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COMMISSION STAFF WORKING PAPER

SUMMARY OF THE IMPACT ASSESSMENT

Accompanying document to the

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

implementing enhanced cooperation in the area of the creation of unitary patent protection

and the

Proposal for a

COUNCIL REGULATION

implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements

{COM(2011) 215 final}
{COM(2011) 216 final}
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1. INTRODUCTION

Patents are an important enabler for economic growth through innovation. Investment in research (R&D) accounts for 1.9% of GDP in the EU[1] and a functioning patent system is essential to translate that investment into economic growth.

Today, however, patent protection in Europe is fragmented. The Europe 2020 Strategy[2] and the Single Market Act[3] identified the creation of an economy based on knowledge and innovation as a priority. Both initiatives are seeking to improve the framework conditions for business to innovate by creating unitary patent protection in the EU Member States (MS).

In spite of broad recognition of the competitive disadvantage European business faces in the absence of unitary patent protection, in December 2010 the Competitiveness Council could only confirm[4] that there were insurmountable difficulties that made the establishment of such protection in the entire EU impossible to attain within a reasonable period. This statement was followed by a request from 12 MS to establish enhanced cooperation in the area of unitary patent protection. The Commission subsequently submitted a proposal[5] to the Council for authorising enhanced cooperation that was followed by the request of another 13 MS to join the cooperation. The European Parliament gave its consent to the launch of enhanced cooperation on 15 February[6] and the Competitiveness Council adopted the authorising decision on 10 March[7]. As a consequence, the impact assessment report (IA) has to take into account the conditions set by the Council's authorising decision. Finally, this IA does not address the unified patent litigation system that follows a parallel work stream and will be subject to different legal instrument. The Impact Assessment Quality Board issued a favourable opinion on 25 February 2011.

2. CONTEXT – THE EXISTING PATENT SYSTEMS IN EUROPE

In the EU, patent protection can be obtained either through the national patent offices of the MS that grant national patents or through the European Patent Office (EPO).

If the applicant chooses to apply for a "European patent", the application is dealt with by the EPO under the procedures laid down in the European Patent Convention (EPC)[8]. The EPC established centralised procedures for the search, examination and grant of European patents in English, French or German. But a patent that is granted and published, does not take effect automatically. It must first be validated in the States in which the patentee seeks protection, i.e. the European patent has to be "converted" to national patents.

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1 Eurostat, 2008 data.
2 COM(2010) 2020.
3 COM(2010) 608 final/2.
4 Press release 17668/10.
5 COM(2010) 790.
6 P7_TA(2011)0054.
7 Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (OJ. L 76, 22.3.2011, p. 53).
8 http://www.epo.org/patents/law/legal-texts/html/epc/1973/e/ma1.html

3. PROBLEM DEFINITION

The procedure for searching, examining and granting European patents is well-functioning and widely accepted by applicants from Europe and third countries. This standardised procedure, however, is complemented by mandatory post-grant procedures that are complex, divergent and result in unnecessary cost for business. This IA looks into the problems and possible solutions with respect to the post-grant stage of patent protection.

3.1. Problem 1: High costs related to the translation and publication of patents

After the grant of European patents the applicable national validation requirements include translation, publication fees and various formal filing requirements. Where the patent holder fails to observe any of the above, the European patent is deemed to be void *ab initio* in that State. The fees charged by patent agents add to these costs.

Even if the London Agreement[9] reduced the costs of validation requirements in some MS, the overall cost of validation in 3 MS (DE, FR, UK) equal € 680; it reaches € 12 500 in 13 MS and over € 32 000 if a patent is validated in the whole EU. It is estimated the actual validation costs are around € 193 million per year in the EU.

3.2. Problem 2: Differences in the maintenance of patents in the Member States

Renewal fees have to be paid by the patentee each year in each country where the patent is validated. If he/she does not pay the fees, the patent lapses and becomes part of the public domain. Renewal fees show great diversity in the MS. Moreover, there are many auxiliary provisions in the national law that make the maintenance of patents in several MS unnecessarily difficult. The deadlines for the payment of the fees differ, payment by bank transfer is still not possible everywhere, some countries make the appointment of a patent attorney mandatory and communication with the national patent offices is often only possible in the local language. It is estimated that the accumulated cost of the technical assistance for payment can reach € 61-81.2 million over a 10-year period.

3.3. Problem 3: Administrative complexity of registering transfers, licences and other rights

Patents can facilitate transactions in the markets for technology: they can be bought and sold as property titles or, more frequently, be subject to licensing agreements. Transfers and rights are registered in the national patent registers of the countries where the patent is validated. Such registration requires appointing a professional representative in more than half of the MS. Registering the transfer of a patent valid in 5 countries can cost € 2000-2500 in addition to the different procedural fees charged in the MS. Moreover, there are divergent requirements as regards the types of documents to be submitted to the patent register, certificates, etc.

