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NOTE

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Subject:	Supplementary Protection Certificate (SPCs) - Presidency Policy Paper

With a view to facilitating the discussions at the meeting of the Working Party on Intellectual Property on 20 October 2025, delegations will find attached a Presidency Policy paper setting out questions to explore the political and legal implications of embedding the network of competent national authorities in the EPO and conferring powers to the EPO to grant and refuse unitary SPCs .

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Policy Paper: Embedding a Network of Competent National Authorities in the EPO and Conferring Powers to the EPO to Grant and Refuse Unitary SPCs

At the IP Working Party on 3 October 2025, delegations stressed once again that the granting procedure for SPCs should **draw on the expertise of national patent offices**, which currently handle SPC examinations.

However, **several delegations** expressed a **preference for embedding the network**, which is suggested to be tasked with the examination of unitary SPCs, **within the European Patent Organisation (EPO)**. Several delegations also called for entrusting the EPO with the power to grant and refuse unitary SPCs.

Several delegations favoured this approach over the Presidency partial revised text (doc. 13278/25), under which a designated national office would act as rapporteur and would take the granting or rejecting decision on a given unitary SPC application, with effect across the remaining UPC (Unified Patent Court) Contracting Member States.

However, no concrete solutions have yet been proposed for implementing a structure that would embed the network into the EPO.

This paper aims to explore what would be politically acceptable and legally sound options of establishing a framework that would allow a network to be embedded in the EPO, and to ultimately make the EPO responsible for the grant or refusal of a unitary SPC, subject to review by the UPC.

Such a system should preserve full competence of the Member States over the governance of the network, including its structure, participation, and examination procedures, in line with the EU *acquis*.

Legal basis in the European Patent Convention to issue Supplementary Protection Certificates

Central to the issue of delegating the role of the granting authority to the EPO is the legality of this approach, including its legal basis, bearing in mind that SPCs are *sui generis* IP rights that are currently issued nationally on the basis of an EU Regulation.

Several delegations have requested that the model follows the approach of Article 9 of the Unitary Patent Regulation (Regulation (EU) No 1257/2012), which assigns certain tasks to the EPO in relation to the unitary patent, based on Article 143 of the European Patent Convention (EPC).

Article 63(2)(b) of the EPC does permit for a Contracting State to grant extensions to the term of protection to the subject-matter of a European patent, which has undergone an administrative authorisation procedure before it can be put on the market. Paragraph 4 of the same article mentions the possibility for *a Contracting State* to conclude an agreement with the EPO on entrusting it with tasks associated with implementing such provisions.

Further, Article 142(1) EPC refers explicitly to a "European patent with unitary character" and allows EPC Contracting States to make use of such an authorisation. That Article is contained

in Part IX "Special Agreements" of the EPC, i.e. the section in the EPC setting out provisions relevant for unitary patents.

Article 142 does not, however, refer to SPCs expressly, and there is no equivalent provision foreseeing a special agreement between contracting parties on SPCs.

It is therefore uncertain whether tasks related to unitary SPCs could be delegated to the EPO under the existing framework in the EPC.

Delegations have stressed the importance of ensuring that the unitary SPC system is legally sound. They are thus invited to express their views on the following elements:

- **whether the current EPC provisions are sufficient** for the EPO to issue SPCs despite not containing explicit reference to them in the EPC;
- if not, **whether an amendment to the EPC would be necessary** to incorporate SPCs within its scope and, if an amendment is considered necessary, where such an amendment should be foreseen and whether such amendment would be feasible within a reasonable timeframe;
- **whether the EPC could be amended via the procedure referred to in Articles 35(3) and 33(1)(b) of the EPC** (bringing the EPC in line with EU law, subject to unanimity of the EPC Contracting States and a one-year scrutiny period before the entry into force), and whether in such case the SPC Regulations would need to explicitly regulate procedural matters, voting rules, financial questions etc; and
- what the **nature of the agreement** concluded with the EPO would be: could the envisaged conferral of tasks to the EPO based on an administrative agreement (between the EPO on the one side, and the EU/EU Member States (concerned) on the other side), or would it require an international treaty with all contracting parties of the EPC.

Negotiations between EU and EPO

Whether an agreement with the EPO would need to be concluded with the EU, with its Member States or with both, depends on whether or not/to what extent the subject matter of the agreement falls within Union competence.

In the view of the Presidency, it is possible that an agreement regulating SPCs could be considered an area of EU external competence in negotiations with third parties given that:

- The EU has already acted in the sphere of national SPCs.
- When the unitary SPC proposals are adopted, these proposals will be regulating the conditions for granting the unitary SPCs, the EU will have legislated comprehensively in this field.
- The EU has external competence for any external commitment that would affect or alter the scope of those common rules, under Article 3(2) TFEU and the ERTA doctrine, that triggers exclusive EU competence.

