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

I. INTRODUCTION

1. The unitary patent package comprises two Regulations¹, agreed in 2012, implementing an enhanced cooperation in the field of unitary patent protection, and an intergovernmental agreement, signed on 19 February 2013, setting up a Unified Patent Court (UPC) common to the contracting EU Member States².
2. The unitary patent system will make access to the European patent system easier and less costly, and will improve the level of patent protection, by making it possible to obtain uniform patent protection in all the participating EU Member States.
3. The UPC will provide a centralised jurisdiction for litigation relating to the infringement and the validity of European patents and European patents with unitary effect, with a view to enhancing legal certainty in relation to the enforcement of those patents, and in relation to the defence against unfounded claims or the revocation of such patents.

¹ Regulation (EU) 1257/2012 (OJ L 361, 31.12.2012, p. 1);
Council Regulation (EU) 1260/2012 (OJ L 361, 31.12.2012, p. 89).

² OJ C 175, 20.06.2013, p. 1.

4. The launch of the unitary patent system is conditional upon the ratification of the UPC Agreement (UPCA) by at least 13 Member States, amongst whom must figure the three Member States in which the highest number of European patents were in effect in 2012.

II. STATE OF PLAY

5. Following years of delay, the provisional application of the UPCA started on 19 January 2022. This provisional application has enabled the completion of remaining preparatory work to establish the court and the unitary patent system in time. The achievements include amongst others: the adoption of procedural rules for the administration of unitary patents, including budgetary provisions and rules on fees, the establishment of the court's rules of procedure and its budget, the appointment of judges, training of judges and administrative staff and the set-up of a fully electronic Case Management System (CMS).
6. On 17 February 2023, the instrument of ratification of Germany for the UPCA was deposited with the General Secretariat of the Council of the European Union. This was the final legal requirement for the UPCA to come into force.
7. According to Article 89 of the UPCA, it shall enter into force 'on the first day of the fourth month after the deposit' of the final required ratification. Hence, the UPCA will enter into force on **1 June 2023**, triggering at the same time the entry into operation of the whole unitary patent system.
8. Seventeen Member States have so far ratified the UPCA³. A further seven Member States have signed the Agreement but have not yet completed their ratification procedures⁴.
9. In the Annex to this Note, delegations will find a comprehensive **Progress Report on the unitary patent package**, prepared by Mr Jérôme Debrulle, Chair of the Select Committee of the Administrative Council of the European Patent Organisation, and Mr Johannes Karcher, Chair of the Administrative Committee of the Unified Patent Court.

³ Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Slovenia and Sweden.

⁴ Cyprus, Czech Republic, Greece, Hungary, Ireland, Romania and Slovakia.

III. CONCLUSION

10. At the Competitiveness Council on 2 March 2023, the Presidency will give an overview of preparations for the entry into effect of the unitary patent package.
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PROGRESS REPORT ON THE UNITARY PATENT PACKAGE

Prepared by Jérôme Debrulle, Chair of the Select Committee of the Administrative Council of the European Patent Organisation and Johannes Karcher, Chair of the Administrative Committee of the Unified Patent Court

Introduction

The Unitary Patent package consists of two elements: the Unitary Patent Protection (UPP) by way of two EU Regulations adopted in 2012 and the Agreement on a Unified Patent Court of 19 February 2013 (UPCA) establishing the first European court to decide private party litigation with direct effect in the participating EU-Member States. After the final outstanding ratification of the Agreement by Germany on 17 February 2023, the UPCA will enter into force on 1 June 2023 triggering also the application of the EU Regulations on the UPP.

Patent protection in Europe across borders will offer innovative industry a new level of protection for their invention safeguarding jobs in future-oriented industries and positioning Europe as a high-tech market. It is the missing link in the integration of the European patent system and a particularly comprehensive reform in the European Single Market, which has taken the longest to achieve. It has taken decades!

Its entry into operation is expected to boost innovation, economic growth and European competitiveness. That is the reason why the Competitiveness Council has always taken a keen interest in this reform and it is a great honour and pleasure for us to inform you today of its completion.

I. Implementation of the Unitary Patent

The Unitary Patent was created by two EU Regulations adopted in 2012, which provide unitary effect to a European Patent granted by the European Patent Office (the EPO) for the territories of the participating EU Member States. It builds on the well-established system of the European Patent Convention. However, for its functioning the Unitary Patent required a whole set of implementing measures and secondary legislation to be adopted by the Select Committee of the EPO 's Administrative Council and by the EPO.