[9] Agreement on the application of Article 65 EPC (London Agreement) adopted in October 2000 *(OJ EPO 2001, 550).*

3.4. Consequence: EU-wide patent protection is expensive

As a consequence, access to comprehensive patent protection in Europe is so costly and complex that it is inaccessible to many inventors and companies. In particular, SMEs often prefer an informal protection of their innovations (i.e. secrecy).

But even when European patents are solicited and granted, they are usually validated only in a few countries selected by the patentee. Currently, a European patent is, on average, validated in 5 MS[10]. The number of validations has even decreased over the last 15 years[11]. Moreover, the administrative burden and complexity of maintaining patents and registering rights and licences generate unnecessary costs for inventors and businesses, including the ones seeking patent information.

The fragmentation of patent protection also renders the enforcement of patent rights more difficult. When goods enter the EU through a MS where a patent is not in force, the patent holder may not rely on the EU Customs Code to withhold the goods suspected to be in breach of a patent[12].

The situation described above has major undesirable effects on the functioning of the internal market. In addition to maintaining the fragmentation of the market, it also has a negative impact on innovation, growth and the competitiveness of European business.

4. SUBSIDIARITY

The creation of European intellectual property rights to provide uniform protection throughout the EU and associated language arrangements is provided for by Article 118 TFEU. The problems outlined above can only be addressed at EU level by a solution that drastically reduces translation and administrative requirements compared to the current regime. EU action is necessary, as without an EU legal instrument MS would not sufficiently be able to establish legal effects attached to patents that are uniform in several MS. Proportionality was taken into account in the analysis of the options.

5. OBJECTIVES

Following from the problem definition, the general objectives of this proposal are to enhance the functioning of the Single Market and foster growth and innovation. These objectives could be achieved by increasing SMEs' access to patent protection, increasing the scope of patent validations and knowledge dissemination (specific objectives).

The above objectives can only be reached by lowering the overall costs of patent protection in Europe, in particular by reducing the translation and publication costs, simplifying the maintenance of patents (renewal) and simplifying the registration of transfers, licensing agreements and other rights.

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[10] Study on the Cost of Patenting by Roland Berger Market Research, August 2004.

[11] Economic cost-benefit analysis of the Community patent by van Pottelsberghe, Danguy, 2009.

[12] Council Regulation (EC) No 1383/2003 (OJ L 196, 2.8.2003, p. 7–14).

6. POLICY OPTIONS AND ANALYSIS

The policy options were measured against the following criteria: effectiveness, cost reduction, simplification and political feasibility. The MS, however, that requested the Commission to propose enhanced cooperation in the area of unitary patent protection also indicated the scope and the objectives of such cooperation. These preconditions had to be taken into account when considering the options.

6.1. Option 1 (Base-line scenario) – the Commission takes no action

Under this scenario, the current patent system in Europe would remain intact. The only improvement could be the accession of more MS to the London Agreement. Accession is, however, not only optional but lengthy and complex. This scenario is ineffective as it would not address the shortcomings of the current European patent system. It would not result in cost reduction or simplification as the problems of validation, renewal and registration would persist. Finally, this option is also not in line with the political engagement of the Commission and the Council to address the problems in the current patent system.

6.2. Option 2 – the Commission continues to work with the other institutions towards an EU patent covering 27 Member States

Under this option, the Commission – together with the Council and the European Parliament – would continue to work towards an EU patent which covers all MS, i.e. would continue the discussions on the basis of the Commission's proposals on the Community patent[13] and on the translation arrangements[14]. This option would fully achieve the objectives of the initiative. It would result in a major cost reduction, as translation costs would amount to € 680 in the entire EU with no additional cost of validation. The overall savings could reach € 159 million per year. From the elimination of the cost of technical assistance for the payment of renewal fees, a saving of € 49-65.2 million in a 10-year period could be foreseen. As the payment and management of the renewal, as well as the registration of the patents and the related rights would be managed centrally, this option would achieve major simplification. However, this option is not feasible politically as the Council had tried and failed on several occasions to reach a unanimous agreement on the indispensable translation arrangements.

