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Subject: Unitary Patent and Unified Patent Court
- Information from the Presidency on the state of play

Delegations will find in the Annex, for information under Any Other Business in the Competitiveness Council of 29 February 2016, a report drawn up by the Chairs of the Select Committee of the Administrative Council of the European Patent Organisation and the Preparatory Committee for the Unified Patent Court on the latest state of play in the implementation of the Patent package.

Implementing the Patent package

Fourth 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.

The Select Committee held its inaugural meeting on the 20th of March 2013. Since then the Select Committee has held seventeen more meetings.

The Select Committee consists of representatives of the 26 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)

1.2. Activities of the Select Committee since May 2015

Summary

Since the last information provided to the Competitiveness Council at its meeting of May 2015, there are two major and positive developments:

- The first one is the completion of the implementation of the Unitary Patent Protection;
- The second one is the accession of Italy to the enhanced cooperation in the area of the creation of Unitary Patent Protection.

1° Accession of Italy to the enhanced cooperation

On the 2 of July 2015 Italy has notified to the Council of the European Union and the Commission its intention to participate in the enhanced cooperation in the area of the creation of Unitary Patent Protection. According to Article 331. 1. of the Treaty on the Functioning of the European Union, the Commission has on the 30 of September 2015 confirmed the participation of Italy to the enhanced cooperation. The decision of the Commission has been published on the 1st of October 2015 in the Official Journal of the European Union. Italy is thus become the 26th participating Member State to the enhanced cooperation.

2° Completion of the implementation of the Unitary Patent Protection

On the 15th of December 2015, the Select Committee has completed the implementation of the Unitary Patent Protection. After having taken in June and November 2015 preliminary decisions related respectively to the level of the renewal fees for the Unitary Patent Protection and to the distribution of fees among the participating Member States, the Committee has formally adopted on the 15th of December 2015 all the Rules which are necessary for the implementation of the Unitary Patent Protection. Those Rules are:

- The Rules relating to the Unitary Patent Protection³

Those Rules regulate the administrative procedure that the European Patent Office will apply in order to carry out the tasks related to the administration of the Unitary Patent Protection which are enumerated in Art. 9 (1) EU Regulation 1257, which will be entrusted to the EPO by the participating EU Member States. They concern for example the filing of the request for unitary effect, the filing of a statement of licenses of right, the compensation scheme for the reimbursement of translation costs, the entries in the Register for Unitary Patent Protection, etc. Those Rules constitute the legal implementation of the Unitary Patent Protection.

³ Those Rules are available on the web pages of the Select Committee of the European Patent Organisation:
[http://documents.epo.org/projects/babylon/eponet.nsf/0/0F967C9C422EF4D1C1257F230059D1C0/\\$File/edsc1501.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/0F967C9C422EF4D1C1257F230059D1C0/$File/edsc1501.pdf)

- The Rules relating to fees for Unitary Patent Protection⁴

Those Rules define the level of the renewal fees for the Unitary Patent Protection in accordance with Article 12 Regulation 1257/2012⁵. The level of renewal fees applicable to the Unitary Patent set by the Select Committee corresponds to a “True Top 4”. It means that the renewal fees covering the territory of the 26 EU Member States participating in the enhanced cooperation correspond to the sum of the national renewal fees currently paid for the four EU participating Member States out of the 26, in which, in June 2015, European patents were most frequently validated.

⁴ Those Rules are available on the web pages of the Select Committee of the European Patent Organisation:
[http://documents.epo.org/projects/babylon/eponet.nsf/0/EC5538ECBE1154E6C1257F23005A0F4F/\\$File/edsc1502.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/EC5538ECBE1154E6C1257F23005A0F4F/$File/edsc1502.pdf)

⁵ Article 12 of the EU Regulation 1257/2012 lays down that:

“1. Renewal fees for European patents with unitary effect shall be:

- (a) progressive throughout the term of the unitary patent protection;*
- (b) sufficient to cover all costs associated with the grant of the European patent and the administration of the unitary patent protection; and*
- (c) sufficient, together with the fees to be paid to the European Patent Organisation during the pre-grant stage, to ensure a balanced budget of the European Patent Organisation.*

2. The level of the renewal fees shall be set, taking into account, among others, the situation of specific entities such as small and medium-sized enterprises, with the aim of:

