



**COUNCIL OF
THE EUROPEAN UNION**

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PROGRESS REPORT

from: Presidency
to : Permanent Representatives Committee (Part 1)
No. prev. doc 8566/07 PI 14
No. Cion prop. 8302/07 PI 11
Subject : Enhancing the patent system in Europe

I. INTRODUCTION

1. On 4 April 2007, following the conclusions adopted by the Competitiveness Council on 4 December 2006 and the European Council on 8-9 March 2007, the Commission presented a Communication on enhancing the patent system in Europe (doc. 8302/07).
2. The above-mentioned document as well as the questionnaire issued by the Presidency (doc. 8566/07) formed the basis for the discussions in the Working Party on Intellectual Property (Patents) on 3 and 11 May and 1 June 2007.

3. The purpose of the present report is to inform the Permanent Representatives Committee of the essence of these discussions and in order to facilitate the continuation of discussions during the incoming Presidency.

II. MAIN ISSUES

4. Delegations broadly welcomed the Commission's approach, which involves the continued search for effective solutions concerning the Community Patent as well as support for a single, European-wide patent jurisdiction. They shared the Commission's opinion that, in order to achieve significant added value compared to the status quo in both of these areas, any solution at EU level must find replies to the demands expressed in the consultations that the Commission held with stakeholders last year.
5. Several delegations were in favour of reopening the discussion on the Community Patent in the light of certain issues mentioned in the Communication, particularly with regard to simplifying the language regime. Some Member States expressed openness toward diverging from the approach contained in the 2003 Common Political Approach¹ and rejected by a significant number of European business associations (translation of claims into all official languages and their legal effect), with some Member States referring to the London Protocol as an appropriate model for the Community Patent. The delegations welcomed the Commission's initiative to continue – together with the Member States – its efforts to find effective solutions that would lead to a considerable reduction in translation costs.

¹ 7159/03 PI 24.

6. As to the Commission's compromise approach to the establishment of a single patent judiciary², no delegation questioned the general principles that, once established, any effective litigation system would have to be decentralised at first instance, have a centralised appeal court and make use of technical expertise in the proceedings. However, there was a widespread feeling that more clarity was needed with regard to the factual details underlying these general principles, which might otherwise be subject to varying interpretation and understanding among the Member States, and that without a common understanding, no true consensus could be achieved.
7. Several delegations were of the opinion that in order to satisfy the above-mentioned principles the Community should join the discussions on the European Patent Litigation Agreement (EPLA) on the basis of a negotiating mandate to be given to the Commission (Option A). They stressed that this system could be established within a comparatively short time-frame since the draft EPLA already exists in detailed form and would need only minor changes in order for it to be adapted to the Community *acquis*. To avoid a duplicate litigation structure, the EPLA could be opened up to a future Community Patent.
8. Other delegations argued that the national jurisdiction for European patents should be transferred to the Community jurisdiction by means of an international treaty between the EU Member States and the European Union, with the possible participation of non-EU States parties to the European Patent Convention (Option B). In the opinion of these delegations, this approach – which aims at setting up a specialised court system within the Community framework – would better safeguard the unitary character of the patent judiciary and fit in better with the Community's legal order. Some of those countries favouring Option B pointed out that national constitutional problems might arise in the case of accession to non-Community judicial institutions such as the EPLA.

² The opinions of some delegations regarding the structure of the future European patent litigation system were given on a provisional basis since their respective governments have not yet completed their internal decision-making procedures.

9. The detailed questions raised during the Working Party's meetings demonstrated the great interest of all delegations in dealing constructively with the complicated legal and factual details of the various options and working towards an overall solution. It was widely acknowledged that Option A (EPLA) is the most fully developed proposal so far and that it contains many essential elements which should serve as a model for a European patent judiciary. On the other hand, many delegations felt that Option B and the Commission's compromise proposal required further work on technical details before delegations could take a final position.
10. The reports provided by the majority of delegations on their respective national (patent) court systems highlighted the existing differences as regards regulatory elements such as the concentration of patent cases in a single or limited number of specialised courts, the allocation of validity and infringement procedures to a single or different courts and the participation of technical judges or experts in the deliberations/decision-making of these courts.
11. Serious legal concerns were raised with respect to both Option A and Option B. For this reason, the legal implications need to be explored further by the Working Party based on a contribution of the Council's Legal Service still to be delivered. This discussion should in particular address the questions of the extent to which the draft EPLA interferes with Community competences (Option A) and whether the transfer of national jurisdiction over European patents to the ECJ is permissible under the EC Treaty (Option B).

III. CONCLUSION

12. On the basis of the Working Party's discussions, it is the Presidency's view that progress has been achieved with respect to the awareness and knowledge of the factual and legal issues which need to be addressed before the Council can adopt conclusions on the basis of a true, unanimous consensus among the Member States. Assessing the impact of available options for a single European patent litigation system has now been facilitated considerably by the detailed overview that has been provided by the delegations' reports on their respective national jurisdictional structures.

13. The Permanent Representatives Committee is invited :

- to take note of this progress report,
- to continue the search for practical and legally feasible solutions for the Community Patent,
- to work on the features and technical details required for a legally secure and cost effective patent litigation system around which consensus could be built.