For negotiating an agreement that involves Union competences, a negotiating mandate will be required (Article 218(3) TFEU).

As regards the accession to, or conclusion of, such an agreement with the EPO, it needs to be borne in mind that the EU is not a party to the EPC, and if the EU has external competence on

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SPCs, Member States would need to be authorised to conclude the agreement on behalf of the Union.

As mentioned, Article 63(4) of the EPC currently only allows for *a Contracting State* to conclude an agreement with the EPO. Thus, while the Commission could be mandated to negotiate with the EPO without the EU being a party to the EPC, it is currently not foreseen under the EPC for the EU to conclude any agreement, and it would most likely have to be the individual Member States who, would have to be authorised to do so, on behalf of the EU.

Alternatively, the EU would have to become party to the EPC, while the possibility for an accession by the EU is currently not foreseen in the EPC (cf. Article 166(1) of the EPC).

Delegations are invited to reflect on these points related to Union competence and give their views regarding the feasibility and the potential timeframe of accomplishing the steps necessary for concluding an agreement with the EPO.

Regulatory Oversight

As outlined above, delegating to the EPO the task of granting SPCs would likely require an agreement between the EU and the EPO. This would necessitate discussions on examination procedures, governance, and oversight.

In the discussion held so far, delegations have indicated that if the network is embedded in the EPO, the EPO's role should remain primarily administrative, while substantive examination should be performed by the network of competent national authorities, as envisaged in the revised Presidency text. In this respect, it is to be noted that there is no precedent for such a distribution of tasks in the current institutional setup of the European Patent Organisation, under which the EPC Contracting States exercise supervisory functions and substantive tasks are performed by departments of the EPO.

The Rules of Procedure of the EPOrg Administrative Council do allow the Administrative Council to establish new subsidiary bodies, but they are confined to advisory functions (cf. Article 14(1)). This could mean that we would need to find a way to establish a structure, where the Member States, and possibly the EU institutions, would continue to have oversight over the procedure, without conflicting with the EPO's current institutional framework.

Delegations are invited to share their views on:

- to what extent the examination procedures, rules of procedure, network structure, and timelines should be governed by EU law; and
- how compliance with EU rules could be ensured.

A governance structure similar to that of the Select Committee established for the Unitary Patent may not provide adequate regulatory oversight for a network as envisaged in the revised Presidency text, given that Articles 142–145 EPC only establish cooperation mechanisms for existing EPO tasks, such as the Unitary Patent, and only concern some EU Member States. Likewise, the entrustment provision in Article 63 EPC does not include any details on the governance arrangements.

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Given that the EPO is not a Union body subject to EU law or accountable to the EU institutions, delegations are invited to consider:

- How should this oversight be designed: to what extent should (and could) regulatory oversight be addressed in an international agreement with the EPO and would any additional measures be needed, for example a governance structure similar to the Select Committee for Unitary Patents? And to what extent would the substantive provisions and administrative provisions have to be regulated via EU Regulations?
- How are necessary amendments to the EPC (and related administrative provisions or rules of procedure) envisaged to be adopted? And, for potentially making use of the procedure referred to in Articles 35(3) and 33(1)(b) of the EPC for bringing the EPC in line with EU law, what rules and what level of detail would be needed in the EU Regulations?
- What role – if any – should the Commission and the EU institutions play in supervising the SPC-related activities if delegated to the EPO?

Appeals before the UPC

Several delegations have proposed that not only invalidity actions but also appeals against EPO decisions on the grant or refusal of Unitary SPCs should fall under the jurisdiction of the Unified Patent Court (UPC). This would likely require an amendment to the UPCA, potentially under Article 87. The feasibility of such an amendment remains to be verified.

Member States are invited to reflect on any legal and/or administrative steps that would have to be made in order to make the UPC responsible for appeals, both for SPCs granted nationally and by the EPO.