1. Secondary regulation adopted by the Select Committee

In accordance with the EU Regulations creating the Unitary Patent, the Select Committee has adopted the following set of secondary legislation:

- *The Rules relating to Unitary Patent Protection*¹

Those rules lay down the procedures to be applied at the EPO for the administration of the Unitary Patent. They relate for instance to the procedure for obtaining a Unitary Patent, the payment of renewal fees and the entries in the Register for Unitary Patent Protection.

- *The Rules relating to fees for a Unitary Patent*²

Those rules set out the fees to be paid to the EPO by proprietors of a Unitary Patent and the methods of paying them. They also lay down the amount of compensation for translation costs which SMEs, universities, non-profit organisations and public research organisations having their residence or principal place of business in an EU Member State can get if they opt for a Unitary Patent after filing a European patent application in an official EU language other than English, French or German.

The Unitary Patent shall benefit from attractive fees and result in considerable costs savings. There will be no filing, no registration, no publication fees for the request for unitary effect and there will be no post-grant translation costs after the transitional period of 6 years. Furthermore, the transactional costs for the maintenance of the Unitary Patent as well as for licensing and transfers will be reduced as the post-grant procedures are centralised at the EPO.

The level of the renewal fees for the Unitary Patent has been set at a very attractive level for the users of the European patent system including SME's. The amount of renewal fees for the entire territory of the participating Member States (currently 17) corresponds to the combined renewal fees which have to be paid today for a classical European patent valid in four Member States. The overall amount shall be less than EUR 5 000 for maintaining a Unitary Patent during the first ten years which is currently the average lifetime of a European patent.

¹ <https://www.epo.org/law-practice/legal-texts/official-journal/2022/04/a41.html>

² <https://www.epo.org/law-practice/legal-texts/official-journal/2022/04/a42.html>

- *The Budgetary and Financial Rules*³

Those rules set out the provisions applicable to managing the income and costs related to Unitary Patents.

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

With the adoption of these Rules, the Select Committee established the distribution key determining the share of distribution of the relevant renewal fee income among the participating EU Member States, in accordance with fair and equitable criteria laid down in the relevant EU Regulation.

2. Accompanying measures at the national level

It is important to provide to the users of the European patent system an overview of the measures adopted at the national level by the participating EU Member States relating to the implementation of the Unitary Patent. To this end the Committee has decided to regularly publish an update of replies by Member States to a questionnaire on relevant national measures.

The EPO has published on its website the booklet "National measures accompanying the implementation of the Unitary Patent" which provides a concise overview of the most important national measures accompanying the implementation of the Unitary Patent in the participating EU Member States⁴. It allows the relevant information to be retrieved country by country. It is important that Member States evaluate before the entry into operation whether the national measures taken so far are sufficient and that Member States cooperate with the EPO to keep the relevant information up to date.

3. Operational implementation by the EPO

The EPO has taken the necessary measures for implementing the secondary legislation adopted by the Select Committee in operational terms and has in particular created efficient and reliable IT tools for the relevant procedures including the cooperation with Member States.

³ <https://www.epo.org/law-practice/legal-texts/official-journal/2016/05/a41.html>

⁴ <https://www.epo.org/law-practice/legal-texts/national-measures-up.html>

In addition, the EPO has taken specific measures to facilitate the uptake of the Unitary Patent.

- *Top up search for earlier national rights*

A Unitary Patent can be obtained only for European patents granted with the same set of claims for all participating EU Member States. Consequently, users have an interest in information about earlier national rights which could result in different claims for different Member States and thus prevent them from obtaining a Unitary Patent.

For this reason, the EPO rolled out a systematic top-up search for earlier national rights, to provide users with the relevant information. This new service is free of charge for the applicants.

- *Transitional measures*

In order to facilitate an early uptake of the Unitary Patent, the EPO has also introduced on 1 January 2023 two transitional measures applicable to European patent applications having reached the final phase of the grant procedure. These transitional measures are the so-called “Early request for unitary effect” and the “Request for a delay in issuing the decisions to grant a European patent”⁵.

The first enables applicants to file early requests for unitary effect already before the entry into operation of the Unitary Patent system. This means that patent owners can get their Unitary Patent immediately upon the start of the new system from day one.

The second provides the possibility for applicants of a European patent, whose application is already in the last phase of the grant process, to request a delay in issuing the decision to grant a European patent in order to wait for the entry into operation of the Unitary Patent.

It reflects the interest of the users in the Unitary Patent that the EPO received the first “early request for a Unitary Patent” on 1 January 2023, 36 minutes after midnight and more than 1 900 requests for delay of grant were filed since the beginning of the year.