6.3. Option 3 - the Commission presents proposals for regulation implementing enhanced cooperation

Under this option, the Commission would present the proposals necessary for the implementation of enhanced cooperation in the area of unitary patent protection. Unitary patent protection would cover the 25 MS that wish too cooperate in this framework. They represent 79% of the territory of the EU and over 92% of the applications are filed from these countries. The unitary patent protection would be optional to the users and would co-exist exist with the current European and national patent systems. The costs and the complexity of patent protection would be significantly reduced. All patent holders would equally enjoy the benefits of this option, no matter whether they are residents in countries inside or outside the enhanced cooperation.

[13] COM(2000) 412.
[14] COM(2010) 350.

Although this option would not bring the full benefits of option 2, it would be effective and have a positive impact on users of the patent system in Europe. The payment and management of the renewal of the patents, as well as the registration of the patents and the related rights would be managed centrally by the EPO with respect to the territory of the participating MS. In a 10-year period, the cost savings from the fees of technical assistance for payments could reach € 5760-7680 per patent if 25 MS participated in the enhanced cooperation. In the non-participating countries patents would still need to be managed one-by-one.

6.3.1. Sub-option 3.1 - the Commission proposes translation arrangements applicable in the area of unitary patent protection that correspond to its proposal of 30 June 2010

Under this sub-option, the Commission would propose translation arrangements applicable in the area of unitary patent protection that are identical to its proposal for the translation regime for the EU patent. The patentee would supply to the EPO a translation of the claims into the two other official languages of the EPO. No additional translations would be required (except in the case of dispute). The average cost of patents for the area of enhanced cooperation would be € 680. The cost of protection for the whole EU could be 15% of the costs today (with 25 participating MS). The overall savings could reach € 58.5 million per year. This sub-option would be cost-effective and result in relevant simplification but did not find sufficient support in Council. The MS requesting the launch of enhanced cooperation wish to include in the implementing regulations some of the elements proposed by the Belgian Presidency on the translation arrangements. The proposal for the draft Council decision authorising the enhanced cooperation contains already a number of substantive elements in this regard. Therefore, this option is politically not feasible.

6.3.2. Sub-option 3.2 – the Commission proposes translation arrangements applicable in the area of unitary patent protection based on its proposal of 30 June 2010 and incorporating elements of a compromise proposal discussed by the Council

Under this sub-option, the above translation arrangements would be complemented by certain elements of a compromise proposed by the Belgian Presidency in 2010, as requested by the MS demanding the Commission to provide for a proposal to launch enhanced cooperation. The main set of linguistic requirements would the one under the EPC. In addition, supplementary translation requirements would be applicable for a transitional period that would result in additional costs for patentees. Therefore, the total costs of translation during a transitional period may vary from approx. € 980 to € 2380 per patent in the area of enhanced cooperation. When high-quality machine translations become available, the cost of translation would be reduced to € 680. The cost of protection for the whole EU could be 20% of the costs today (with 25 participating MS). The overall savings could reach € 50 million per year. This sub-option can be expected to get significant political support.

7. COMPARING THE OPTIONS AND THEIR IMPACTS

When comparing the options, option 2 has the highest score according to the effectiveness, cost reduction and simplification criteria. However option 3 also has major benefits and results in important savings and simplification for the users from Europe and from third countries.

The creation of an EU patent (option 2) would have the most positive impact on the internal market, on the users of patent information and on consumers, as it would integrate the entirety

of the internal market in terms of patent protection. But option 3 would also increase the level of integration not only between the participating MS but also between participating and non-participating countries. By implementing enhanced cooperation, the overall costs and complexity of obtaining patent protection throughout the EU will be significantly reduced, thus, more inventors can be expected to seek patent protection also in the MS that do not participate in the enhanced cooperation.

Improved integration will have a positive impact on consumers' access to goods and services. A better integrated market will ensure better cross-border trade and will facilitate fight against counterfeited goods. The centralised registration and publication of patents by the EPO would facilitate the dissemination of knowledge and have a positive impact on innovation.

Easier and cheaper access to patents in Europe is likely to result in an increased number of innovative SMEs. SMEs have a major role in job creation; they ensure 2/3 of private sector jobs[15]. The increase in the number of new business, therefore, can be expected to have a positive impact on job creation.

While it is clear that in economic terms an EU patent would the most effective, 10 years of negotiation have shown that this option is politically not feasible. The analysis of option 3 shows that its benefits would still be very important. Although the translation regime under sub-option 3.1 would be the most cost-effective, sub-option 3.2 is likely to have the widest support among the MS participating in enhanced cooperation. Therefore, option 3 with sub-option 3.2 is the preferred option.

8. MONITORING AND EVALUATION

Five years after the start of application, the Commission will review the application of the legislation, with particular attention to the transitional translation arrangements. The Commission will also monitor the relevant indexes on the conditions of innovation, the number of patents and their cost on an annual basis.

[15] http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/index_en.htm