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INFORMATION NOTE

From: Presidency
To: Council Competitiveness
Subject: Implementation of the Patent package
- Presentation by the relevant Committee Chairs, requested by the
Commission

The Chairs of the Preparatory Committee and Select Committee of Administrative Council of the European Patent Organisation have prepared a report on the latest state of play in the implementation of the Patent package.

Delegations will find this report in Annex.

The Council is invited to take note of this report.

Implementing the Patent package

Third progress report

1. State of implementation of Regulations 1257/2012 and 1260/2012

1.1. General framework

Regulation 1257/2012¹ defines a “European patent with unitary effect” as 1) a patent granted by the European Patent Office under the rules and procedures laid down by the European Patent Convention (hereinafter referred to as "the EPC") and 2) which benefits from unitary effect in the participating Member States by virtue of Regulation 1257/2012².

The European patent with a unitary effect thus relies on the interplay of two legal instruments, i.e., Regulation 1257/2012 and the EPC. Regulation 1257/2012 defines the conditions and the scope of the unitary effect that will be attributed to a European patent granted under the rules of the EPC.

It is in this context that Article 9(1) of Regulation 1257/2012 lays down that the participating Member States shall give the European Patent Office (hereinafter referred to as "the EPO) administrative tasks related to the unitary effect as foreseen in Article 143 of the EPC.

Article 9(2) of Regulation 1257/2012 imposes also an obligation on the participating Member States to set up a Select Committee (hereinafter referred to as "the Select Committee") in the framework of the European Patent Organisation.

¹ Regulation (EU) N° 1257/2012 of the European Parliament and of the Council of 17 December 2012, implementing enhanced cooperation in the area of unitary patent protection, OJ L 361, 31.12.2012, p. 1.

² Article 2, points (b) and (c) of Regulation 1257/2012.

Within the Select Committee, the participating EU Member States shall ensure compliance with Regulation 1257/2012 in fulfilling their international obligations undertaken in the EPC and shall cooperate to that end. In their capacity as Contracting States to the EPC, the participating Member States shall within the Select Committee ensure the governance and supervision of the activities related to the tasks referred to in Article 9(1) of Regulation 1257/2012 and shall ensure the setting of the level of renewal fees and the setting of the share of distribution of the renewal fees in accordance with Articles 12 and 13 respectively of that Regulation.

1.2. Creation, activities and timetable of the Select Committee

Summary

Since the last information provided to the Competitiveness Council at its meeting of May 2014, the Select Committee has:

- adopted in principle the draft Rules relating to the Unitary Patent Protection, with the exception of some technical aspects that require further discussion;
- continued work on the level of renewal fees which will have to be fixed by the EU participating Member States in the Select Committee on the basis of simulations of fees scenarios and their financial implications.

During the next meetings to be held until the end of this year, the Select Committee will concentrate its work on the financial and budgetary aspects of the implementation of the Unitary Patent Protection in particular on projections of scenarios for the level of renewal fees and estimations of costs for the administration of the Unitary Patent Protection. The Select Committee will also initiate discussions on the share of distribution of the renewal fees among the participating Member States.

Institutional aspects

The Select Committee held its inaugural meeting on the 20th of March 2013. Since then the Select Committee has held eight more meetings respectively on the 29th of May, the 25th and the 26th of June, the 18th of September, the 30th of October, the 9th and 10th of December, the 26th of March, the 26th and 27th of May and the 24th of June. The next meeting is foreseen on the 28th of October.

The Select Committee consists of representatives of the 25 participating EU Member States and the Commission as an observer *de jure*. Business Europe, the European Patent Institute and other EPC Contracting States that are not EU Member States participating in the enhanced cooperation have received the status of observers.

The Rules of procedure of the Select Committee are available on the following webpage:
[http://documents.epo.org/projects/babylon/eponet.nsf/0/5090D9BDBB96C175C1257BAB005A07FA/\\$File/dsc1301_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/5090D9BDBB96C175C1257BAB005A07FA/$File/dsc1301_en.pdf)

Substantive aspects

After having dealt with institutional issues, the Select Committee has since June 2013 concentrated its work on the legal aspects of the implementation of the Unitary Patent Protection. By June 2014, the Select Committee has almost completed all its work on the legal aspects.

During its ninth meeting on the 24th of June 2014, the Select Committee has adopted in principle the Draft Rules relating to Unitary Patent Protection with the exception of some technical aspects that require further discussion.

The Rules relating to Unitary Patent Protection concern mainly to the procedure that will be administrated by the EPO in carrying out the tasks that the participating EU Member States will entrust to the EPO in accordance with Article 9(1) of Regulation 1257/2012. They concern administrative procedures like the filing of the request for unitary effect, the filing of a statement of licenses of right, the administrative rules related to the payment of renewal fees, the entries in the Register for unitary patent protection, etc.

