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NOTE

from:	Presidency
to:	Council Competitiveness
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Subject:	European Patent with Unitary Effect and Unified Patent Court – Information from the Presidency and Preparatory and Select Committee

The Presidency has requested the Preparatory Committee and Select Committee of Administrative Council of the European Patent Organisation to submit a report on the latest state of play in the implementation on the enhanced patent system.

Delegations will find this report in Annex.

The Council is invited to take note of this report.

Implementing the Patent Package

The EU Regulations N° 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and 1260/2012 dealing with the applicable translation arrangements were adopted on the 17th of December 2012¹.

On the 19th of February 2013 the Agreement on a Unified Patent Court was signed by 25 Member States of the European Union.

There is a close interaction between the two EU Regulations and the UPC Agreement. The two EU regulations on the unitary patent protection shall apply from the date of the entry into force of the Agreement on a Unified Patent Court and a European patent for which unitary effect is registered in the Register for unitary patent protection shall have unitary effect only in those participating Member States in which the Unified Patent Court has exclusive jurisdiction².

¹ Both acts were published in O.J. L 361 of 31.12.2012

² Article 18.2. of the Regulation (EU) N° 1257/2012 of the European Parliament and the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection

1. State of implementation of the EU regulations N° 1257/2012 and 1260/2012

1.1. General framework

The EU Regulation N° 1257/2012 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 (hereafter EPC) and 2) which benefits from unitary effect in the participating Member States by virtue of the EU Regulation N° 1257/2012³.

The European patent with a unitary effect thus relies on the interplay of two legal instruments i.e. the EU Regulation and the EPC. The EU Regulation N° 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 the EU Regulation N° 1257/2012 lays down that the participating Member States shall give the European Patent Office administrative tasks related to the unitary effect as foreseen in Article 143 of the EPC. Article 9.2 of the EU Regulation N° 1257/2012 imposes also an obligation on the Participating Member States to set up a Select Committee in the framework of the European Patent Organisation (hereinafter - Select Committee).

Within this Select Committee, the EU Participating Member States shall ensure compliance with Regulation N° 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 paragraph 1 of article 9 EU Regulation N° 1257/2012 and shall ensure the setting of the level of renewal fees in accordance with article 12 of the EU Regulation N° 1257/2012 and the setting of the share of distribution of the renewal fees in accordance with article 13 of the EU Regulation N° 1257/2012.

³ Article 2 b) and c) of the Regulation (EU) N° 1257/2012 of the European Parliament and the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection

1.2. Creation, activities and timetable of the Select Committee

Institutional aspects

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

Between 20 March and the 25 June 2013, the work of the Select Committee has been mainly focused on institutional matters: its creation, its composition and the adoption of its rules of procedure⁴.

In accordance with article 9.2 of the EU Regulation N° 1257/2012, the Select Committee consists of representatives of the 25 EU participating Member States and the Commission as an observer. The Committee elected Jérôme Debrulle (Belgium) and Lubos Knoth (Slovak Republic) as its chairman and vice-chairman.

⁴ 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

Since the 26th of June, the Select Committee has begun to work on issues of substance.

The first issue of substance to be dealt with by the Select Committee is the draft Rules relating to the Unitary Patent Protection. These draft Rules relate mainly to the procedures that will be administrated by the EPO in carrying out the tasks that the Participating Member States will entrust to the EPO in accordance with article 9.1 of the EU Regulation N° 1257/2012. They concern administrative procedures like the filing of the request for unitary effect, the filing of a statement of license of right, the administrative rules related to the payment of renewal fees, the entries in the Register for unitary patent protection, etc⁵. Discussions considered a number of comments received both from Member States and users of the patent system. Several future meetings of the Select Committee will be dedicated to the examination of this draft rules before their formal adoption.

At the end of October a first meeting of the Select Committee has been also held to start discussions on the financial and budgetary aspects of the implementation of the unitary patent protection. The financial and budgetary aspects of the implementation of the unitary patent protection concern mainly the level and the distribution of the renewal fees, the budgetary aspects of the tasks entrusted to the EPO in accordance with Article 9.1 of the EU Regulation N° 1257/2012 and the implementation of the compensation scheme for the reimbursement of translation costs referred to in Article 5 of EU Regulation N° 1260/2012.

During this first meeting statistical and financial information have been presented to the Select Committee. The discussions on the basis of concrete proposals are expected to start at the beginning of 2014.

