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Subject: Report from the Chairs of the Preparatory Committee and Select  
Committee of Administrative Council of the European Patent Organisation:  
State of Play in the Implementation of the Patent Package.

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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.

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## **Implementing the Patent Package Fourth Progress Report**

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

#### **1.1. General framework**

Regulation 1257/2012<sup>1</sup> 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 1257/2012<sup>2</sup>.

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.

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<sup>1</sup> 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.

<sup>2</sup> 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<sup>3</sup> 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 Select Committee held its inaugural meeting on the 20<sup>th</sup> of March 2013. Since then the Select Committee has held thirteen more meetings.

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<sup>3</sup> 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. Judgments of the CJEU in Case C-146/13 Spain v Parliament and Council and Case C-147/13 Spain v Council**

Spain has brought on the 22 March 2013 actions for annulment of the EU Regulation 1257/2012 on the creation of unitary patent protection (Case C-146/13) and of the EU Regulation 1260/2012 governing the applicable translation arrangements (Case C-147/13).

By its judgments delivered on the 5<sup>th</sup> of May 2015, the Court of Justice has dismissed both of Spain's actions. In particular, the Court has confirmed in the Case C-146/13 that the implementing measures for the unitary patent, laid down in article 9 of the EU Regulation 1257/2012, are to be taken by the EU participating Member States in the Select Committee.

## **1.3. Activities of the Select Committee since September 2014**

### Summary

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

- approved, in principle, the draft Rules relating to Unitary Patent Protection. The consolidated version of the draft Rules has been made available on the website of the EPO;

- discussed two alternative proposals on the level of renewal fees submitted by the European Patent Office;
- continued exchanging views on the distribution key for the repartition of the share of renewal fees between the EU participating Member States.

During the next meetings to be held until the end of June, the Select Committee will concentrate its work on the main financial and budgetary aspects of the implementation of the Unitary Patent Protection, with the aim of taking a decision on those aspects by the end of June.

### **Substantive aspects**

#### Legal implementation of the Unitary Patent Protection

In December 2014 (11<sup>th</sup> meeting) the Select Committee has approved, in principle, the draft Rules relating to Unitary Patent Protection.

The Rules relating to Unitary Patent Protection concern mainly the procedures 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 compensation scheme for the reimbursement of translation costs, the entries in the Register for unitary patent protection, etc.

The consolidated version of the draft Rules has been made available on the website of the EPO<sup>4</sup>.

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<sup>4</sup>[http://documents.epo.org/projects/babylon/eponet.nsf/0/410C4BE15F77CE58C1257DB10039DB08/\\$File/draft\\_rules\\_unitary\\_patent\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/410C4BE15F77CE58C1257DB10039DB08/$File/draft_rules_unitary_patent_en.pdf)

## Financial and budgetary implementation of the Unitary Patent Protection

Between September and December 2014, the Select Committee has continued its work on the level of renewal fees<sup>5</sup>, on one hand, on the basis of simulations of fee level scenarios and of their impact on the budget of the European Patent Organisation, and, on the other hand, on the basis of a presentation given by the Office on the estimated costs of the Unitary Patent Protection.

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<sup>5</sup> 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.”*

Since its meeting in March 2015 (13<sup>th</sup> meeting), the Committee examines two alternative proposals on the level of renewal fees submitted by the European Patent Office. These proposals have been adjusted for the meeting in May 2015 (14<sup>th</sup> meeting). They currently foresee fee levels of respectively the equivalent of the renewal fees which have to be paid for the four or five countries out of the twenty-five EU participating Member States in which most European patents are currently validated (True Top 4 and True Top 5). The True Top 5 proposal in addition foresees a 25% fee reduction for the first ten years of the lifetime of the patent for specific entities such as SME's, universities and public research institutions.

Since February 2015 (12<sup>th</sup> meeting), the Committee has started to work on the distribution key for the repartition of the share of renewal fees between the EU participating Member States. Member States have exchanged views on the way the different criteria which compose the distribution key, should be defined and weighted<sup>6</sup>.

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- <sup>6</sup> 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.”*

Beside the level of the renewal fees and the distribution key, the Select Committee has also initiated a discussion on the draft Rules relating to Fees for Unitary Patent Protection. Those draft Rules concern, on one hand, the Fees to be paid to the EPO and the payments to be effected by it and, on the other hand, the budget and administration of renewal fees.

The objective is now to further concentrate the work of the Select Committee during its next meetings on the main financial and budgetary aspects of the implementation of the Unitary Patent Protection, with the aim of taking a decision on those aspects by the end of June 2015.

### **Timetable**

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 by the end of 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 has made good progress since the last Competitiveness Council meeting. It has held two meetings so far this year with the next one scheduled for 10 July 2015 and further anticipates another two meetings before year-end, in October and December 2015. 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 at its last meeting in September 2014<sup>7</sup> the Preparatory Committee has:

- Agreed the financial regulations;
- Agreed Rules on Administrative & Budget Committees
- Concluded discussions on the Rules on Legal Aid
- Concluded discussions on the European Patent Litigation Certificate
- Completed two classroom modules of judicial training at the Budapest Training Centre
- Started discussions on a remuneration scheme and the staff regulations applicable to judges
- Held a public hearing on the Rules of Procedure in Trier
- Launched a consultation on court fees
- Commenced discussions on the provisional application phase.