⁵ <https://www.epo.org/applying/european/unitary/unitary-patent/transitional-arrangements-for-early-uptake.html>

4. Communication and awareness raising

The communication and awareness raising on the advantages of the Unitary Patent and the Unified Patent Court is one of the main remaining objectives for the participating EU Member States, the European Institutions and the EPO. The aim of this is to provide companies, and especially SMEs as well as universities and research institutions with clear, consistent and easily accessible information on this major reform of the European Patent system.

To this end it is essential to proceed in close cooperation between the EU Member States, the European Institutions, the EPO, the UPC and the users' associations.

The EPO has already launched a comprehensive communication campaign relating to the Unitary Patent package and has made a number of communication products available to the EU Member States⁶, which were presented and discussed with Member States in three dedicated workshops.

II. Implementation of the Unified Patent Court

The Unified Patent Court as the second pillar of the reform of the European patent system is established by way of an agreement under international public law concluded by the participating EU-Member States. It provides for European cross-border litigation on European patents and European patents with unitary effect.

1. Establishment of the UPC Committees

After the conclusion of the Agreement on a Unified Patent Court (UPCA) on 19 February 2013, participating Member States had formed the Preparatory Committee to cover the various aspects relevant for the work of the Court as an international organisation to be created. The Preparatory Committee, under the leadership of the Chairs Mr. Paul van Beukering from 2013 to 2015 and Mr. Alexander Ramsay from 2015 to 2022, structured its work in several work streams: Legal affairs, Human Resources, UPC-IT, Finance and Facilities.

⁶ The second edition of the Unitary Patent Guide was published in April 2022 after a consultation of the users of the European patent system:
<https://www.epo.org/applying/european/unitary/unitary-patent/unitary-patent-guide.html>
A revamped EPO website, including a completely revised set of FAQs:
<https://www.epo.org/applying/european/unitary.html>

With the entry into force of the Protocol on Provisional Application of the UPCA on 19 January 2022, the Unified Patent Court came into existence as an organisation. The governing bodies, the Administrative Committee and the Budget Committee were formed in inaugural meetings on 22 and 23 February 2022. The Advisory Committee formed on 24 February 2022 comprises recognised experts in patent law and patent litigation and assists the Administrative Committee in the preparation of the appointment of judges and relevant technical questions relating to patent litigation before the Unified Patent Court.

2. Set-up of local divisions in Contracting Member States

Divisions of the Court of First Instance are located across Member States. Apart from the Central Division with the seat in Paris and its section in Munich, 13 local divisions have been established by decision of the Administrative Committee of 8 July 2022: in Austria (Vienna), Belgium (Brussels), Denmark (Copenhagen), Finland (Helsinki), France (Paris), Germany (Düsseldorf, Hamburg, Mannheim, Munich), Italy (Milan), Portugal (Lisbon), Slovenia (Ljubljana) and the Netherlands (The Hague). One Nordic-Baltic regional division for Sweden, Estonia, Latvia and Lithuania has been set up (mainly Stockholm). Hosting Member States, according to Article 37 paragraph 1 UPCA, provide the facilities necessary for that purpose. Premises at the above location and the technical equipment including the equipment needed for a fully electronic oral hearing are made available to the Court. During an initial transitional period of seven years from the entry into force of the Agreement, hosting Member States provide the administrative support staff. Currently, 72 staff have already been provided undergoing training and taking on first administrative tasks.

3. Appointment of Judges, the President of the Court of Appeal and the Court of First Instance

On the basis of the opinion of the Advisory Committee, 85 judges comprising legally and technically qualified members of the Court have been appointed in October 2022, most of them part-time in the beginning and with effect from the entry into force of the Agreement. The Judges have elected Dr. Klaus Grabinski from Germany as President of the Court of Appeal and Ms. Florence Butin as President of the Court of First Instance. Both Presidents as well as five further judges forming together the Presidium of the Unified Patent Court have been appointed as Judges of the Court with effect from the beginning of November 2022. Since then, they have been active assuming their responsibilities in the administration of the Court as foreseen in the Agreement.

Work is finalised e.g. on the Rules for the Court's Registry, the Rules implementing the EU General Data Protection Regulation as well as a proposal for a Code of Conduct for Judges to be submitted by the Advisory Committee in cooperation with the Presidium and approved by the Administrative Committee.

4. Appointment of the Registrars

The Presidium with effect from 19 January 2023 has selected and appointed the Registrar of the Court of Appeal, Mr. Alexander Ramsay from Sweden, and the Deputy Registrar, Mr. Axel Jacobi from Germany, at the Court of First Instance. The appointments provide the lead for the procedural support in the litigation before the Court as well as the head of the UPC administration in the areas of legal affairs, human resources, UPC-IT, finance and facilities. To serve this function, 16 staff are currently already at work in Luxembourg.

