and the constructive approach shown by delegations in discussions within the Working Party provide grounds for optimism that solutions can be found for both the patent litigation system and the Community patent.

13. **The Council (Competitiveness) is invited to:**
 - **take note of this progress report ;**

 - **instruct its preparatory bodies to continue work on the patent litigation system and on the Community patent, with a view to finding solutions and reaching agreement in both areas as soon as possible.**
