



The draft agreement on the creation of a European and Community Patent Court is not compatible with European Union law

The Council of the European Union drew up a draft international agreement, to be concluded between the Member States, the European Union and third countries which are parties to the European Patent Convention,¹ with the objective of creating a court with jurisdiction to hear litigation related to the European patent and the future Community patent. The wider context of that draft agreement is the introduction of an integrated system for the European and Community patent to be issued by the European Patents Office. Currently, although the procedure for granting that right is unitary, the European patent breaks down into a bundle of national patents, each governed by the domestic law of the States which the holder of the right has designated. By contrast, the distinguishing feature of the future Community patent is that it would be unitary and autonomous and would have equal effect throughout the European Union. It could be granted, transferred, declared invalid or lapse only in respect of that territorial area.

The draft international agreement is to establish a European and Community Patent Court composed of a court of first instance - comprising a central division and local and regional divisions – a court of appeal and a joint registry.

Against that background, the Council made a request to the Court of Justice to obtain its opinion on the compatibility of the envisaged agreement with European Union law.²

The Court observes, first, that, under that agreement, the European and Community Patent Court is an institution which is outside the institutional and judicial framework of the European Union. It is an organisation with a distinct legal personality under international law. The draft agreement confers on it exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of patents, in particular actions for actual or threatened infringement of patents, actions for revocation of patents and certain actions for damages or compensation. To that extent, **the courts of the Member States** are divested of that jurisdiction and accordingly **retain only those powers which do not fall under the exclusive jurisdiction of the European and Community Patent Court**.

The Court adds that that court, in carrying out its tasks, has the duty to interpret and apply European Union law. The Court has, it is true, held that an international agreement providing for the creation of a court with the duty to interpret, inter alia, provisions of European Union law is not, in principle, incompatible with European Union law. The Court has also accepted that an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and that the autonomy of the European Union legal order is not adversely affected. However, unlike other international judicial systems on which the Court has ruled in the past,³ **the European and Community Patent Court has the duty to interpret and apply** not only the envisaged international agreement, but also **provisions of European Union law**.

¹ The European Patent Convention, signed at Munich on 5 October 1973, is a treaty to which 38 States, including all the Member States of the European Union (but not the Union itself) are currently parties.

² 21 Member States have intervened in this procedure.

³ Opinion 1/91 of 14 December 1991 and Opinion 1/00 of 18 April 2002.

Further, the Court declares that **the creation of that court would deprive national courts and tribunals of the power, or, as the case may be, the obligation, to refer questions to the Court for a preliminary ruling** in the field of patents, given that the draft agreement provides for a preliminary ruling mechanism which reserves to the European and Community Patent Court the power to refer questions for a preliminary ruling while removing that power from the national courts.

The Court observes that the current system establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order. The tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of European Union law.

In that regard, the Court recalls the principle that a State is obliged to make good damage caused to individuals as a result of breaches of European Union law for which it is responsible, irrespective of which authority of that State, including a judicial authority, caused the breach. Likewise, where an infringement of European Union law is committed by a national court, a case may be brought before the Court to obtain a declaration that the Member State concerned has failed to fulfil its obligations.

However, the Court states that **if a decision of the European and Community Patent Court were to be in breach of European Union law it could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States.**

In those circumstances, the Court considers that the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law. The agreement would also affect the powers of the Court to reply, by preliminary ruling, to questions referred by those national courts. Accordingly, **the agreement would alter the essential character of the powers conferred on the institutions of the European Union and on the Member States which are indispensable to the preservation of the very nature of European Union law.**

Consequently, **the Court concludes that the envisaged agreement creating a European and Community Patent Court is not compatible with the provisions of European Union law.**

NOTE: A Member State, the European Parliament, the Council or the Commission can request the opinion of the Court of Justice on the compatibility of an envisaged agreement with the Treaties. Where the opinion of the Court is adverse, the envisaged agreement may not enter into force unless it is amended or the Treaties are revised.

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The [full text](#) of the opinion is published on the CURIA website

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