Community patent: establishing a Court, appeals before the Court of First Instance

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The Council held a debate on an enhanced patent system in Europe and adopted **conclusions** on the main features of the future patent system based on two main pillars comprising:

- **the creation of a unified patent litigation system** that would have exclusive jurisdiction in respect of civil litigation related to the infringements and validity of EU and European patents, and would consist of a court of first instance (with a central division and local and regional divisions), and a court of appeal;

- **the creation of an EU patent as a unitary legal instrument for granting patents valid in the EU as a whole**. In a public session the Council also agreed on a general approach (i.e. an agreement in principle pending the opinion of the European Parliament) on a draft regulation establishing the EU patent.

The Council conclusions concern, *inter alia*, **the main features of the European and EU Patents Court**. This should have exclusive jurisdiction in respect of civil litigation related to the infringement and validity of EU patents and European patents. The EEUPC should comprise a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance should comprise a central division as well as local and regional divisions. The European Court of Justice shall ensure the principle of primacy of EU law and its uniform interpretation.

The Composition of the Panels:

- it is vital that the composition of the panels is organised in a way which makes best use of experience of patent litigation among judges and practitioners at national level through pooling of resources. Experience could also be acquired through theoretical and practical training which should be provided in order to improve and increase available patent litigation expertise and to ensure a broad geographic distribution of such specific knowledge and experience;

- all panels of the local and regional divisions and the central division of the Court of First Instance should guarantee the same high quality of work and the same high level of legal and technical expertise;

- divisions in a Contracting State where, during a period of three successive years, less than 50 cases per year have been commenced, should either join a regional division with a critical mass of at least 50 cases per year or sit in a composition whereby one of the legally qualified judges is a national of the Contracting State concerned and two of the legally qualified judges, who are not nationals of the Contracting State concerned, come from the pool of judges to be allocated to the division on a case by case basis;

- divisions in a Contracting State where, during a period of three successive years, more than 50 cases per calendar year have been commenced should sit in a composition whereby two of the legally qualified judges are nationals of the Contracting State. The third legally qualified judge,

who would be of a different nationality, would be allocated from the pool of judges. The legally qualified judges from the pool should be allocated on a long term basis where this is necessary for the efficient functioning of divisions with a high work load;

- all panels of the local and regional divisions should comprise an additional technical judge in the case of a counterclaim for revocation or, in the case of an action for infringement, when requested by one of the parties;

- all panels of the central division should sit in a composition of two legally qualified judges and one technically qualified judge. The technically qualified judge should be qualified in the field of technology concerned and be allocated to the panel from the pool of judges on a case by case basis. Under certain conditions to be defined in the Rules of Procedure and with the agreement of the parties, cases in the First Instance may be heard by a single legally qualified judge;

- the allocation of judges should be based on their legal or technical expertise, linguistic skills and relevant experience.

Actions and counterclaims for revocation: in order to ensure that local and regional divisions work in an expeditious and highly efficient way, it is vital that the divisions have some flexibility on how to proceed with counterclaims for revocation.

- Direct actions for revocation of patents should be brought before the central division.

- A counterclaim for revocation can be brought in the case of an action for infringement before a local or regional division. The local or regional division concerned may; (i) proceed with the counterclaim for revocation; or, (ii) refer the counterclaim to the central division and either proceed with the infringement action or stay those proceedings; or, (iii) with the agreement of the parties, refer the whole case for decision to the central division.

Languages of proceedings: the Draft Agreement, the Statute and the Rules of procedure should provide for arrangements which would **guarantee fairness and predictability of the language regime** for the parties. Furthermore, any division of the EEUPC should **provide translation and interpretation facilities in oral proceedings** to assist the parties concerned to the extent deemed appropriate, in particular when one of the parties is an SME or a private party.

The language of proceedings of the local and regional divisions should in general be the language(s) of the Contracting State(s) where they would be established. Contracting States may however designate one or more of the official languages of the European Patent Office as language of proceedings of the local or regional division they host. **The language of proceedings of the central division should be the language of the patent**. The language of proceedings of the Court of Appeal should be the language of the proceedings at the First Instance.

Any subsequent decisions which would in any way affect the arrangements regarding the language of proceedings under the Agreement on the EEUPC should be adopted by unanimity.

Transitional period: the transitional period should not last longer than five years after the entry into force of the Agreement on the EEUPC. During the transitional period, proceedings for infringement or for revocation of a European patent may still be initiated before the national courts or other competent authorities of a Contracting State having jurisdiction under national law. Any proceedings pending before a national court at the end of the transitional period should continue to be subject to the transitional regime.

Financing: the EEUPC **should be financed by its own financial revenues** consisting of the court fees, and at least in the transitional period, by contributions from the European Union and from the Contracting States which are not Member States. A Contracting State setting up a local division should provide the facilities necessary for that purpose.

The court fees should be fixed by the Mixed Committee on a proposal by the Commission which should include an assessment by the Commission of the expected costs of the EEUPC. The court fees should be fixed at such a level as to ensure a right balance between the principle of fair access to justice, in particular for SMEs and micro-entities, and an adequate contribution of the parties for the costs incurred by the EEUPC.

The EEUPC should be organised in the most efficient and cost effective manner and should ensure equitable access to justice, taking into account the needs of SMEs and micro-entities.

At the end of the transitional period, on the basis of a report from the Commission on costs and financing of the EEUPC, the Mixed Committee should consider the adoption of measures aimed at the **objective of self-financing**.