



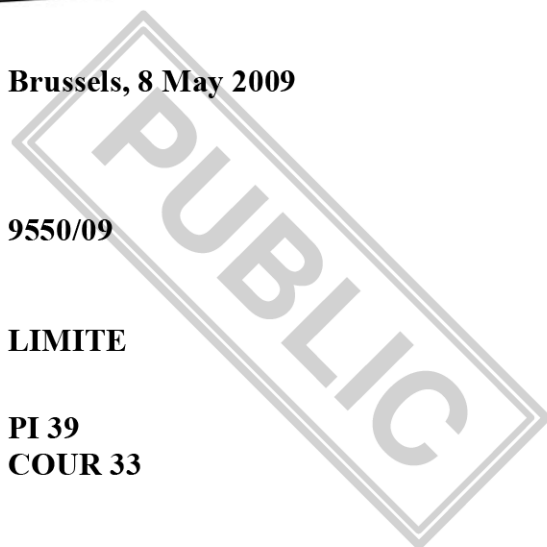
**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 May 2009

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LIMITE

**PI 39
COUR 33**



NOTE

from: Presidency / General Secretariat
to: Permanent Representatives Committee (Part 1)

Subject : **Preparation of the Competitiveness Council of 28 - 29 May 2009**
Enhancing the patent system in Europe
(c)Request for an opinion by the European Court of Justice on the
compatibility with the EC Treaty of the envisaged Agreement
creating a Unified Patent Litigation System
- Agreement in principle

1. The lack of a unified patent litigation system in Europe has been identified by users of the European patent system as a major deficiency of that system. Despite having reached a high degree of harmonisation of substantive patent law across Europe, mainly by means of the European Patent Convention, the possibility of multiple litigation and contradictory judgments over one and the same European patent create legal uncertainty and set the cost of litigation at levels which render the patent system unattractive and difficult to access for users, especially to SMEs.

2. In its 2007 Communication entitled "Enhancing the patent system in Europe", the Commission analysed the deficiencies of the patent litigation system in Europe by discussing different ways forward towards a future solution. The Communication suggested that consensus could be developed around an integrated jurisdictional system which would combine features of the draft European Patent Litigation Agreement (EPLA) and a Community jurisdiction.
3. Since discussions in the Council on the patent litigation system were relaunched in April 2007, successive versions of a draft Agreement on a unified patent litigation system have been discussed within the Intellectual Property Working Party (Patents) (hereinafter referred to as "the Working Party"), the latest version being document 7928/09.
4. The idea of a mixed agreement, to be concluded between the Community, its Member States and other Contracting States of the European Patent Convention, has been gathering support from a very large number of delegations. At the same time, there appears to be broad agreement amongst delegations that it would be appropriate to seek an opinion from the European Court of Justice (ECJ) under Article 300(6) EC Treaty regarding the compatibility of such an agreement with the EC Treaty.
5. The need for such clarification has been acknowledged both by the Council Legal Service and by the Commission in its recent Recommendation to the Council to authorise the Commission to open negotiations on an agreement creating a unified patent litigation system. The Working Party discussed a Presidency Note on this matter on 8 May 2009.
6. The Presidency intends to adopt a two-step approach in the consultation of the ECJ. First of all, agreement should be reached in the Council on the principle of consulting the ECJ under Article 300(6). Secondly, the Council Legal Service would draw up the memorandum to be submitted for the consultation of the ECJ, which would be expected to be discussed in the Working Party in June. After detailed examination in the Working Party, the full memorandum will then be presented to the Permanent Representatives Committee for adoption by the Council as soon as possible before submission to the ECJ.

7. The request should ask the ECJ to provide an opinion on whether the envisaged Agreement is compatible with the EC Treaty. In order to address this issue adequately, the request should be framed broadly to encompass all relevant issues of compatibility with Community law.
8. Where the memorandum describes the envisaged Agreement, it should, first of all, underline that consensus is still to be achieved on the legal basis, the choice of legal instrument and on some substantive issues. The memorandum will also need to reflect the legal doubts that some Member States have expressed on the envisaged Agreement. In particular, certain delegations would prefer to use a Community instrument which would confer jurisdiction for patent litigation cases on the ECJ. On the other hand, some of these delegations would also like to see the ECJ act as a final instance of appeal on all points of law ("cassation") contrary to the role in giving preliminary rulings on questions conferred to it as envisaged by the draft Agreement.
9. In line with the practice of the ECJ, in addition to the Council inviting the Commission and the European Parliament to make observations to the Court on the request, Member States should be invited by the Court to make their own observations. The request to the ECJ should explicitly ask the Court to invite Member States to present their observations on the request from the Council.
10. **The Permanent Representatives Committee is therefore invited to recommend to the Council on 28 - 29 May 2009 to:**
 - **agree in principle, as a first procedural step, to submitting a request for an Opinion under Article 300(6) EC to the European Court of Justice on the compatibility of the envisaged Agreement creating a unified patent litigation system with the EC Treaty; and**
 - **instruct the Council Legal Service to prepare, in accordance with established practice, the necessary documents and submit them to the Council for approval as soon as possible.**