⁵ The draft rules relating to the Unitary Patent Protection can be found on the following webpage:
<http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/4a402486-c7f2-40f5-8841-00e61574156c/Presentation/PublicationAttachment/bf11e108-8645-45f0-bd24-07cf029f9ee1/esc1316-Revised-UP-RoP.pdf>

Timetable

The work of the Select Committee has to proceed in parallel to the work of the Preparatory Committee on the creation of the Unified Patent Court. Given the timetable of the Preparatory Committee which envisages an entry into operation of the Unified Patent Court early 2015, 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 by June 2014.

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

The 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 arrangements⁶ (Recital 11) recalls 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 expected to be available in the early months of 2014 for all of the official languages of the European Union.

⁶ O.J. L 361 of 31.12.2012, p. 89.

2. Building the Unified Patent Court

As can be deduced from the minutes of the signing ceremony of the Agreement on the Unified Patent Court, it was the desire of the Contracting States that preparations for setting up the Unified Patent Court should start immediately. The first action was to set up a Preparatory Committee, composed of representatives of the Contracting States tasked with preparing the practical arrangements. It would draw up a roadmap for the early establishment and coming into operation of the Unified Patent Court.

Following discussions in the Friends of the Presidency group (patents) and on the basis of a note that was prepared by Sweden and the Netherlands, the Irish Presidency convened the inaugural meeting of the Preparatory Committee of the Unified Patent Court on the 26th of March 2013 at the Permanent Representation of France to the European Union. The Committee elected Paul van Beukering (Netherlands) and Alexander Ramsay (Sweden) as its chairman and vice-chairman. The secretariat of the Committee is being held by Mrs. Eileen Tottle (UK).

To date the Preparatory Committee has held three meetings at which, among other issues, it established its Roadmap, launched a pre-selection procedure for future judges of the UPC, launched a public consultation on the draft Rules of Procedure of the UPC and discussed the financing of costs arising in the preparatory phase.

It was decided that early 2015 would constitute an ambitious but realistic target date for the entry into operation of the Court.

2.1. Organisational structure

The Committee has broken its work down into five areas, each with a co-ordinator to lead a sub-group of Contracting States and report back to the Committee on progress:

- Legal framework (Mr. Johannes Karcher – Germany);
- Financial aspects; (Mr Jean Francois Magana – France)
- IT; (Mr. Neil Feinson – United Kingdom)
- Facilities; (Ms. Anne Goedert – Luxemburg)
- Human resources and training. (Mr. Oliver Varhelyi – Hungary)

Each of these Area Working Groups comprise experts from the Contracting States whose task it is to prepare the necessary work. A comprehensive overview of the preparatory work that needs to be done can be found in the Committee's Roadmap (which was agreed at the Committee's second meeting). A dedicated website of the Preparatory Committee's work can be found at www.unified-patent-court.org and should be viewed as the authoritative voice of the Committee.

The work of the Preparatory Committee is closely connected to that of the Select Committee. Close coordination of both committees' work will ensure a coherent approach.

2.2. Objective

The Committee views its task as being to ensure that the Unified Patent Court is from the outset fully operational in early 2015. The Court will need sufficient judges with the necessary experience in patent litigation, or who have received appropriate training. It will also require the appointment of non-judicial staff. The legal and financial framework will need to be in place. The Court will need to have at its disposal adequate facilities and an electronic case management and filing system. The Registry will need to be able to register and manage cases. Patent holders wishing to opt out their patents in accordance with article 83(3) of the Agreement shall have the opportunity to register their opt-out in a way which ensures that the opt out is effective from the first day of the UPC being in operation. Also requirements for the patent litigation certificate as well training shall be developed in advance.

2.3. Progress in the different working areas

Legal framework

Preparing the Rules of Procedure of the Unified Patent Court is one of the most urgent and important tasks of the Committee. The Committee has launched a formal consultation on the basis of a draft prepared by a Commission expert practitioners group chaired by Mr. Kevin Mooney. The first phase of the consultation, in which stakeholders were given the opportunity to submit written comments closed on the 1st of October. Over a 100 submissions were received, which are now being analysed in preparation of the second phase of the consultation in which the Legal Working Group will examine the comments including a public hearing to be held in the beginning of next year. On the basis of a revised draft prepared by the Legal Working Group the Committee aims to adopt the Rules of Procedure before summer 2014.