Annex – Legal provisions in EPC and EU law

Article 9 of Regulation (EU) No 1257/2012 - Administrative tasks in the framework of the European Patent Organisation

1. The participating Member States shall, within the meaning of Article 143 of the EPC, give the EPO the following tasks, to be carried out in accordance with the internal rules of the EPO:

(a) to administer requests for unitary effect by proprietors of European patents;

(b) to include the Register for unitary patent protection within the European Patent Register and to administer the Register for unitary patent protection;

(c) to receive and register statements on licensing referred to in Article 8, their withdrawal and licensing commitments undertaken by the proprietor of the European patent with unitary effect in international standardisation bodies;

(d) to publish the translations referred to in Article 6 of Regulation (EU) No 1260/2012 during the transitional period referred to in that Article;

(e) to collect and administer renewal fees for European patents with unitary effect, in respect of the years following the year in which the mention of the grant is published in the European Patent Bulletin; to collect and administer additional fees for late payment of renewal fees where such late payment is made within six months of the due date, as well as to distribute part of the collected renewal fees to the participating Member States;

(f) to administer the compensation scheme for the reimbursement of translation costs referred to in Article 5 of Regulation (EU) No 1260/2012;

(g) to ensure that a request for unitary effect by a proprietor of a European patent is submitted in the language of the proceedings as defined in Article 14(3) of the EPC no later than one month after the mention of the grant is published in the European Patent Bulletin; and

(h) to ensure that the unitary effect is indicated in the Register for unitary patent protection, where a request for unitary effect has been filed and, during the transitional period provided for in Article 6 of Regulation (EU) No 1260/2012, has been submitted together with the translations referred to in that Article, and that the EPO is informed of any limitations, licences, transfers or revocations of European patents with unitary effect.

2. The participating Member States shall ensure compliance with this Regulation in fulfilling their international obligations undertaken in the EPC and shall cooperate to that end. In their capacity as Contracting States to the EPC, the participating Member States shall ensure the governance and supervision of the activities related to the tasks referred to in paragraph 1 of this Article and shall ensure the setting of the level of renewal fees in accordance with Article 12 of this Regulation and the setting of the share of distribution of the renewal fees in accordance with Article 13 of this Regulation.

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To that end they shall set up a select committee of the Administrative Council of the European Patent Organisation (hereinafter 'Select Committee') within the meaning of Article 145 of the EPC.

The Select Committee shall consist of the representatives of the participating Member States and a representative of the Commission as an observer, as well as alternates who will represent them in their absence. The members of the Select Committee may be assisted by advisers or experts. Decisions of the Select Committee shall be taken with due regard for the position of the Commission and in accordance with the rules laid down in Article 35(2) of the EPC.

3. The participating Member States shall ensure effective legal protection before a competent court of one or several participating Member States against the decisions of the EPO in carrying out the tasks referred to in paragraph 1.

Provisions in the EPC for the unitary patent

Article 63 ***Term of the European patent***

(1) The term of the European patent shall be 20 years from the date of filing of the application.

(2) Nothing in the preceding paragraph shall limit the right of a Contracting State to extend the term of a European patent, or to grant corresponding protection which follows immediately on expiry of the term of the patent, under the same conditions as those applying to national patents:

> *(a) in order to take account of a state of war or similar emergency conditions affecting that State;*
>
> *(*b) *if the subject-matter of the European patent is a product or a process for manufacturing a product or a use of a product which has to undergo an administrative authorisation procedure required by law before it can be put on the market in that State.*

(3) Paragraph 2 shall apply mutatis mutandis to European patents granted jointly for a group of Contracting States in accordance with Article 142.

(4) A Contracting State which makes provision for extension of the term or corresponding protection under paragraph 2(b) may, in accordance with an agreement concluded with the Organisation, entrust to the European Patent Office tasks associated with implementation of the relevant provisions.

Article 142 Unitary patents

(1) Any group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States.

(2) Where any group of Contracting States has availed itself of the authorisation given in paragraph 1, the provisions of this Part shall apply.

Article 143 Special departments of the European Patent Office

(1) The group of Contracting States may give additional tasks to the European Patent Office.

(2) Special departments common to the Contracting States in the group may be set up within the European Patent Office in order to carry out the additional tasks. The President of the European Patent Office shall direct such special departments; Article 10, paragraphs 2 and 3, shall apply mutatis mutandis.

Article 144 Representation before special departments

The group of Contracting States may lay down special provisions to govern representation of parties before the departments referred to in Article 143, paragraph 2

Article 145 Select Committee of the Administrative Council

(1) The group of Contracting States may set up a select committee of the Administrative Council for the purpose of supervising the activities of the special departments set up under Article 143, paragraph 2; the European Patent Office shall place at its disposal such staff, premises and equipment as may be necessary for the performance of its duties. The President of the European Patent Office shall be responsible for the activities of the special departments to the select committee of the Administrative Council.

(2) The composition, powers and functions of the select committee shall be determined by the group of Contracting State.

Art. 14.1 of the Rules of Procedure of the Administrative Council of the European Patent Organisation

The Council may establish committees, working parties or other subsidiary bodies to advise it on particular questions.

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