At its meeting on 26 March 2014, the Select Committee had already adopted the Rules for the compensation scheme for reimbursing translation costs for applicants obtaining European patents with unitary effect. Those Rules relate mainly to the administrative procedure that the EPO will apply in order to reimburse the relevant translation costs in accordance with Article 5 of Regulation 1260/2012³. The financial aspects related to the compensation scheme, including the level of the compensation and the allocation of the costs of the scheme, will be discussed together with the other financial and budgetary aspects of the implementation of the Unitary Patent Protection.

³ Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361, 31.12.2012, p. 89.

As already indicated in the previous reports submitted to the Competitiveness Council, in December 2013 and May 2014, members of the Select Committee had an exchange of views on possible measures to be taken at national level to accompany the Unitary Patent Protection. Those possible measures relate in particular to the need for information concerning the registration of unitary effect, the simultaneous protection of an invention by a national patent and a European patent with unitary effect, the registration of compulsory licences in the Register for Unitary Patent Protection and remedies in cases where a request for unitary effect has been rejected after the deadlines for validations of the European patent at national level have expired.

At its meeting in October 2013 the Select Committee has initiated the discussions on the financial and budgetary aspects of the implementation of the Unitary Patent Protection. Those aspects concern mainly the level of the renewal fees, the budgetary aspects of the tasks entrusted to the EPO in accordance with Article 9(1) of Regulation 1257/2012 and the costs for the implementation of the compensation scheme for the reimbursement of translation costs referred to in Article 5 of Regulation 1260/2012. During this meeting, statistical and financial information relating to the validation and maintenance of European patents and the current renewal fees have been presented to the Select Committee.

During its 8th and 9th meetings, the Select Committee has continued its preparatory work on the level of renewal fees on the basis of simulations of scenarios for the level of renewal fees and their financial implications.

The objective is now to further concentrate the work of the Select Committee during its next meetings on the financial and budgetary aspects. At the upcoming 10th meeting of the Select Committee to be held on the 28th of October, the remaining open legal issues and an estimation of the costs related to the tasks entrusted to the EPO in accordance with Article 9.1 of EU Regulation N°1257/2012 will be discussed. The Select Committee will also initiate discussions on the share of distribution of the renewal fees among the participating Member States.

Timetable

Finally, during its meeting of March 2014, the Select Committee has adopted the timeline of its work for 2014.

The work of the Select Committee has to proceed in parallel to the work of the Preparatory Committee for the creation of the Unified Patent Court. The timetable of the work of the Select Committee needs to insure that the implementation of the Unitary Patent including the legal, administrative and financial measures are completed in due time before the entry into operation of the Unified Patent Court. The current roadmap of the Select Committee foresees completion of the work of the Select Committee during the first semester 2015.

1.3. Work of the EPO on the implementation of the Machine Translation Program

Regulation 1260/2012 recalls in recital 11 that “ *In order to promote the availability of patent information and the dissemination of technological knowledge, machine translations of patent applications and specifications into all official languages of the Union should be available as soon as possible. Machine translations are being developed by the EPO and are a very important tool in seeking to improve access to patent information and to widely disseminate technological knowledge. The timely availability of high quality machine translations of European patent applications and specifications into all official languages of the Union would benefit all users of the European patent system. Machine translations are a key feature of European Union policy. Such machine translations should serve for information purposes only and should not have any legal effect.*”

In parallel to the work of the Select Committee, the EPO has continued to further roll out its machine translation program. Machine translations from and into English are now available for all official languages of the European Union. Translations from and into French and German are similarly available for these languages. More details on the EPO Patent Translate service can be found at <http://www.epo.org/searching/free/patent-translate/faq.html>

2. Building the Unified Patent Court

The Preparatory Committee continues to prepare for a Unified Patent Court (UPC) that meets users' expectations with regard to quality and timeliness of decisions. The Committee has recently updated its Roadmap and published it on the UPC website. The next meeting of the Preparatory Committee will take place on 4 November 2014.

Overall summary

Since the update provided to the Competitiveness Council at its last meeting in May 2014⁴ the Preparatory Committee has:

- Agreed on a method for collecting statistical data with regard to the volume of patent litigation;
- Had first discussions on how to carry through the transition from the preparatory phase into the operational phase;
- Approved a list of suitable candidate judges which has been prepared by the Preparatory Committee's Advisory Panel. These individuals have also been informed of the outcome;
- Had first discussions on a proposal for the training framework for the candidate judges;
- Concluded the discussions on the financial regulations;
- Positive reception of the draft Rules for the Administrative Committee and the Budget Committee;
- First discussion on the proposal for Rules on Legal Aid;
- Organised a public consultation on draft Rules relating to the Patent Litigation Certificate;
- Announced further Signatory States who have completed their ratification process. These are Sweden, Belgium and Denmark;
- Established an Expert Panel to advise the Chairman and working group co-ordinators on developing strategies on the UPC.

