

**SUB-GROUP OF THE WORKING PARTY ON LITIGATION
SECOND PROPOSAL FOR AN EPLP
(WPL/SUB 13/01)
UNICE COMMENTS**

I. GENERAL COMMENTS

The Second Proposal represents a remarkable achievement and a major step towards a final proposal. UNICE appreciates that continued efforts are being devoted to maintaining the momentum.

UNICE welcomes the fact that the Second Proposal underlines clearly a number of essential issues, which will require further elaboration in order for an appropriate and predictable common jurisdictional system to be created.

In UNICE's opinion, there is no feasible alternative solution for cross-border patent disputes based on national patent courts of first instance. As UNICE has repeatedly emphasised, it is impossible to create the necessary confidence in any such alternative which does not eliminate present disparities in national judicial arrangements affecting patent litigation.

Before making any detailed comments, UNICE would like to express its concerns regarding the organisation of the first common instance, which it considers a crucial element of EPLP. In UNICE's opinion, a judicial system demonstrates its efficiency and quality through its first instance mechanism. In this respect, UNICE believes that the elements of a solution outlined in the explanatory notes to Part III of the Second Proposal are not satisfactory. Therefore, UNICE calls for further fundamental consideration of this subject.

A new integrated judicial system must offer an entirely practicable expedient for resolving patent disputes and prove itself as an alternative to present, fragmented national litigation. It must not only be beneficial from the point of view of litigants, plaintiffs as well as defendants, but also support geographical distribution of professional experience and competence at national level, among practitioners as well as judges. In particular, during an initial phase but also on a longer perspective, it is essential to make use of the experience of national patent judges and at the same time provide an opportunity to improve their experience.

It is only feasible to meet these objectives by a structure of the first instance that establishes a decentralised organisation with a permanent local basis in regional divisions of the single common court.

However, such a decentralised structure must not jeopardise consistency and reliability in the application of common substantive and procedural law already in the first instance. To this effect, a systematic exchange of judges between different divisions of the Court and an international composition of panels of judges are essential elements of a decentralised organisation. It must secure the necessary education and experience of judges of all divisions, even if some divisions will not have experienced national patent judges from the same region to rely on or only deal with a limited number of cases.

Cases should be decided by panels composed of judges from different Regional Divisions and judges should be assigned to act as *rapporteurs* within a Regional Division and to sit on panels of other Regional Divisions. Judges in Regional Divisions may also serve in a national court.

Cases should be allocated among the Regional Divisions according to established rules similar to normal forum rules. Thus, an arbitrary allocation of cases reflecting capacity is not acceptable in UNICE's view. There may also be a Central Division for the limited number of cases where no Regional Division is an appropriate forum, such as isolated revocation actions between parties who

are not domiciled within the EPLP area. Regional Divisions should also deal with preliminary injunctions and protective measures in actions brought before them.

UNICE below submits its considerations on a series of main issues identified in the Second Proposal. Because of the complexity of the subject, other important topics have not been covered in these comments and UNICE may wish to offer further comments and proposals at the meeting.

II. DETAILED COMMENTS

1. ADMINISTRATIVE COMMITTEE. EXECUTIVE COMMITTEE. PRESIDUM

UNICE generally supports the relevant provisions in the Second Proposal.

2. STRUCTURE OF EPC 1

2.1. Seat of EPC 1

As proposed, EPC 1 would have its seat in one of the Member States of EPLP, the location of the seat being preferably chosen as one easily reached from all major cities in Europe.

The Presidium of EPC 1, the personnel of the Registry and other appropriate staff should be permanently located at the seat.

A full Court structure should be set up at the seat. It may be called the Central Division of EPC 1. There is, however, no need for the Central Division to have more permanent judges than comprised in the Presidium since panels with the same composition as in any other Divisions will hear cases.

2.2. Composition of EPC 1

Member States of EPLP should appoint Judges to the Court or judges may submit applications, but it should be possible for other European States also to appoint judges to the Court.

All the judges except those forming the Presidium should remain located in their countries of origin and may continue to hold a post in a national court there, workload permitting.

Regular meetings of judges appointed to EPC 1 should be organised at the seat.

UNICE believes the requirements set out in Art. 68 of the Second Proposal for appointments of judges to EPC 1 to be excessively stringent. Very few current judges in EPLP countries would pass the test. It would seem possible to require only that a judge is experienced in patent litigation matters.

2.3. Local presence

The Second Proposal seems to favour the creation of Regional Divisions as local courts. While UNICE fully supports the creation of Regional Divisions, it believes further clarification of the concept is required.

UNICE supports the setting-up of Regional Divisions. They should be organised with judges appointed on a rotational basis to the Regional Division, including a presiding judge. Each Regional Division should include judges from different countries and a panel of three judges of that Regional Division would hear cases allocated to a Regional Division. Judges could be appointed to several Regional Divisions if appropriate.

2.4. Composition of panels

UNICE supports the concept of panels comprised of three judges, one of them with a technical background. Each panel should comprise judges of different nationalities, the *rapporteur* being a judge from the country where the relevant Regional Division is installed. In addition, panels may include assessors as defined in Art. 57 of the Second Proposal.

Regarding technical judges, UNICE believes that the necessary experience and training requirements should be applicable to them. Such experience and training would be assessed on a case-by-case basis.

2.5. Allocation of cases to Regional Divisions

UNICE agrees that cases should be allocated on the basis of allocation rules, which will preferably reflect the jurisdiction rules under the Brussels and Lugano conventions, and that allocation should be final and binding on both the parties and the Regional Divisions.

2.6. Languages

While UNICE still believes that the most practical solution in terms of cost and efficiency would be to have all proceedings conducted in English throughout the EPJ, subject to possible derogatory provisions for "purely national cases", other solutions must be explored for the moment .

In this perspective, UNICE suggests considering that the three EPO languages appear the most appropriate choice: the regional chamber where the panel will sit will define the language of proceedings. This option may represent the best compromise because each regional chamber would be associated with one of the three official languages of the EPO, which would be the language of any proceedings at that regional chamber.

One definite advantage of this option would be to avoid situations where none of the judges in a panel would be at all familiar with the language. The judges in a panel would be free to decide in which language they find it easiest to communicate among themselves.

It may also be envisaged that judges are appointed to panels at least partly based on their language affinities.

The decisions would be translated into the other two languages.

In addition, the language of the court should be the same in both instances. If not, filing an appeal would become very costly because all documents produced during the first instance would need to be translated into the language to be used in the second instance.

2.7. Purely national cases

The first problem here is one of definition. It seems appropriate to define a purely national case as a case where all the parties are nationals of, or domiciled in, the same Member State and the infringement and/or validity issues relate only to the rights under a European patent in that Member State.

A second problem is what happens if a case that started as a purely national case develops into a case where one or more of the above requirements are missing: counterclaim arguing invalidity of the whole EP, addition of new defendants from other States, additional claims regarding infringement acts in other countries, etc. This problem must be kept in mind when the various ways of handling purely national cases are being assessed.

