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INFORMATION — INTERNAL MARKET

The Convention on a Community Patent

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The final conference for the adoption and signature of the draft Convention for the European Patent for the Common Market (Community patent) is to be held in Luxembourg from 17 November to 15 December 1975. Those taking part in the Conference are the nine Member States and the Commission of the European Communities. The seven non-Community States which are signatories to the Munich Convention of 1973 on the Grant of European Patents (Austria, Greece, Liechtenstein, Monaco, Norway, Sweden and Switzerland), the World Intellectual Property Organization, the Council of Europe, the International Patent Institute and fourteen private international organizations have been invited to attend as observers.

The Luxembourg Conference will bring to a conclusion the work on the creation of a body of European patent law begun by the Six in 1959 on the initiative of the Commission and resumed with new objectives, in 1969. The final conference, which was originally to have been held in May 1974, was postponed at the request of the Government of the United Kingdom. In the meantime, agreement was reached among the Nine on a number of questions the clarification of which the United Kingdom had made a condition for its agreement to the signature of the Convention.

For the Member States of the Community, the Community Patent Convention represents a necessary complement of the first Convention signed in Munich in 1973 by sixteen European States. This first Convention contains all the provisions of substantive and procedural law which are necessary for the grant of a European patent. European patents are granted by the European Patent Office with headquarters in Munich, which was also set up by this first Convention. From the date on which they are granted, European patents count as national patents in the States which are parties to the Munich Convention, i.e. they are subject - with a few exceptions - to the national provisions of the Contracting State in which they have effect.

In order to ensure that once it is granted the European patent is subject to the same legal provisions in all Member States of the Community, the Community Patent Convention creates a uniform body of patent law which contributes to the attainment of the objectives of the Treaty of Rome by eliminating within the Community the distortions of competition and the obstacles to the free movement of goods arising from the territorial limitation of national patent laws. For the time being, national patent laws will continue to exist alongside the Community patent law. The draft, however, also contains provisions in respect of national patents, with the aim of restricting to a minimum the effects of their maintenance on the common market.

Unitary nature of the Community patent

The European patent granted by the European Patent Office under the provisions of the first Convention is a "batch" patent which has the effect of a national patent in the Contracting States. In order to avoid a fragmentation of the effect of the European patent within the Member States of the Community, the nine national patents in the "batch" are combined to form a single patent, the Community patent. This Community patent has the same effect in all Member States. Only as a single entity can it lapse, be transferred or be revoked. Rights conferred by the Community patent are governed solely by the provisions of the second Convention.

One result of this unitary nature is that the Member States may not invoke the reservations contained in the first Convention as regards the term of patents and certain exceptions to patentability (in respect of foodstuffs and medicaments). This is particularly important in the case of Italy, whose national law has up to now made no provision for the patentability of medicaments.

The unitary nature of the Community patent also makes it necessary to ensure that in European patent applications the Member States can only be designated jointly. Designation of only one or of several Member States will be deemed to be designation of all Member States.

A new Article 84(a) of the draft Convention before the Luxembourg Conference contains an exception to this rule. During a ten-year transitional period applicants have a choice between the Community patent and the European patent. The applicant can state that he desires the protection of a patent in only one or in only some of the Member States. If he makes such a statement and designates in his application Germany and France, for example, he receives a European patent for those two countries which has only the effect of a national patent.

Revocation proceedings

In the States party to the first Convention which do not belong to the European Communities the national courts decide, with effect for their respective territories, on the revocation of the European patent, applying the grounds for revocation laid down in the first Convention. For instance, the European patent can be revoked by a Swedish court without this directly affecting its status in Switzerland or Austria. Decisions on the revocation of the Community patent, however, are taken with effect for all Member States by the Revocation Divisions (first instance) and the Revocation Boards (second instance) set up by the second Convention, in accordance with a uniform revocation procedure. These bodies, which are to be incorporated in the European Patent Office as special departments, naturally also make their decisions on the basis of the grounds for revocation laid down in the first Convention. There is a right of appeal to the Court of Justice of the European Communities against decisions of the Revocation Boards.

A new provision in the draft Convention restricts the exclusive competence of the special departments of the European Patent Office to rule on the revocation of the Community patent. Under certain conditions, national courts before which actions for infringement of patent are brought are also to have the possibility of revoking the Community patent with effect for the territory of the Member State in which the national court is situated. This change in the original concept runs counter to one of the fundamental principles of the Community Patent Convention, whereby the Community patent has the same effect in all Member States.

Proceedings for infringement of patent

The national courts, on the other hand, are competent to hear actions relating to infringement of the Community patent. The competent national court gives its decision in accordance with the provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which entered into force on 1 February 1973 between the Member States (with the exception of the new Member States). The national courts must, however, apply the relevant provisions of the second Convention, in which the rights conferred by the Community patent are defined. In order to ensure uniform application of these provisions, provision is made for the Court of Justice of the European Communities to give preliminary rulings on their interpretation. Any national court can refer the matter to the Court of Justice if there is a dispute regarding the interpretation of the Convention. Indeed, in such cases courts of last instance are obliged to do so.

