

Judicial training in the framework of the Unified Patent Court as a prerequisite for the success of the Unitary Patent System

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The Unified Patent Court (UPC), which is to be created on the basis of an international agreement—the Agreement on a Unified Patent Court (AUPC)¹—will bring about profound changes to the European patent litigation landscape when that Agreement is ratified.²

As the first specialised court common to almost all European Union Member States, and hearing patent cases across the European Union in multinational panels, the Unified Patent Court will have unique European procedures, drawing on the best practices of existing national systems and creating innovative rules aimed at allowing effective and rapid oral hearings within a period of one year.

The success of the Unitary Patent System—which is expected to begin functioning according to optimistic predictions in 2015 and according to realistic expectations in 2016—depends to a major extent on the quality and celerity of decisions which will be adopted by the legally and technically qualified judges who are appointed. Patent users have to be able to rely on a system which brings enough legal certainty and rapidity. A lack of confidence in the Unified Patent Court will jeopardise the entire structure. During a transitional period of seven years from the entry into force of the AUPC, patent owners of a European patent (without unitary effect), will have the

¹Agreement on a Unified Patent Court, (2013/C 175/01), 20.6.2013, OJEU 175/1.

²For more details on the Unified Patent Court, see the Editorial written by the same author in ERA Forum 2014 (Volume 15, Number 2), pp. 160–168. For information on the ratification process, click on the following link: http://ec.europa.eu/growth/industry/intellectual-property/industrial-property/patent/ratification/index_en.htm.

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possibility of derogating from the exercise of competence on the part of the Unified Patent Court by choosing to bring their cases before national courts. It is therefore rightly feared that legal uncertainty as regards the new court will discourage patent litigators, first from applying for a unitary patent with unitary effect and second, from bringing cases before the Unified Patent Court by exercising their choice to opt out and prefer to litigate their European patents before national courts.³

The panels of the Unitary Patent Court are to be multinational, *i.e.*, composed of judges with the nationalities of different contracting states. One of the aims of this mixed composition is to set up a system in which countries with little experience in patent litigation can learn from countries with a longer tradition. Traditionally, Germany, France, the United Kingdom, the Netherlands and Sweden are the countries which have been faced with the highest volume of patent infringement and validity cases. At an early stage, the role of experienced judges coming from these countries will therefore be very important for the purposes of sharing knowledge with other judges coming from less mature countries. The need for training for these more experienced judges will be lower. However, due to the unique character of the Unified Patent Court, all judges—even the most experienced ones—will need at some point to receive training on the innovative and quite complex rules of procedures applicable before the new court.⁴

All judges will also have to be regularly updated on the case law of the Court of Justice of the European Union (CJEU) and on European Union legal developments which could have an impact on their decisions. As provided for in Article 11 AUPC, appropriate and regular training shall be provided for judges, ranging from the organisation of platforms for the exchange of expertise, courses and workshops to the adoption of measures in order to promote vocational training and to cooperate with international organisations and education institutes in the field of intellectual property law.

The Preparatory Committee of the Unified Patent Court received expressions of interest from about 1,300 candidates wishing to be considered as a Unified Patent Court judge. In July 2014, a list of 700 candidates suitable to become judges was approved, divided into legally qualified judges and technically qualified judges. Insofar as concerns the legally qualified judges, the list is divided into those who will be eligible without training and those who will be eligible after training, the latter being strongly encouraged to start training programmes already during the pre-selection procedure. Pre-selection does not, however, mean nomination. As pre-selected judges do not have any guarantee that they will be nominated as Unified Patent Court judges⁵ and as the AUPC is still in the process of ratification, one can understand why most of the Members States are not yet making haste to provide financing for training their pre-selected national judges.

³Article 83 paragraphs 1 and 3 of the Agreement on a Unified Patent Court.

⁴The 17th draft of the rules of procedure of 31 October 2014 can be consulted by clicking on the following link: http://upc hearing.era-comm.eu/wp-content/uploads/2014/11/UPC_Rules_of_Procedure_17th_Draft.pdf.

⁵The Administrative Committee of the Unified Patent Court shall appoint the judges of the Court acting by common accord.

Both categories of judges will be required to have proven experience in patent litigation. But obviously, the need for training will be different as for legally and for technically qualified judges. As legally qualified judges “shall possess the qualifications required for appointment to judicial offices in a Contracting Member State”, they will already have experience, or at least knowledge, of civil and commercial procedure.⁶ The offer of training should therefore take the form of advanced training in substantive patent law as regards validity and infringements, injunctions, damage calculation, as well as regarding the rules of procedure which will be applicable before the new court.

