

THE JUDICIAL SYSTEM FOR COMMUNITY PATENTS

UNICE ADDITIONAL COMMENTS

UNICE has earlier expressed its view on industry's need concerning judicial arrangements for the Community patent (UNICE discussion paper of 26 October 1998). Nevertheless, further to recent developments linked to IGC discussions on the reform of the EU judicial system it would like to reiterate and clarify its views.

1. SUMMARY

- To meet industry's needs, the Community Patent system must include an efficient judicial system with a new unitary court structure, including both a first and a second instance.
- If this implies an amendment of the EU Treaty, this must be done urgently. UNICE urges the Commission to undertake any action necessary for the Community patent system to meet industry's needs, particularly in terms of judicial arrangements.
- Discussions on judicial arrangements for Community patents and European patents must be coordinated.

2. THE DEMAND FOR EFFICIENT JUDICIAL ARRANGEMENTS

The Commission initiative to restart work on a Community patent system has received industry's full support from the start. UNICE would welcome a Community patent system enabling companies to use a unitary title covering the whole territory of the European Union, provided that it meets requirements with regard to costs and efficiency of the judicial system.

UNICE also fully supports discussions in the framework of the European patent Convention to improve efficiency in litigation for European patents by creation of a new integrated judicial system.

The present post-grant fragmentation of patent protection based on national rights enforced before national courts renders enforcement burdensome and hazardous for both patentees and their competitors. A radical improvement of the efficiency in patent litigation in terms of:

- uniformity;
- speed;
- predictability;
- legal certainty;
- reduction of cost;

is necessary for the Community and European patent system to serve its objectives and to be acceptable to industry.

3. THE NEED FOR A COMMON COURT STRUCTURE AND PROCEDURE

The success of the new community patent will depend to a great extent on whether industry's practical needs in terms of judicial arrangements are met, be it as patentees or as competitors.

UNICE sees the following items as indispensable to ensure effectiveness of the future community patent judicial system:

- uniformity must be achieved already in the first instance, by cases being dealt with by a common court;
- there must be a right of appeal to a single common court;
- the above courts must be competent to try both patent infringement and validity, including injunctions, damages and claim amendments. In interpreting claims and in deciding on infringement and validity, factual and legal issues must be considered jointly by the above courts;
- on appeal, cases in the second instance must be tried *de novo* with regard to both infringement and validity;
- preliminary injunction matters must be decided also in the second instance, i.e. the appellate court must have the powers to review such matters fully;
- judges with appropriate technical expertise are required;
- the court procedure must ensure that disputes can be litigated in all instances with the required efficiency. Rules and principles are needed in particular with regard to taking evidence, rules of court procedure, preliminary injunctions, sanctions and relief as well as litigation costs;
- judicial arrangements for Community and European patents must be coordinated.

4. REQUIRED CHANGES TO THE EU TREATY

The arrangements under the 1989 Community Patent Agreement were unacceptable to industry both with regard to national courts of first instance and with regard to the Community Patent Appeal Court.

Thus, allowing the common appellate instance full powers on infringement and revocation actions appealed from national patent courts will not avoid present hazards of patent litigation before national courts or alter the disparities between national substantive and procedural law.

In UNICE's view it is therefore indispensable to allow for a unitary judicial system as outlined above. This applies to both Community and European patents.

In this context, any changes to the EU treaty that are necessary to establish such a judicial structure must be carried out.