The abovementioned Convention on Jurisdiction and the Enforcement of Judgments is of great practical importance as regards the institution of legal proceedings. Proceedings need be brought only once, before the court in the place of residence of the infringer, in respect of all actions for infringement even where these involve several Member States. The judgment in infringement cases is recognized in principle in all Member States and can be enforced in simplified proceedings even outside the State in which it was delivered.

Prohibition of market-splitting

One of the main aims of the second Convention is the dismantling of territorial barriers to the marketing of patent-protected products. The draft therefore prohibits the splitting of the common market into nine national sub-markets. The products protected by the Community patent can circulate freely once the proprietor of the patent has put them into circulation in any part of the common market. The same applies to products lawfully put into circulation by contractual licensees; that is to say, area licences for parts of the common market are permissible but do not guarantee absolute territorial protection. If, for example, the holder of a licence for France has lawfully put a product into circulation, the licensee for Germany cannot prohibit the importation of that product. In any judgment as to what is lawful, the future development of Community law, in particular the interpretation of Article 36 of the Treaty of Rome with respect to the exercise

in a manner compatible with the Community of the rights conferred by the patent, will play an important role.

In order to guarantee the free movement of goods also in those cases where the patent protection is based not on a Community patent but on one or more national patents held by the same person or by persons who are linked commercially, the draft contains a provision whereby the putting of the product into circulation in any Member State results in the exhaustion of the right conferred by the patent; in other words, the proprietor of national patents for Germany and France, for example, cannot use his German or French patent to prohibit the importation of products which he himself or a third party acting with his consent has put into circulation in another Member State.

A Protocol attached to the draft Convention provides that during a transitional period of from five to ten years the provisions designed to prevent market-splitting are not to be applied. Adoption of this Protocol would enable patentees to exercise control over the marketing of their products within the common market and to protect national markets from imports from other Member States.

In two Opinions addressed to all Member States in April 1974 and September 1975 the Commission pointed out that both the Protocol and a proposal before the Luxembourg Conference for an amendment which would lead to a restriction of free trade in patent-protected products represent clear infringements of Community law.

Compulsory licences

The patent laws of all the Member States contain provisions under which the right of exclusivity conferred by the grant of a patent can be restricted if the manner in which the monopoly is exploited is prejudicial to the public. The following kinds of compulsory licence are of particular importance: compulsory licences on grounds of the public interest (public security, health, national defence); compulsory licences on grounds of non-exploitation (the product protected by a patent is not manufactured or not manufactured in sufficient

quantities on national territory); compulsory licences on grounds of dependence (the invention which is the subject of a recent patent is based on an invention protected by a previous patent and can therefore not be developed without the consent of the proprietor of the earlier patent).

The draft lays down the principle that compulsory licences in respect of the Community patent are to be granted by the competent national courts in accordance with national law with effect for the territory of the State concerned. Since the conditions for the grant of compulsory licences vary from one Member State to another, the reference to national law leads to varying degrees of restriction of the right conferred by the Community patent and thus to unequal conditions of competition for industry.

For these reasons, the Member States have undertaken in a draft resolution to commence the necessary work as soon as the Convention has entered into force to enable it to be supplemented, following a transitional period, by uniform rules on the grant of compulsory licences.

Participation of non-Member States

Accession to the Community Patent Convention is open only to future Member States of the European Community. Non-Member States which are parties to the first Convention and which form a customs union or a free trade area with the European Economic Community may, however, be invited by the Council to conclude a special agreement with the Member States in which the conditions of their participation in the Community Patent Convention are determined.

Entry into force of the two Patent Conventions

The Member States had originally intended to bring the Munich Convention of 1973 and the Community Patent Convention into force at the same time. Because of the approximately eighteen months' delay in terminating work on the Community patent, Member States have been given the option of ratifying the Munich Convention first so that the opening of the European Patent Office need not be postponed.

The filing of at least six instruments of ratification, which is necessary for the Munich Convention to enter into force, can be expected to be completed by the end of 1976 at the latest. Since it will be at least two years after commencing its activity before the European Patent Office will be able to grant European patents, it can be assumed that by this time the nine Member States will also have ratified the Community Patent Convention.

For the Member States of the European Communities, the two European Patent Conventions have the effect of a single treaty which creates within the common market conditions for the acquisition and exploitation of patents which are similar to those of an internal market. Industry is enabled to implement a manufacturing and marketing policy which is adopted to the scale of the common market and which is not impeded by national frontiers. The new patent system will facilitate and expand trade between States by creating equal conditions of competition and bringing about the free movement of goods.