In order to qualify as a technical judge, it will be necessary to “have a university degree and proven expertise in a field of technology”. A proven knowledge of civil law and procedure relevant in patent litigation will also be required. Therefore, a technical judge will not need to follow courses on substantive patent law and liability requirements but he will need to acquire extensive knowledge in patent procedural law and in the Unified Patent Court Rules of Procedure.

Exchange of practices between judges implemented *via* internships—particularly in national courts which have already developed an extensive expertise in validity and infringement patent cases—will also be a key element in reaching an ultimate common understanding as between judges regarding how to apply the provisions of the AUPC.

Disputes involving patents will not be limited to technical or purely patent law matters and judges will be confronted with issues involving other areas of national and European Union laws. As a court common to the contracting Member States,⁷ the Unified Patent Court will base its decisions on European Union law, including both of the European Union Regulations setting up the Unitary Patent System and its translation arrangements.⁸ Arguments raised by litigants will certainly not be constrained to pure patent matters. Judges will hence have to adopt decisions on complex legal issues involving questions as regards the principle of exhaustion in intellectual property rights, the interpretation of licensing agreements and compulsory licensing, the regime applicable to supplementary protection certificates, the compatibility of behaviours with competition law, patent settlement requirements and the extent of FRAND (Fair, Reasonable and Non-Discriminatory) commitments, as well as to some extent the protection of fundamental rights. European Union law has developed a legal framework for most of these aspects and judges will have to know them and apply them, as well as the related case-law adopted by the CJEU. Moreover, judges of the Unified Patent Court will be entitled to use the preliminary ruling procedure in order to ask questions to the CJEU on unclarified points of European Union law. As demonstrated in a study on judicial training in the European Union Member States produced for the European Parliament by the Academy of European Law (ERA) in

⁶Article 15 of the Agreement on a Unified Patent Court.

⁷Article 1 of the Agreement on a Unified Patent Court.

⁸Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJEU L 361, 31.12.2012); and 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 arrangements (OJEU L 361, 21.12.2012).

2011 with the support of the European Judicial Training Network, knowledge on the part of judges concerning the preliminary reference procedure is still lacking.⁹ It will therefore be important for judges to be trained on when, according to the European Union Treaties, they should use this procedure and on how to draft preliminary questions for the CJEU. International private law will also have to be on the judicial training agenda, as the Unified Patent Court provides for specific provisions on the competence of courts which are inspired by the current version of the Brussels I Regulation. Moreover, as national law will remain the reference point for any question related to the property rights attached to a patent, training should also to some extent include national law.

According to Article 15 AUPC, all judges will need to have a good command of English, French or German which are the official languages of the European Patent Office. As the Unified Patent Court panels will be composed of judges of different nationalities, the need for language training for both types of judges—more specifically on patent terminology and on the drafting of decisions—is not to be underestimated. Without entering into the details of the complex linguistic regime which will be applicable before the local and regional divisions of the new court, the language of the proceedings will be the language of the seat of the local or regional division of the Unified Patent Court. Member States are entitled to choose a second language for the proceedings. Germany, the Netherlands and France will most probably opt for English as the second language of the proceedings and other contracted states might follow this model. English will most probably therefore become the most-used common language as between the judges.

Judicial training—coordinated by a Training Centre for the Unified Patent Court which officially opened its doors on 13 March 2014 in Budapest—will commence during the preparatory phase of the Unified Patent Court, with, most probably, a first series of courses being settled in the first or second half of 2015. The first series of courses will be organised under the responsibility of the European Patent Academy of the European Patent Office (EPO) which has, over the years, developed outstanding experience in providing training on patentability requirements before the EPO, and on patent infringement arising in national proceedings.

Other educational institutions which have developed extensive experience in training judges will also certainly have a role to play. National judicial schools and the European Judicial Training Network (EJTN)—an association which includes ERA as a founding member, judicial training institutes from all 28 Member States and educational institutions which have developed extensive experience in training judges—will be well placed to answer to the need for exchanges of practices and experiences between the judges composing the different Unified Patent Court panels.¹⁰

Like judges, legal practitioners entitled to litigate before the Unified Patent Court will first need to familiarise themselves with the new concepts of the Unified Patent Court Rules of Procedure and second with key principles of European Union law and in particular European Union competition law. According to Article 48 AUPC, two

⁹ *Judicial training in the European Union Member States*, study PE 453.198, 2011.

