



Council of the
European Union

115731/EU XXV. GP
Eingelangt am 20/09/16

Brussels, 19 September 2016
(OR. en)

12101/16

PI 90
COMPET 472

NOTE

From:	Presidency
To:	Council
No. prev. doc.:	6029/16 COMPET 52 PI 16
Subject:	Unitary Patent and Unified Patent Court - Information from the Presidency on the state of play

Delegations will find in the Annex, for information, a report drawn up by the Chairs of the Select Committee of the Administrative Council of the European Patent Organisation and of the Preparatory Committee on the latest state of play in the implementation of the unitary patent package.

Implementing the Patent package

Fifth 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 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 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. State of play of the implementation work done by the Select Committee

As indicated in the last progress report provided to the Competitiveness Council at its meeting of February 2016, the Select Committee has completed the implementation of the Unitary Patent Protection.

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, entrusted to the EPO by the participating EU Member States. 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”⁶.

- 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 1257/2012⁷ and determine the share of distribution of the renewal fees among the participating Member States.

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.”*

⁶ 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.

⁷ 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.”*

- Budgetary and Financial Rules⁸

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

In March 2016 the Select Committee has held a meeting in order to fine-tune some technical aspects concerning the technical systems for the data transfer between the EPO and national offices in relation to the Unitary Patent Protection and the administrative instructions relating to the distribution of fees amongst the participating Member States

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 completed.

It means that the Unitary Patent Protection is now ready to enter into operation 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.

⁸ 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)

2. Building the Unified Patent Court

2.1. Overall summary

The Preparatory Committee has agreed all legal instruments required for the Unified Patent Court (UPC) and is now in its last phase of preparing the technical framework and judicial appointments. Since its last report in February 2016, the Preparatory Committee has met on a further four occasions and is now in a position to conclude all the preparatory work at its final meeting in October 2016. That will set the project in the position to enter into its next phase - the period of provisional application. During this phase the Court will be able to start operating as a legal entity.

The entry into the provisional application phase depends on a sufficient number of Member States having ratified the Unified Patent Court Agreement (UPCA). Eleven Member States have already done so but the ratification of both the UK and Germany are still pending and required for the Agreement to enter into force and for the Court to become operational.

2.2. Progress in the working groups

Legal Framework

All the legal instruments required for the operation of the Court have now been agreed.

Recently the Committee has agreed on:

- a set of consequential amendments to the [Rules of Procedure](#) following the previous agreement on the [court fees](#);
- a [Code of Conduct](#) for representatives who appear before the Court, developed together with organizations representing lawyers and attorneys (EPLAW, EPLIT and the epi);
- The Rules of Arbitration and Mediation together with the operational rules of the Patent Mediation and Arbitration Centre.

In addition the Committee has agreed on a set of adaptations to the Rules of the Administrative, Advisory and Budget Committees to apply during the provisional application period. The purpose of these adaptations is to cater for the specific circumstances of the provisional application.

HR and training

The Committee launched the formal judicial recruitment on 9 May 2016. The exercise received over 800 applications. The Advisory Panel has identified a further group of judicial candidates for basic training. This training took place on the first and third weeks of September. The Advisory Panel aims at completing the preparations for the recruitment by the future Committees of the UPC by end of November regarding both legal and technical judges. Thereafter no further work can be done on the finalization of the appointment procedure until the sufficient number of ratifications has been achieved. Only after the required number of Member States' ratifications has been achieved the judicial interviews, advanced training and selection of judges be made.

The Service Regulation for the UPC judges and the Staff Regulation for the rest of the UPC staff have been agreed including salaries, qualifications of staff and draft vacancy notices. The only pending work in this area is the completion of the rules on the pension, payroll and the health care systems which are being finalized in collaboration with the International Service for Pensions and Remuneration (the ISRP). These rules are foreseen to be completed at the meeting of the Committee scheduled for October 2016.

The UPC training framework has been agreed allowing the Budapest training center to proceed with plans for the first year of the Court's operation of judicial training.

Finance

The Committee has dealt with the important issue of pensions, payroll and health care. In this respect the ISRP is working closely with members of the Committee providing valuable expert advice, guidance and assistance in these areas.

The Committee has endorsed the draft budget of the UPC with the clear caveat that it will be a “live document” subject to review before finally being adopted by the Administrative Committee.

In the same vein as in the legal area the Committee has agreed a set of rules that will govern the financial management during the provisional application phase instead of the regular Financial Regulation of the Court. This is needed due to the specific circumstances of this period.

IT

The Case Management System (CMS) is close to completion, subject to some remaining work including input from expert practitioners necessary to ensure that it meets the high standards of its future users. It is widely acknowledged by all involved parties, that the CMS will be continuously reviewed and improved up to the launching of the Court.

The implementation of IT including the CMS is now being led by the team in Luxembourg - the home of the future Registry of the Court - where all corporate functions will be based.

2.3. Miscellaneous

The premises for the Court of Appeal are almost finished, the Court room operational since late spring. The premises for the central division in Paris, London and Munich are being readied and preparations are well under way in several Member States to accommodate local and regional divisions.

The Committee has engaged considerably to design the operating model for the court. This will be largely centralised and governed from the Registry of the Court in Luxembourg including the corporate functions such as finance, IT, HR.

On 29 June 2016, a protocol on privileges and immunities to the UPCA was signed by representatives of Member States in the margins of COREPER I in Brussels. The protocol means that the UPC will, by using a common approach, benefit from privileges and immunities which are necessary for the exercise of its functions.

The interest in the project is huge among the user collective and the entry into force of the system is eagerly anticipated. Over the last six months numerous mock trials have taken place across Europe. These have been hugely successful and well attended. More events are planned for early 2017.

2.4. Timetable

According to the official timetable of the Committee the Court could be operational in early 2017. This was based on the assumption that the required ratifications were received during the fall of 2016.

The outcome of the UK referendum has had consequences on the UK ratification process. The time-plan, therefore, may have to be revisited.

It is highly desirable to keep any delay of the entry into force of the system to a minimum in order to provide the business community with the clarity and the swift entry into operation of the new patent system they require.