⁴ Document 9563/14

Progress in the working groups:

Legal framework

Following the digest of comments received during the public consultation on the Rules of Procedure and the publication of the 16th draft of the said Rules, the Committee's Team 1 of the Legal Group, composed of experts from the different contracting states, has set itself to review the draft rules and prepare for an oral hearing. To this end a new revised draft will be established, in close cooperation with the Committee's Expert group. The Preparatory Committee plans to hold the oral hearing later this year. A confirmed date is yet to be agreed.

In June a public consultation on draft rules on the European Patent Litigation Certificate was held. The Rules shall establish the conditions for the grant of the Certificate and the rules governing the other appropriate qualifications European patent attorneys can alternatively have in order to be entitled to represent parties before the UPC. The committee received over 80 submissions. Team 7 of the Committee's Legal Working Group is now analysing the comments received, with a view to the preparation of a revised final draft.

Substantial progress has been made with regard to organisational rules for the administrative committee and for the budget committee which was positively received by the Preparatory Committee. A first draft of the Rules on legal aid was discussed in the Committee's 6th meeting in July and a further presentation will be given to the Expert Panel at its first meeting.

On mediation and arbitration, an analysis and comparison with existing systems will need to take place in order to ensure that the system brings added value to the users. Work shall commence with the necessary analysis and the establishment of the principles on the basis of which the Applicable Rules shall be drafted. The Preparatory Committee will receive a further report in this area at its November meeting.

HR and training

At its 6th meeting, the Preparatory Committee took a decision by agreeing a list of candidates that are considered eligible to become judge in the Unified Patent Court. A selection was made from the vast number of over 1,100 applications that were received by the Committee. The committee's Advisory Panel assessed all applications and has classified both the suitable candidates for legally qualified and for technically qualified candidates into two categories: eligible and eligible subject to training. These categories were created to reflect the level of knowledge of substantive patent law and the level of experience in patent litigation. Eligible candidates have been able to demonstrate a high level of knowledge in substantive patent law and a high level of experience in patent litigation as of today.

According to the assessment of the Advisory Panel, which was approved by the Committee, a sufficient number a high quality applications was received, especially in the area of technically qualified judges. A number of 341 technically qualified judges were considered to be eligible. From the applications received for legally qualified judges, 170 candidates were considered to be eligible and 184 were considered eligible subject to training.

While there is in general terms a broad coverage of candidates, the high quality candidates might not spread evenly among the geographical pattern of the contracting member states. For this reason, the first phase of the training program will focus on candidates coming from contracting states where further capacity needs to be built. To this end a training program has been designed, starting with developing expedited knowledge on substantive patent law and practical experience, in particular for candidates coming from contracting states where building capacity is most urgent. This will include practical training.

Finance

The Committee has made substantial progress in drafting the financial regulations of the Court and will now turn to developing a policy for the financial situation in the Court's first operational years.

Court fees are a joint working effort between the finance and legal working groups. A discussion on court fees is expected before the end of 2014. Following which, planning will commence for the consultation on fees to be launched in spring 2015. The budget for the first year of operation will then follow.

Facilities

The Committee has now to deal with the local staff required to service the framework of central, regional and local courts. This work will be taken forward jointly by the Facilities and HR & Training working groups and is scheduled for an early discussion in 2015. Similarly each signatory state is analysing their position on a headquarters agreement. Various administrations in each respective country will need to have sufficient time for this work before it is brought back before the Committee.

IT

Good progress has been made in this area. Contractors have commissioned a prototype system to test decisions about system type in the preparation phase and will shortly begin work on the OJEU tender documentation.

Internal and external patent court users will test the prototype and provide feedback virtually and at user workshops. Information on aspects of the Court's operating model should help inform the tender specification.

Miscellaneous

The Committee has initiated the work on how to organise the phase from preparation to operational which marks a significant milestone.

The Committee will need to ensure that all practical arrangements for the proper functioning of the UPC are in place or are duly prepared. The Committee has had exploratory discussions on two issues. One possible option that is being explored is for Signatory States to agree to allow for the provisional application of the institutional, organisational and financial provisions of the UPCA and Statute during a period of three to six months before the UPCA enters into force. It would allow all legal texts and all decisions and appointments to be adopted in accordance with the relevant procedures. It would also allow for enough time to carry out procedures thoroughly, to avoid errors and to overcome unforeseen difficulties. The Preparatory Committee is further investigating the possibility and willingness of the EPO to handle the task of registering applications for opt outs during the transitional phase. It would initially relieve the new organisation from an administrative burden and minimize the risks of undesired effects of the opt-out system.

Timetable

The Committee has publicised that their work would not be completed before the end of 2015. This still remains the case, however, it will work closely with colleagues in the Select Committee to ensure that the European Patent package is delivered in the most timely and efficient way, minimising any uncertainty for business wherever possible.
