



**COUNCIL OF  
THE EUROPEAN UNION**

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**11845/09**

**PI 66  
COUR 60**

**NOTE**

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from: Presidency  
to: Working Party on Intellectual Property (Patents)

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Subject : Questions regarding the Preparatory Work on Rules of Procedure for a Unified Patent Litigation System

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Delegations will find in Annex a Presidency Note aimed at structuring discussions in the meeting of the Intellectual Property (Patents) Working Party on 22 July 2009 on the Commission services' Working Paper on Rules of Procedure for a Unified Patent Litigation System contained in document 11813/09.

## 1. Purpose of the exchange of views in the Working Party

According to Article 22(2) of the latest version of the Draft Agreement on the European and Community Patents Court (hereafter referred to as "Draft Agreement")<sup>1</sup> the Commission of the European Communities shall draw up the proposal for the Rules of Procedure on the basis of a broad consultation with the stakeholders and after having received an opinion of the European and Community Patents Court (below ECPC). As stated by the Commission in document 11813/09, which is part of the ongoing preparatory work initiated by the Commission, it will be a tremendous task to prepare comprehensive, uniform and detailed Rules of Procedure to provide for the most efficient and fair procedural practices, and thus guarantee that the new litigation system becomes the attractive forum for resolving patent disputes that European businesses need. The Presidency therefore deems it important to initiate the work on the Rules of the Procedure already at an early stage, before the Draft Agreement is agreed upon.

It is clear that work on the Rules of Procedure for a Unified Patent Litigation System is still at a very early stage. Therefore, it is not yet appropriate to have a detailed discussion on the draft Rules of Procedure contained in the Annex to doc. 11813/09 (hereafter referred to as "Rules of Procedure"). Instead, the Presidency's purpose is twofold. Firstly, a presentation of the Rules of Procedure will enable Member States *to better perceive how the ECPC will work in practice*. Secondly, Member States will have an opportunity to provide an early input on the *more general principles concerning the main outlines of the proceedings*. The focus as for now will be on the first part, i.e Rules 1-42 of the Rules of Procedure. Member States' views will be important to define the guiding principles and to achieve the right balance. The point of departure for the discussion in the Working Party will be document 11813/09 and the questions set out below.

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<sup>1</sup> Document 7928/09.

## 2. The purpose of the Rules of Procedure

A useful starting point for this exercise is to bear in mind the objectives that should be fulfilled by the future ECPC, which shall improve the enforcement of patents and enhance legal certainty. The ECPC shall be designed to ensure expeditious and high quality decisions, striking a fair balance between the interest of right holders and other parties and taking into account the need for proportionality and flexibility. It shall be able to deal with litigation in ways which are proportionate to its importance and complexity according to Article 23 of the Draft Agreement. The procedure shall be expedient, cost-efficient and secure. The Rules of Procedure should further embody the creation, continuous development and maintenance of a uniform procedure for the ECPC, safeguarding these objectives.

## 3. Points for discussion on Rules of Procedure 1–42

### 3.1 *Do Member States agree on the general principle that the case shall be set out as early as possible in the proceedings?*

- Considering especially the **initial written procedure**, whereby the parties shall set out the general framework for the proceedings, such as the subject matter of the case, the order or remedy sought, the facts relied upon and the nature of evidence relied upon to a reasonable extent. (See Section 1 of Rules of Procedure).
- Considering also the purpose of the **preparatory procedure**, giving the judge rapporteur the necessary powers to actively manage the case and to ensure a fair, orderly and efficient preparatory procedure, including a possibility to conduct an oral conference in order to prepare for the main oral hearing. (See Section 2 of Rules of Procedure and the general principle of active case management in Article 24 of the Draft Agreement).

### 3.2 *Do Member states agree with the principle of concentration as set out in Rule 38 that the oral hearing shall not last longer than one day as a general rule, notwithstanding the principle of proportionality and the need for flexibility in respect of more complicated cases according as set out in Article 23 of the Draft Agreement?*

- Considering for instance the conditions for a concentrated main hearing such as the principle that evidence by witnesses and experts should be provided for in written sworn statements - as a general rule - but with a possibility to hear witnesses and experts on request and with the possibility for the parties to question witnesses and experts under the control of the ECPC. (See Section 3 of Rules of Procedure.)

***3.3 Do Member States agree with the principle of an overall time frame for the proceedings stating that the cases should be decided within a year, notwithstanding the principle of proportionality and the need for flexibility in respect of more complicated cases according as set out in Article 23 of the Draft Agreement?***

***3.4 Do Member States agree with the general principle that the proceedings shall be based on electronic means of communication, including the service, after the initial service of the defendant?***

***3.5 Do the Rules contained in the Annex of 11813/09 strike the appropriate balance between the Draft Agreement, the Statute and the Rules of Procedure, in particular with regard to the level of detail?***

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