# Enhanced cooperation in the area of the creation of unitary patent protection: implementation

2011/0093(COD) - 30/05/2011

The Council exchanged views at a public session on the creation of unitary patent protection. The outcome of the debate provides a political orientation for the implementation of enhanced cooperation among 25 Member States towards the creation of a unitary patent title. It paves the way for further work with a view to reaching a general approach at the extraordinary Competitiveness Council meeting devoted to unitary patent protection in Luxembourg on 27 June 2011.

The debate was conducted on the basis of a Presidency compromise text, following the two proposals submitted by the Commission on 13 April with provisions to implement enhanced cooperation in the area of the creation of unitary patent protection:

- the first proposal prescribes how patent holders can obtain European patents with unitary effect that ensures uniform protection for their invention;
- the second proposal contains the translation arrangements.

**Key issues**: despite their general support, delegations identified three key matters where they wish to depart from the Commission's proposal, in order to better reflect the conditions set out in their requests and the Council's authorising decision. The draft proposals were also adjusted to accommodate the additional technical issues raised by delegations.

A) All delegations are **strongly opposed to empowering the Commission to adopt delegated acts on the level of renewal fees for European patents with unitary effect**, as well as the distribution of renewal fees between the participating Member States. Delegations argued that this proposal represents a significant departure from the content of their request for launching enhanced cooperation since point 38 of the 2009 Council conclusions on an Enhanced patent system in Europe which sets out that a "Select Committee of the Administrative Council of the European Patent Organisation should […] fix both the exact level of the renewal fees and the distribution key for their allocation". One delegation raised some concerns relating to the proposed solution and argued that the tasks entrusted to the Select Committee, including setting the level of the renewal fees and their distribution could also be regulated by implementing acts in accordance with Article 291(2) of the TFEU. The Commission, on the other hand, considers any solution other than the use of delegated acts illegal and insists on the use of the latter instrument for determining the level of renewal fees and their distribution. The Presidency compromise proposals acknowledge the concerns of the delegations and propose that the level of renewal fees and their distribution should be set by the Select Committee. The Presidency suggests that the draft Regulation should be modified in accordance with the wording set out in Articles 12 and 12a, of the compromise proposal in the Annex.

B) Almost all delegations underlined the need to reflect the political link between the creation of unitary patent protection and the unified patent litigation system. Consequently, they consider it necessary to establish a legal link between application of the regulations on unitary patent protection and the setting up of the unified jurisdiction. Some delegations underlined that the establishment of such a link should not hinder or block progress in either area. The Commission expressed its understanding towards the request to highlight the political link between the projects through appropriate wording in the draft Regulations. The Presidency suggests that the draft Regulations should be modified accordingly.

C) A majority of delegations requested the proper reflection of the criteria for the **distribution of renewal fees to the national patent offices**. One delegation requested the deletion of all provisions on renewal fees and their distribution from the draft Regulation.

Several delegations wished to reopen the discussion on the criteria and requested adding a new element, i. e. "an equal amount per participating Member State determined on the basis of an established percentage of the annual renewal fees". A significant number of delegations as well as the Commission were against this proposal, insisting that such direct transfer had not been foreseen in the compromise achieved under the Swedish Presidency.

These conclusions state that, according to which the "distribution key should be fixed taking into account a basket of fair, equitable and relevant criteria such as for instance the level of patent activity and the size of the market. The distribution key should provide compensation for, among other things, having an official language other than one of the official languages of the European Patent Office, for having disproportionately low levels of patent activity and for more recent EPC-membership". One delegation requested the deletion of all provisions on renewal fees and their distribution from the draft Regulation. The Presidency is of the opinion that the proposals in the Annex represent a balanced compromise between the different positions and respect the agreement enshrined in the 2009 Council conclusions without reopening the principles set therein.