



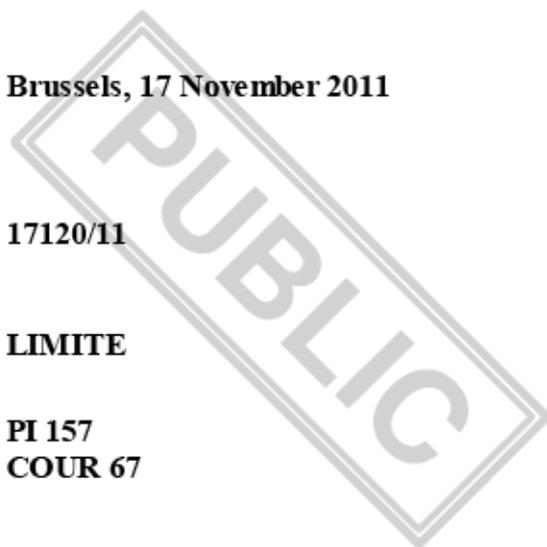
**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 17 November 2011

17120/11

LIMITE

**PI 157
COUR 67**



NOTE

from: Presidency
to: Permanent Representatives Committee (Part 1)

No. prev. doc.: 16741/11 PI 155 COUR 64

Subject: Preparation for the Council meeting "Competitiveness" (Internal Market, Industry, Research and Space) on 5-6 December 2011

- Draft Agreement on the creation of a Unified Patent Court
= Exchange of views

I. INTRODUCTION

1. On 29 September 2011, the Competitiveness Council held an exchange of views on the creation of a unified patent litigation system, in particular on the compatibility of the draft Agreement with the EU legal order. The Presidency concluded that delegations seemed sufficiently reassured in this respect and announced that it would continue working with a view to reaching political agreement on the patent "package" by the end of the year.
2. In the course of October and November 2011, the Presidency organised numerous technical meetings to further elaborate the text of the draft Agreement. A 3-day long drafting session in Warsaw on 12-14 October was followed by meetings of the "Friends of the Presidency" group on 18 and 27 October and 14 November.

In parallel, on 11 October, 9 November and 16 November, three informal trilogues were held on the regulations implementing enhanced cooperation in the area of unitary patent protection, addressing also the European Parliament's draft own-initiative report on a jurisdictional system for patent disputes.

3. The Commission made a commitment to present the necessary amendments to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) early 2012 in order to ensure the compatibility of the draft Agreement with Union law.
4. Whilst the text of the draft Agreement has been thoroughly discussed and elaborated at technical level, there remain three issues that require political consideration and decision:
 - a) The financing of the Unified Patent Court, the financial contributions of the Member States and the level and type of court fees;
 - b) The link between the entry into force of the Agreement on the Unified Patent Court and its coming into operation and the application of unitary patent protection;
 - c) The transitional arrangements and the review clause.

II. KEY ISSUES

5. The financing of the Unified Patent Court, the financial contributions of the Member States and the level and type of court fees.

The Unified Patent Court will be a court common to Member States. Consequently it has to be financed by the financial contribution of the Member States and court fees to be paid by the parties. The basic principles, which need to be laid down in the Agreement, could be the following:

A) Facilities. It is indispensable for the proper functioning of the new litigation system that the Unified Patent Court has the appropriate facilities at its disposal from the very beginning. It seems that this could be best ensured if the Member States hosting divisions of the Court of First Instance or the Court of Appeal provide for the basic facilities. This would allow the use, at least during the initial stage and temporarily, of the facilities of existing national courts as concerns premises, office and IT equipment and administrative support staff. This would not only help to limit significantly the costs of the setting up the Unified Patent Court but it would also ensure that the facilities can be organised locally, without a need for their central management, and that they can be built up progressively in line with the real needs of the Court which can be expected to grow gradually.

Consequently,

- Member States hosting a local division would need to provide the appropriate facilities in terms of premises, furniture, office and IT equipment [and administrative support staff];
- Member States sharing a regional division would need to provide jointly the appropriate facilities in terms of premises, furniture, office and IT equipment [and administrative support staff];
- the Member State hosting the central division or the Court of Appeal would need to provide the appropriate facilities in terms of premises, furniture, office and IT equipment [and administrative support staff].

B) Court fees. The fee system of the Unified Patent Court should be straightforward and predictable for the users. It should also serve the long-term objective of a self-financed Court. Accordingly, the Unified Patent Court should apply a system of fixed fees.