5. Adoption of secondary legislation

On the basis of the preparatory work done by the Preparatory Committee, the Administrative Committee of the Unified Patent Court adopted a wide range of secondary legislation⁷ including the UPC Rules of Procedure which represent the first European code of civil procedure for the new jurisdiction. As a common court of participating EU-Member States, the Unified Patent Court, according to Articles 1 and 20 UPCA, applies Union law and respects its primacy as any national court of Contracting EU-Member States. To this end the Rules of Procedure implementing Union law refer e.g. to the application of Regulation (EU) 2020/1784 of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and Regulation (EU) 2020/1783 of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. The Rules of Procedure have entered into force on 1 September 2022.

Regulations Governing the Conditions of Service of Judges, the Registrar and the Deputy-Registrar of the Unified Patent Court have been adopted. They specify the conditions of service and the rights, duties and obligations of Judges and Registrars and contain important parameters for the medical and social security plan, the pension plan and the tax regime of the Court.

⁷ <https://www.unified-patent-court.org/en/court/legal-documents>

Parties, according to Article 48 UPCA, shall be represented by lawyers authorised to practice before the Courts of a Contracting Member State or European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office and who have appropriate qualifications. The requirements for such appropriate qualifications have been specified by the Administrative Committee in the Rules on the European Patent Litigation Certificate and other Appropriate Qualifications which make provisions for the requirements relating to both the content and the accreditation of such courses to acquire a litigation certificate. The Rules are in force since 15 June 2022. The first accreditation requests have been entered and are currently submitted to the Advisory Committee for opinion.

6. Electronic Case Management System and UPC Website

The Unified Patent Court, according to Article 44 UPCA, shall make best use of electronic procedures. To this end, the electronic Case Management System (CMS) has been built to allow for fully electronic procedures from the filing of an action to the final decision of the Court. The web-based system is easily accessible from any user device. Representatives must identify themselves with an electronic user authentication when logging on to the system. Important documents uploaded into the system by representatives of the parties such as a Statement of claim or a Statement of defense as well as the decisions by the Court are digitally signed with a qualified electronic signature satisfying the requirements of Regulation (EU) No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS). Oral hearings of the Court can, where the requirements are met, also be held in electronic form by video conferencing.

In view of the start of the UPC in 2023 the website for the Unified Patent Court www.unified-patent-court.org has been newly designed and went live in November 2022. It contains useful information about the Court and provides *inter alia* access to decisions of the Court, publications of open posts and a link to the Case Management System.

7. Training of judges and staff

Training of judges as well as administrative support staff is well advanced. A judge craft training for Technically Qualified Judges has been administered by the Centre for International Intellectual Property Studies (CEIPI) held in Paris from 7 to 8 October 2022. A training for all judges on the UPC Rules of Procedure was organised in Budapest from 17 to 21 January 2023. After a pilot training in early October 2022, a comprehensive internal rules training for all support staff of the registry and sub-registries concentrating on their procedural and administrative functions took place in Budapest from 31 January to 2 February 2023. To further build the skills of judges and administrative support staff in the use of the electronic Case Management System, an in-depth training is foreseen from Mid-February to Mid-March 2023 alongside e-learning programs.

8. Finances

On the basis of the Financial Regulations and special Rules applicable during the Provisional Application Period adopted by the Administrative Committee on 22 February 2022, the Budget Committee has provided the Unified Patent Court with the necessary resources for its set-up and operation. On 9 February 2023 the budget for the remaining time of the Provisional Application Period until entry into force of the Agreement has been adopted as well as the Budget for the Court's first accounting period from 1 June to 31 December 2023. Contributions will be called from contracting Member States according to the provisional contribution key established for the initial budget of the provisional application period.

9. The users

It is encouraging to see many users preparing for working with the new Court system and make themselves familiar with the UPC's rules of procedure and the Court's case management system.

Substantial efforts have been made to enable practitioners to take the necessary measures to get access to the CMS in due time, which is essential for practitioners to act before the Court. Various training sessions, mock-trials and seminars are being attended by lawyers and patent attorney, which will enable them to properly advise and represent clients before the new court.

III. Conclusion

The Unitary Patent package is on the verge of becoming a reality. Its entry into operation has taken much longer than initially envisaged. But the time has not been wasted. Utmost care has been taken to render the system as user friendly, efficient and cost effective as possible and to make it most attractive for companies.

When on 1 June this year the first Unitary Patents will be registered by the EPO this will be a great day for the European Union which finally will have brought to fruition one of its longest outstanding reforms.

If it becomes, as is expected, a full success this may also convince those EU Member States, which currently do not participate in the new system to join it as rapidly as possible to the benefit of their companies and the entire European Single Market.
