



**COUNCIL OF
THE EUROPEAN UNION**

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PROGRESS REPORT

from : Presidency

to : Council (Competitiveness)

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Subject : **Preparation of the Competitiveness Council of 28 - 29 May 2009**

Enhancing the patent system in Europe

(a) Proposal for a Regulation of the Council on the Community patent

(b) Draft Agreement creating a Unified Patent Litigation System

- Progress report

1. Following the conclusions adopted by the Council on 4 December 2006 and the European Council on 8 and 9 March 2007, the Commission presented its Communication on enhancing the patent system in Europe (8302/07) on 3 April 2007.

2. On the basis of that Communication, intensive discussions have taken place in the Working Party on Intellectual Property (Patents) (hereinafter referred to as "the Working Party") under the German, Portuguese, Slovenian and French Presidencies. These discussions initially focused on developing the main features of the court system and exploring solutions for the Community patent. The Slovenian Presidency presented a preliminary draft Agreement on a unified patent litigation system and a revised proposal for a Council Regulation on the Community patent. The unified patent litigation system envisages a mixed agreement to be concluded between the Community, its Member States and other Contracting Parties to the European Patent Convention. Under the French Presidency, the Working Party further developed the draft Agreement on a unified patent litigation system and continued work towards resolving the outstanding issues on the Community patent.
3. At its meeting on 1 December 2008, the Competitiveness Council took note of a progress report prepared by the French Presidency (16006/08) and instructed the Working Party to continue work on the patent litigation system and the Community patent with a view to finding solutions and reaching agreement in both areas as soon as possible.
4. In line with this Council mandate, the Czech Presidency has convened six Working Party meetings so far, with about equal time having been devoted to the unified patent litigation system and the Community patent.
5. The aim of this report is to inform the Competitiveness Council of the progress which has been achieved to date and the state of play in these topics.

6. As regards the unified patent litigation system, the Working Party has conducted detailed discussions on the draft Agreement and the draft Statute of the future Court on the basis of two successive Presidency working documents (5072/09 and 7928/09). The first of these documents contained a number of modifications, additions and clarifications of the text, which allowed new details to be added in the second of these documents. This has given delegations a better understanding of the functioning of the envisaged court system. Important areas that have been addressed and further developed by the Working Party are the composition of the panels of judges, the implementation and operation of the agreement, the role of the European Court of Justice (ECJ) in the interpretation of Community law and transitional arrangements. The Working Party has also discussed the economic aspects of a unified and integrated patent litigation system on the basis of an expert study performed by Professor Dietmar Harhoff on behalf of the Commission. His report highlighted the economic benefits of the unified patent litigation system and supported a strong recommendation to proceed with efforts to establish a litigation system for both European and Community patents. The study gave an estimate of total annual savings by businesses of 148 to 289 million EUR compared to the current fragmented patent litigation system. This cost saving exceeds likely operating costs of the future unified patent litigation system by more than five times.

7. In its Opinion of 10 November 2008 (15487/08), the Council Legal Service recommended that the ECJ be consulted on the compatibility of the envisaged Agreement on the European Union Patent Judiciary with the EC Treaty, in accordance with Article 300(6) EC, as soon as a recommendation to open negotiations is submitted by the Commission. Further to the call at the December 2008 Council by a number of Member States for the Commission to propose negotiating directives on a future international agreement establishing a patent litigation system, the Commission adopted, on 20 March 2009, a Recommendation to the Council to authorise the Commission to open negotiations for the adoption of an Agreement creating a Unified Patent Litigation System (7927/09). On 2 April 2009, Commission presented the Recommendation to the Working Party, where a large majority of delegations expressed their wish to proceed rapidly with a consultation of the ECJ on the compatibility of the draft Agreement with the EC Treaty. Accordingly, the Presidency drew up a working document outlining possible issues to be covered in a request for an Opinion under Article 300(6) EC on the compatibility of the draft Agreement with the EC Treaty (9076/09). This was discussed on 8 May 2009. Furthermore, there appears to be broad consensus among delegations to defer a detailed examination and adoption of the Commission's recommendation until the ECJ has given an opinion on the draft Agreement.

8. With regard to the Community patent, the Presidency has advanced discussions in the Working Party by presenting a working document (6044/09) on possible cooperation arrangements between patent offices in Europe based on enhanced partnerships. Member States showed broad support for these proposals and a willingness to develop them further in view of the future Community patent system. Furthermore, the Working Party discussed economic aspects of the Community patent on the basis of an expert study carried out by Professor Bruno van Pottelsberghe on behalf of the Commission. This report highlighted that the creation of a Community patent would facilitate innovation and would, in particular, provide European SMEs and universities with a competitive edge. Moreover, by presenting quantitative simulations of different fee scenarios and keys for the repartition of renewal fees between national patent offices, the study points out clear economic benefits for a Community patent with relatively low annual renewal fees. The Presidency considers that this study provides a solid basis for further work on the level and distribution of renewal fees. Finally, the Working Party discussed a revised version of the Community patent Regulation presented by the Presidency (8588/09), which should form the basis for further discussion and work on the outstanding issues in the coming months.
9. The Presidency considers that on the basis of the constructive discussions in the Working Party, significant progress has been achieved, although there are a number of outstanding issues on both the unified patent litigation system and the Community patent which require further work. With respect to the unified patent litigation system, the Presidency, in line with the wishes of a large majority of Member States, believes that the Council should request an opinion of the ECJ on the compatibility of the unified patent litigation system with the EC Treaty. Finally, the Presidency considers that the Working Party should continue work with a view to enabling the Council to reach an overall agreement on both files as soon as possible.
10. **The Council is invited to:**
- **take note of this progress report, and**
 - **instruct its preparatory bodies to continue work on the patent litigation system and the Community patent with a view to finding solutions and reaching agreement in both areas as a matter of urgency.**