The Court should be accessible for parties with limited resources. Thus the court fees should not be set at a high but at a low to intermediate level.¹

Whilst all users of the Unified Patent Court should contribute to its financing, users having more significant economic interests should provide a reasonable and proportionate contribution to the functioning of the Court, on the basis of a complementary value-based fee system applicable above a pre-defined ceiling.²

C) Contributions by the Contracting Member States. In the first years, the revenue of the Unified Patent Court from the court fees will not be sufficient to balance its budget. Therefore, at least during the transitional period referred to in Article 58 as necessary, the Contracting Member States should contribute to the budget of the Court. Moreover, if the Court is unable to balance its budget out of its own resources, the Contracting Member States shall provide special financial contributions (Article 18).³

The proportion of the financial contribution of the Contracting Member States should be determined on the basis of one of the following two methods:

- contributions could be calculated on the basis of the number of European patents in force in the Contracting Member States, the number of European patents litigated before national courts in the Contracting Member States, complemented by equal parts borne by each Contracting Member State; or
- contributions could be determined in accordance with the scale agreed upon for the distribution of annual renewal fees for European patents with unitary effect.

¹ Examples from the study on the caseload and financing of the Unified Patent Court: Fee for infringement action: €6000, fee for counterclaim for revocation: €4000, fee for revocation action: €6000, fee for appeal against final decision € 9000, fee for appeal against interlocutory order: €4500 (p. 90)

² The ceiling could be set at € 1 million.

³ On the basis of the study on the caseload and financing of the Unified Patent Court, initial/special contributions by the Contracting Member States (taking into account the intermediate fee level) can be expected to reach € 4,8m in 2015, €7,3m in 2016, €8,7m in 2017, €12m in 2018 and €15m in 2019 (p.94).

Contracting Member States should agree on and lay down the principles of the financing of the Unified Patent Court in the draft Agreement.

6. The link between the entry into force of the Agreement on the Unified Patent Court and its coming into operation and the application of unitary patent protection.

In order to ensure legal certainty for patent holders and third parties, in particular alleged infringers and the workability of the system creating the European patent with unitary effect, the establishment of a unified patent litigation system is essential. It is therefore necessary that the ratification of the draft Agreement takes place and Court becomes fully operational as soon as possible.

The draft Agreement should enter into force when [9] Contracting Member States ratify it, including the three States in which the highest number of European patents were in force in the year before the signature of the Agreement. The regulations on unitary patent protection should apply from [...] or the date of entry into force of the Agreement and the date of the coming into operation of the Unified Patent Court, whichever is the later. During a transitional period, until the ratification of the Agreement by all participating Member States, a European patent however should only have unitary effect in those participating Member States where the Unified Patent Court has exclusive competence.

7. The transitional arrangements and the review clause.

A) The transitional arrangements. With respect to "classical" European patents Article 58(1) provides that parties during a transitional period of 5 years have the choice to bring actions either before the Unified Patent Court or before national courts. This is because with respect to those patents, which may be valid only in a small number of Member States, parties may need a judgement only in one or two Member States. Many users of the patent have consistently argued that this period is too short and that in addition a possibility of prolongation beyond the initial period should be foreseen.

Consequently it could be envisaged to fix the initial transitional period at 7 instead at 5 years and to give the Administrative Committee the possibility to prolong the transitional period for another 7 years if a broad consultation with stakeholders reveals that this would be appropriate. Alternatively, as some users argue, a prolongation of the transitional period could be limited in a way that would allow a plaintiff to bring one action in one Member State only and to obtain a judgement there, but would exclude multiple actions before courts in several Member States.

B) The review clause in Article 58d(1) foresees the possibility of a review of the Agreement by the Administrative Committee with respect to the functioning, the efficiency and the implications of the provisions regarding the composition of the panels of the Court of First Instance and the jurisdiction in respect of actions and counterclaims for revocation (Articles 6 and 15a). Some Member States argue that even such a limited review by the Administrative Committee should be possible only by unanimity and should not take effect if a Contracting Member State declares within 12 months following the date of the decision, on the basis of a resolution of its national Parliament, that it does not wish to be bound by the decision. On the other hand, some users argue that a review should be possible also with respect to other provisions on the basis of a broad consultation with stakeholders concerning their functioning and efficiency.

Consequently, it could be envisaged to extend the possibilities for review by the Administrative Committee but make its decisions subject to a scrutiny procedure by the national Parliament as outlined above. In case a national Parliament rejects a decision for review of the Administrative Committee a Review Conference should be convened.

8. Finally, in order to ensure that the Unified Patent Court become operational as soon as possible, the Contracting Member States should make a declaration affirming their willingness to start the preparation for the entry into force of the Agreement without any delay.

9. The Presidency considers that the solutions presented above are efficient, they ensure the good functioning of the Unified Patent Court and provide the necessary legal certainty for the users. Thus, they provide a good basis for a consensus.

III. CONCLUSION

The Permanent Representatives' Committee is therefore invited to give its view on the suggested solutions with a view to prepare discussions and an agreement between Ministers at the meeting of the Competitiveness Council on 5 December.