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<sup>7</sup> Document 13345/14

## **Progress in the working groups:**

### **Legal framework**

Following the digest of comments received during the public written consultation on the Rules of Procedure and the publication of the 16<sup>th</sup> draft of the said Rules, the Committee's Team 1 of the Legal Group, composed of experts from the different Contracting States together with the Committee's Expert Group, have set themselves to review the draft rules and have held an oral hearing on 26 November 2014 in Trier on the basis of a new revised 17<sup>th</sup> draft. More than 80 organisations as well as experienced patent judges had been invited and have provided valuable input to a variety of questions. The agenda of the Legal Group foresees a further joint meeting with the Expert Group to establish a revised final draft to be submitted to the Preparatory Committee this summer for adoption.

After a public consultation on draft rules on the European Patent Litigation Certificate which shall establish the conditions for the grant of the Certificate and the rules governing the other appropriate qualifications for European patent attorneys to be entitled to represent parties before the UPC, Team 7 of the Committee's Legal Working Group has prepared a revised final draft. The Preparatory Committee has examined the draft in two meetings and discussions have been concluded. The draft is scheduled for adoption in a written procedure.

The rules for the administrative committee and for the budget committee which had been positively received by the Preparatory Committee have after another round of discussions been adopted. Discussions have also been concluded on the draft of the Rules on legal aid.

### **HR and training**

At its 6<sup>th</sup> 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.

According to the assessment 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 focuses 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. The first two training modules (February and April) of the training program has been completed with potential candidates participating from Member States from no sufficient number of eligible candidates were selected in the pre-selection phase. These modules included regular tests of the accomplishment of the candidates and were concluded by a mock trial. These modules will be followed up shortly by the next step of the training program: internships at national patent courts with a high level patent litigation. Four participating Member States have made offers to host the candidates in their judiciaries, where they will be able to follow patent cases by being involved in the work of the panels handling the cases. The third and final part of the training will be a classroom training on the application of the Rules of Procedure, together with issues related to judgecraft, foreseen for the autumn of 2015.

Meanwhile, work has also began in relation to the development of the remuneration scheme and the staff regulation applicable to the judges and the registrar of the UPC

## **Finance**

Financial regulations for the Unified patent Court have been approved by the Committee. The Committee also took note of preliminary estimations of the expected contracting states' financial contributions during the first years of the Court's existence. This facilitates contracting states' ratification processes and allows the contracting states to make the necessary financial preparations.

On the 8 May the Preparatory Committee launched a public consultation on the fee structure for the Court. The fee structure for the Unified Patent Court will comprise fixed fees and, for certain actions, an additional value based fee. The fee levels proposed are the lowest that will enable eventual sustainability of the Court.

As well as proposing fee levels, the consultation also addresses a number of points including:

- support for small and medium sized enterprises (SMEs), not for profit organisations and certain other bodies as set out in the Agreement by providing two possible options
- the threshold at which a value-based fee will be payable
- a scale of ceilings for recoverable costs.

Discussions on salaries and allowances are ongoing as well as the work on making more accurate assessments of the expected operating costs.

## **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 will be discussed when practical and organizational issues about local recruitment responsibilities have been agreed later 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**

The UPC IT team are close to the end of the procurement for the case management system (CMS) and permanent website. The successful suppliers will be notified by mid-June and will begin working with the IT Team towards the end of July on configuration. The CMS will be developed over the summer to enable workshops to test the system with users to take place across the EU between September and November, with delivery of the system planned before the calendar year end. This will enable the CMS to be used to register opted out European patents and take payment of the fee in the run up to the formal opening of the court.

Procurement of other aspects of the court's technological infrastructure such as its email system and payment services provider are also under consideration.

## **Miscellaneous**

The Committee will need to ensure that all practical arrangements for the proper functioning of the UPC are in place or are duly prepared in order for the Court to be operational on its first day of existence. This is a logistical challenge since there will be no organisation before this date.

The Committee has progressed work on the organisation of this period where work will go from being preparatory in nature to bringing the Court on its feet enabling it to be operational and ready to deliver high quality judgements .

To this end the Committee is now forwarding work on a protocol to the UPCA that would allow for the provisional application of the institutional, organisational and financial provisions of the UPCA and Statute during a period of approximately six months before the UPCA enters into force. This will allow all legal texts and all decisions and appointments to be adopted in accordance with the relevant procedures. It will also allow for enough time to carry out procedures thoroughly, to avoid errors and to overcome unforeseen difficulties. Hopefully this work can be concluded early fall this year.

## **Timetable**

The official timetable of the Committee still says that work will not be completed before the end of 2015. This still remains the case, however, considering the progress made it is now anticipated that the Committee, during early 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.

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