- (a) facilitating innovation and fostering the competitiveness of European businesses;*
- (b) reflecting the size of the market covered by the patent; and*
- (c) being similar to the level of the national renewal fees for an average European patent taking effect in the participating Member States at the time the level of the renewal fees is first set.*

3. In order to attain the objectives set out in this Chapter, the level of renewal fees shall be set at a level that:

- (a) is equivalent to the level of the renewal fee to be paid for the average geographical coverage of current European patents;*
- (b) reflects the renewal rate of current European patents; and*
- (c) reflects the number of requests for unitary effect.”*

- The Rules relating to the distribution of fees amongst the participating Member States

Those Rules define and weight the different criteria listed in Article 13 Regulation 1257/2012⁶ and determine the share of distribution of the renewal fees among the participating Member States.

- Budgetary and Financial Rules⁷

Those Rules concern the budgetary and financial procedures applicable to the income and costs related to the Unitary Patent Protection.

⁶ Article 13 of the EU Regulation 1257/2012 lays down that:
*“ 1. The EPO shall retain 50 per cent of the renewal fees referred to in Article 11 paid for European patents with unitary effect. The remaining amount shall be distributed to the participating Member States in accordance with the share of distribution of the renewal fees set pursuant to Article 9(2).
2. In order to attain the objectives set out in this Chapter, the share of distribution of renewal fees among the participating Member States shall be based on the following fair, equitable and relevant criteria:
(a) the number of patent applications;
(b) the size of the market, while ensuring a minimum amount to be distributed to each participating Member State;
(c) compensation to the participating Member States which have:
(i) an official language other than one of the official languages of the EPO;
(ii) a disproportionately low level of patenting activity; and/or
(iii) acquired membership of the European Patent Organisation relatively recently.”*

⁷ Those Rules are available on the web pages of the Select Committee of the European Patent Organisation:
[http://documents.epo.org/projects/babylon/eponet.nsf/0/656825781681DB8FC1257F23005A4840/\\$File/edsc1503.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/656825781681DB8FC1257F23005A4840/$File/edsc1503.pdf)

1.3. Conclusion

With the adoption of the above mentioned set of Rules, the legal, administrative and financial implementation of the Unitary Patent Protection is now completed.

It means that the Unitary Patent Protection is now ready to be applied subject to the entry into force of the Agreement on a Unified Patent Court. Indeed, in accordance with Article 18 (2) of Regulation 1257/2012, the Unitary Patent Protection shall apply on the date of entry into force of the Agreement on a Unified Patent Court.

2. Building the Unified Patent Court

The Preparatory Committee has made excellent progress since the signing of the Protocol on Provisional Application last October. Since then some changes have also been implemented in the leadership of the Committee. Following Mr Paul van Beukering stepping down last November, the Committee overwhelmingly voted Mr Alexander Ramsay, who was originally the Vice-Chair, to take over as Chair. The Committee also voted in Mrs Louise Åkerblom from Luxembourg as the Vice-Chair.

The Committee held six meetings in 2015 and is about to embark on a challenging but achievable programme of work in 2016 which will see the Committee meet on a further four occasions. Following the signing on the Protocol on Provisional Application the Committee has publically announced that it intends to conclude all preparatory work needed to enter into provisional application, by the middle of 2016 with the intention the Court will be ready in early 2017. It is on course to complete this timetable and will make a further announcement later in the year with a more specific opening date.

There are now nine ratifications of the Agreement with a further two countries expected to ratify before Spring 2016. Until it is certain of the thirteenth ratification the Committee cannot announce a more precise date for the Court to be operational. The Committee and its members remain focussed and committed to the preparations required for the Unified Patent Court (UPC) that meets users' expectations with regard to quality and timeliness of decisions.

Overall summary

Since the update provided to the Competitiveness Council last October the Preparatory Committee has:

- Eight contracting member states signed the Protocol on Provisional Application
- Agreed and published the European Patent Litigation Certificate
- Agreed and published the Rules of Procedure
- Continued discussion on the Protocol on Privileges and Immunities
- Launched an ambitious timetable for the recruitment of legally and technically qualified judges of the UPC
- Identified a number of physical locations of the UPC, namely in UK, Germany, Luxembourg and the Swedish/Baltic states
- Continued discussion on the court fees and recoverable costs
- Agreed the Rules on Mediation
- Successfully concluded a European-wide tour of workshops on the case management system

Progress in the working groups:

Legal framework

After a successful presentation by the Legal Working Group, the Rules of Procedure were agreed in the Preparatory Committee and have now been published on the UPC website. An amendment of the Rules will be discussed at a future Preparatory Committee meeting to incorporate the relevant rules on court fees which are expected to be agreed by the Committee in February as well as some consequential changes. The Legal Working Group has in its work closely cooperated with the experts of the Drafting Committee.

