UNICE
THE VOICE OF BUSINESS IN EUROPE

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IGC WORKING PARTY ON LITIGATION
OPTIONAL PROTOCOL ON AN INTEGRATED JUDICIAL SYSTEM

UNICE COMMENTS

SUMMARY

The integrated judicial system proposed by the protocol **is strongly supported** by UNICE.

In UNICE's opinion **it is vital to have an EP Court of first and second instance**, common to the protocol signatories and which applies uniform substantive and procedural law.

UNICE believes that the "common entity" proposal does not represent an alternative to such an EP court.

I. GENERAL VIEWS

UNICE welcomes very much and fully supports the creation of an integrated judicial system as outlined in the document *Principal elements of an optional protocol on the settlement of litigation concerning European patents*, presented by the Chair of the Working Party on Litigation for its next meeting.

UNICE considers the protocol suggestion (EPLP) as an urgently required move away from the present national enforcement of European patents, which suffers by a legal fragmentation that ignores the market realities of industry. Further, UNICE sees this move as an essential step in the satisfactory development of the patent system in Europe in a longer perspective.

The truly integrated judicial system under EPLP corresponds to the expectations of European industry and represents a completion of the European patent system on the enforcement side, which has been needed for a long time and is necessary for the patent system to fully have its intended effect in promoting innovation in Europe.

For the EPLP states, the creation of a unitary court system, including an EP Court of both first and second instances, will result in a decisive increase in the efficiency in litigation concerning European patents, as demanded by industry.

Realisticaly, the same result is not obtainable in any other way in the near future. In particular, it offers no such alternative to build on national courts with the present fragmentation of national law and procedures. A concentration of litigation of disputes regarding validity and infringement covering several states to a single court is acceptable to industry **only if** the reliability and efficiency of that court meets the high standards envisaged by EPLP.

II. RELATION BETWEEN EPLP AND NATIONAL LAW

UNICE welcomes that EPLP will provide for a further harmonisation of substantive and procedural law, creating a uniform body of law as the basis for patent litigation under EPLP.

UNICE considers this to be an indispensable condition for uniform application in the EPLP states of European patent law in relation to the validity and infringement of European patents. In crossborder situations, patent disputes must be judged in the same way under EPLP irrespective of the country concerned. In view of the basic principle of EPC that European and national patents shall have the same effect and be subject to the same conditions, corresponding harmonisation of national law is also necessary.

To establish this body of uniform law will be a crucial task in the further work on the EPLP system, requiring continued ingenuity and new approaches.

III. RELATION OF THE EPLP TO OTHER INTERNATIONAL PROVISIONS ON JURISDICTION ETC

UNICE agrees that Article 57 of the Brussels and Lugano Conventions allows for EPLP.

In UNICE's opinion it is, however, more essential that the proposal for an EU *Regulation on jurisdiction and the recognition and neforcement of judgements* has to be taken into consideration to ensure genuine and explicit compatibility. From this point of view, a clear legal basis for EPLP in EPC may be essential.

To establish a proposal for achieving said compatibility is a further crucial task for WPL in its continued work on EPLP.

IV INTERRELATION BETWEEN THE EP COURT AND A "COMMON ENTITY"

The proposed common entity is insufficent to ensure the required uniformity in the interpretation of Europen patents and the examination of their validity. However, to establish a common entity in addition to the EP Court for the EPLP states may promote such uniformity for all EPC states.

UNICE therefore welcomes and support the proposal that the EP Court of second instance take on the tasks of a common entity.

In UNICE's opinion, the common entity must, contrary to the German proposal, decide on the questions of validity and infringements in the specific case which is refered to it, as envisaged by the mandate. UNICE further suggests that any member states should have the option to make such references obligatory for its courts.

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V. JURISDICTION OF THE EP COURT

There is in UNICE's opinion no reason now to preclude a possibility of relying on the EP Court for improving efficiency in crossborder litigation which does not exclusively involve such patents.

VI. LOCAL PRESENCE OF THE EUROPEAN COURT OF FIRST INSTANCE

One conclusion at the first WPL meeting was that the EP Court of first instance should have a local presence. UNICE believes that EPLP must provide for a court structure which meets the needs of industry as a whole and effectively creates such a presence in different regions of the EPLP states. Such a region may be a part of larger Member States and may include several smaller Member States.

A primary object of establishing a local presence of the EP Court is in UNICE's opinion to preserve a desirable geographical distribution throughout the EPLP area of professional experience in patent litigation, among practitioners as well as judges. This is particularly relevant for smaller EPLP states where the volume of patent litigation in national patent courts may be limited as a consequence of EPLP. The unitary court system under EPLP should be structured so as to put parties and patent judges in all regions on an equal footing.

To establish an appropriate such local presence will be an important task for WPL in its continued work on EPLP. Some preliminary views of UNICE on this subject are presented in Annex 1.

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ANNEX 1

PRELIMINIARY UNICE VIEWS

ON A LOCAL PRESENCE OF THE EP COURT OF FIRST INSTANCE

Lack of domestic attorneys experienced in patent litigation has limited impact on internationally operating corporations but will increase the burden of such litigation for plaintiffs and defendants having a local organisation only, as SMEs normally have. Thus, parties in regions where local such experience cannot be retained will be at a disadvantage compared with parties in regions where it continues to be available.