Other projects in this area include the setting up of an arbitration and mediation centre, a patent attorneys' litigation certificate, a schedule of court fees and recoverable costs, rules governing the Registry and the registrar's service, the rules on legal aid and the rules of the Advisory, Budget and Administrative Committees.

Financial aspects

The WG on financial aspects is in charge of preparing a draft Financial Regulation (financial procedures and accountancy rules), draft budgets for the first years of the UPC (salary scales, income and expenses), draft rules for the contribution of Member States and an evaluation of the contributory shares of Member States.

A draft of the general provisions of the Financial Regulations is expected to be submitted to the Preparatory Committee soon while the accountancy rules still need some further work.

Concerning salary scales and pensions, contact has been taken with the International Service For Remunerations and Pensions of the Co-ordinated Organizations (administered by the OECD). An agreement with this service is a possible option for the UPC.

Concerning the contribution of the Contracting Member States to the budget of the UPC work is underway to secure the necessary statistical data.

IT

Procuring an electronic filing and case management system for a court with multiple divisions located in several Member States is a significant challenge, particularly given the uncertainty surrounding the precise future operating practices of the court. The working group has explored a range of options for securing such a system from a bespoke turnkey system at one extreme to a standardised commercial, off the shelf system at the other. The Committee plans to decide on the way forward this year.

Facilities

The Working Group on facilities co-ordinates regular updates on the identification of possible premises for the central division, the court of appeal and the local and regional divisions in the different countries. The Signatory States have exchanges of views on progress and challenges. The identification of those costs to be borne by the state hosting a division and not by the Court itself is being made jointly with the Working Group on Finances.

The Working Group on Facilities has defined common minimum specifications of the buildings hosting UPC court rooms, while further work is required with respect to maintenance arrangements and other utilities and services.

Human resources and Training

The availability of a sufficient number of high quality judges is key to the success of the Unified Patent Court from the first day of its existence. Work in the Human Resources and Training Group has prioritised preparations for the nomination of the first group of judges and the organisation of the initial pool of judges. In accordance with the minutes of the signing ceremony, the organisation of the training of candidate judges and the launch of a pre-selection procedure are two main areas of this task where intensive work is underway.

In these tasks, the Human Resources and Training Group is assisted by an Advisory Panel, composed of experienced, active or former members of chambers of appeal or supreme courts or former lawyers with recognised competence in patent litigation. The Advisory Panel contributes to the work in both the assessment of the qualification and experience of candidates and in the establishment of the training requirements for the candidate judges.

According to the minutes of the signing ceremony of the Agreement, the Preparatory Committee should duly prepare the nomination process to the extent that the appointment of judges will be possible without any difficulty, once the Agreement is operational. At its meeting of the 16 September 2013, the Preparatory Committee launched a pre-selection procedure calling for the expression of interest of candidates, both on a part-time and a full-time basis, for legally qualified and technically qualified judges for the future UPC. Candidates had to submit their expression of interest by the 15 November to the chair of the Preparatory Committee. It needs to be pointed out that the pre-selection procedure is without prejudice to the formal appointment procedure. The aim of the pre-selection procedure is to draw up a provisional list of suitable candidates, allowing the candidates if necessary to participate in the training program that is to be established for the preparatory phase. While offering no guarantees of future appointment as judges, inclusion on the provisional list and, if necessary, participation in the training program of the preparatory phase, will ensure that a field of eligible candidates will be available for the formal appointment procedure to be launched subsequently. The Preparatory Committee agreed that further pre-selection procedures may be held as necessary.

The Human Resources and Training Group has also started work on the priority area of developing a provisional intensive training framework for candidate judges for the preparatory phase and the first year of operation of the UPC. This work should provide the basis for a permanent training framework, to be endorsed by the Administrative Committee once established. The training for legally qualified judges will consist of advanced courses in patent law and patent litigation, possibly combined with mock-trials and internships at patent courts in countries experienced in patent litigation, as well as courses on the UPC Agreement and the Rules of Procedure. For technically qualified judges training will consist of basic concepts of patent law relating in particular to validity and basic concepts of civil procedure, as well as training on the UPC Agreement and the Rules of Procedure. Language training for both legally and technically qualified judges should allow judges to work on and participate in deliberations on a patent case in at least one language which is not their mother tongue.