The Rules for the Registry of the UPC have been discussed and are expected to be agreed in the Preparatory Committee in February. The Preparatory Committee has also agreed on the Rules for the European Patent Litigation Certificate for the representation by European Patent Attorneys before the UPC. Already having agreed on the Rules for the Administrative and the Budget Committee as well as the Rules for Mediation, the Preparatory Committee is, at its next meeting in the end of February, expected to agree also on the Rules for the Advisory Committee and the Rules on Arbitration.

In addition the Expert Panel, who advise the Chair and co-ordinators, have continued their work on the Guidelines to assess case-value. The Guidelines have been discussed by the Legal and the Finance Working Group and it is hoped that they soon will be presented to the Committee.

HR and training

Members of this team have worked tirelessly to conclude negotiations on the judicial salaries and the regulations governing the condition of service of judges, the registrar and the deputy-registrar of the Court, and also on the framework for the recruitment procedure for legally and technically qualified judges. These should be agreed in the coming weeks. A timetable for the recruitment procedure for legally and technically qualified judges, the registrar and the deputy-registrar was presented to a recent Preparatory Committee meeting. It is an ambitious timetable which is quite necessary in order to complete the overall process and to meet the target of the launch date of the Court. Everyone involved is committed to ensure that speed does not compromise quality as it is recognised the quality of judges appointed to the UPC will be the backbone of its success.

Moreover, a first round of training for potential UPC judges was successfully concluded, comprising substantive patent law and patentability requirements, issues arising in patent infringement and litigation, as well as court internships. The modules took place in the Training Centre of Budapest and at specialised courts of France, Germany, the Netherlands and the United Kingdom.

Finance

A compromise proposal on the court fees and recoverable costs met with a favourable reception by the Committee in December. This has allowed the team together with members from the Legal Working Group to finalise the proposal to be agreed at February's Preparatory Committee.

Separately, work on the UPC budget has progressed and the Committee is in the process of establishing cooperation with the International Service for Remunerations and Pensions (ISRP) to provide pensions and social security for employees of the Court.

Facilities

A number of contracting member states have secured premises for the UPC. These will be available on the UPC website shortly. At the next Preparatory Committee meeting the team will present a proposal on translation services for the UPC.

IT

The IT work stream has concluded a set of workshops across Europe, the objective of which was to refine and improve the case management system. This has now been achieved and the team are working closely with a number of dependent teams, for example, on the Rules for the Registry and Rules of Procedure to ensure the case management system is as robust as it can be. The IT Working Group will continue to lead on this work over the coming months, working closely with Luxembourg who will eventually site all the corporate functions such as IT, Finance, HR roles with the Registrar. The UPC website has also been updated and improved. Committee members will get an opportunity to see the case management system at its next meeting in February.

Miscellaneous

This is a crucial time for the Preparatory Committee to begin working on the staffing and corporate functions of the Court. This means how the Court will be governed and how it can be adapted and scaled up in the early years of its formation. An external business adviser with experience of setting up businesses has been appointed to assist the Chair and co-ordinators in this task.

Alongside this it will be important that as many Member States as possible sign the Protocol on Provisional Application of the UPC or by means of a declaration adheres to the principle of provisional application. It is important that the protocol can enter into force as soon as possible since some parts of the preparatory work must wait for the period of provisional application, e.g. the final appointment of the judges. A swift entering into force of the Protocol is necessary to maintain the time-plan.

Timetable

According to the official timetable of the Preparatory Committee it is foreseen that the Court shall be operational early 2017. This is still achievable. The entry into force will of course depend on the further progress of the preparatory work but relies heavily on a sufficient number of contracting Member States ratifying the Agreement. To achieve the goals of the project, strengthening patent protection at the single market, it is desirable to have as many Member States as possible taking part in the system already from the beginning. Considering the progress made it is now anticipated that the Committee, during the fall, will be able to announce a more precise date for the start of the operation of the Court. In providing a more accurate date for entry into operation will enable users to prepare for the launch in sufficient time.