It is equally important to preserve professional experience in patent litigation among national judges. Lack of experienced patent judges in the national courts of an EPLP state may endanger not only the judicial quality of national patent courts but also the possibility of recruiting judges with the desirable experience to the EP Court, the first as well as the second instance. In a long perspective, it is neither acceptable to recruit no judges nor only to have inexperienced judges from a certain EPLP state.

To establish a local presence of the EP Court of first instance may be a means of preserving the desirable geographical distribution of said professional experience.

In view of the overriding object of safeguarding the reliability and efficiency of the EP Court of first instance, it is an absolute requirement that a local presence of the Court must not endanger the uniform application of European patent law for the EPLP states. On the contrary, it should be a secondary but important object to contribute to a uniform application of European patent law also in national patent courts of the EPLP states. To establish links to these courts by a local presence of the EP Court may serve to achieve that European patents and national patents in these states in practice confer the same rights, as stipulated by EPC.

If both parties are from the same region, a local presence of the Court in that region is in their mutual interest. In other situations, only one of the parties may benefit from the local presence of the Court. Such an advantage for the defendant is justified when the infringing activity only takes place in the region where the defendant is domiciled (which presumably will be more frequent if the defendant is an SME). When the same infringing activity is related to several regions (which presumably will be more frequent when the defendant is not a single SME), it is justified to give the plaintiff the advantage of the local presence of the Court in one of these regions. This may be of particular interest for an SME exposed to an infringing activity related to the region where it is domiciled.

ORGANISATIONAL STRUCTURE FOR THE LOCAL PRESENCE

A peripatetic EP Court of first instance may be helpful for the parties but it will fail to meet the above objects of the local presence already because of the fact that it will not contribute to the preservation of a geographical distribution of experience. To that end, a permanent organisational basis for the local presence will be required.

Said objects will, however, no more be met by a system of regional chambers of the EP Court *which are separated from each other.* Such a system will not further the creation of the required uniform European practice in contrast to present national traditions. On the contrary, it will create a risk that such chambers develop their own practices which a negative result for uniform European practice by the EP Court of second instance.

In the opinion of UNICE, neither of these alternatives represents an acceptable solution of the desirable local presence of the EP Court of first instance. Instead, an organisational structure must be created *where judges are effectively integrated into a single Court* in the decision making process though they have a permanent organisational basis for a local presence in each region.

For this purpose, all judges should be appointed to the EP Court and should not be permanently and exclusively working with cases from one region. Thus, judges should be assigned to a region as rapporteurs in cases of that region but should also sit as judges on panels of other regions. In a particular case, the panel of judges therefore will include a rapporteur assigned to the region and a judge (or judges) assigned as rapporteurs for other regions.

Cases will be prepared by a judge assigned as rapporteur to the region in question. The pre-hearing phase should be closed by a presentation in writing by each party of its case. These documents will be distributed to all judges assigned to the panel for that case before the hearing, which will be held at the place of the local presence in the region. The presentations in writing will serve as the basis for the hearing, which therefore may be concentrated to oral explanations and evidence and final pleadings.

For the local presence, the EP Court may be linked to a national patent court in order to avoid an unrealistic cost level. In particular when the number of cases of a region does not justify the establishing of a separate and completely self-supporting organisation, a local presence in a EPLP state may in practice not be possible without such a link.

The possibility of a link between the EP Court and a national patent court may also offer smaller EPLP states an opportunity to retain judicial experience in patent litigation on the national level by having a patent judge in a national court also appointed to the EP Court and assigned as rapporteur to the region of that state. The administrative complication involved in such a dual arrangement seems to be a small sacrifice for the possibility of preserving that experience while improving the efficiency in European patent litigation.

COMPOSITITON OF THE PANEL OF JUDGES

Cost considerations speaks in favour of limiting the number of judges sitting on a panel of the EP Court of first instance. This implies, however, that there may be only two judges with legal education in addition to a judge with technical education who participate in a judgment of the EP Court.

Having two judges with legal education on the panel, one of them will be the rapporteur assigned to the region in question and the other judge will be assigned to another region. Since both of these judges need to be experienced in patent litigation, this leaves no room for a less experienced judge to sit on a panel in order to succesively become trained. Consequently, there would be a requirement of experience in patent litigation before a judge is appointed to the EP Court which may be difficult and in a longer perspective impossible for smaller Member States to meet.

In view hereof, it deserves in the opinion of UNICE to consider a possibility of having five judges sitting on a panel, which would open for the composition of three judges with legal education and two with technical.

If there are three judges with legal education on a panel, one can be a qualified judge with less experience in patent litigation. This will reduce the difficulties in recruiting judges to the EP Court from certain Member States without endangering the required high quality of its judicial activity.

If there are two judges with technical education, one can be experienced in the granting of patents, such as a technical member of an EPO Technical Board or an equivalent national body, and the other can be experienced in the particular technical field of interest. Such a combination of technical experience within the court facilitates in a difficult case a correct understanding and evaluation of technical evidence submitted by the parties in the form of expert opinions and otherwise. Therefore, technical presentations would tend to be to the point and the use of party experts would be less likely to become excessive.

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