¹⁰ As acknowledged by the European Commission in two Communications of 2006 and 2011, ERA is one of the leading providers of European judicial education.

categories of persons will be entitled to represent parties before the Unified Patent Court. The first category includes lawyers who are authorised to practice before a Court of a contracting Member State. Rule 286 of the draft rules of procedure, aligning the Unified Patent Court rules with European Union law, defines the term “lawyer” by referring to Article 1 of Directive 98/5/EC on the recognition of professional qualification in the European Union.¹¹ European patent attorneys—who are entitled to act as professional representatives before the EPO—constitute the second category of persons entitled to represent parties before the Unified Patent Court, to the extent that they can prove that they have the appropriate qualifications such as a European Patent Litigation Certificate (EPLC). With the Unified Patent Court putting in place a unique procedural system in Europe, both categories of individual will need very soon to be trained on the relevant rules of procedure and on European Union patent law.

As regards patent attorneys, the strict wording of Article 48 AUPC has been much debated within the past months, with institutions representing patent attorneys at national and European levels considering that the right of representation should also be opened more broadly to patent attorneys entitled to practice in national patent infringement and invalidity court cases.¹² European patent attorneys will be able to prove the appropriate qualifications by means other than a European Patent Litigation Certificate. According to the current proposal for rules on the EPLC,¹³ “appropriate other qualifications” could include a bachelor or master’s degree in law (which are considered to provide the necessary knowledge of private and procedural law required to conduct patent litigation). Alternatively, practical experience could be proved by having represented a party in three patent infringement actions initiated before a national court of a contracting Member State.

The European Patent Litigation Certificate is a title which does not exist yet; the Administrative Committee of the Unified Patent Court will have to validate the qualification requirements necessary to obtain it. As the certificate will not be available before the entry into force of the AUPC, the recognition of other appropriate qualifications will be necessary in order to allow the Unified Patent Court to start with a sufficient number of qualified European patent attorney representatives. It is the reason why the current draft proposal for rules on the European Patent Litigation Certificate proposes in Article 12 thereof to introduce transitional measures aimed at recognising the qualification to European patent attorneys who would have passed courses offered by a listed number of educational bodies.¹⁴

¹¹Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998.

¹²In the United Kingdom, for example, registered patent attorneys are entitled to litigate in the Intellectual Property Enterprise Court and in the Patent Court.

¹³The draft decision of the Administrative Committee of June 2014 on the rules on the European Patent Litigation Certificate and other appropriate qualification pursuant to Article 48(2) of the Agreement on a Unified Patent Court can be consulted at: <http://www.unified-patent-court.org/images/documents/draft-eplc-consultation.pdf>.

¹⁴Article 12—like the other provisions of the EPLC—is still under discussion and its wording might change within the next months.

The Academy of European Law (ERA), as a European continuing education institution with the mission to enable legal practitioners to gain a wider knowledge of European Union law, is very well equipped to answer to these training needs. ERA has amassed expertise in European intellectual property law and policy by developing numerous training activities covering trade mark and design law, copyright law, patent law and litigation. If for many years patent law has been on the agenda of ERA, its efforts to offer legal practitioners regular updates on the preparatory works aimed at the creation of a Unified Patent Court as well as a platform for discussions have considerably intensified since 2011. Together with the Polish Ministry for the Economy, ERA organised a conference in Warsaw in the framework of the Polish Council Presidency 2011 which aimed at promoting an exchange of views between courts and practitioners on the creation and functioning of a new European Patent Court. This conference attended by some 70 participants consisted of three panels, in which highly qualified judges, experienced legal practitioners, academic experts and users of the patent system were invited to give their perspectives on the draft agreement, the overall architecture of the future Unified Patent Court and the conformity of the new patent system with the EU Treaties. Under the same model, a new platform for discussion was organised in Paris in December 2012 a couple of months after agreement had been reached by the European Council on the location of the Unified Patent Court. This conference provided an opportunity to introduce and discuss the latest proposals finally adopted at the end of 2012. In November 2013, a platform organised in Brussels focussed mainly on procedural issues and on future litigation patent holder strategies offered by the Unified Patent Court. The latest event organised in London in December 2014 and in cooperation with Queen Mary University of London gave legal practitioners the opportunity to discuss the latest stage of the Unified Patent Court Rules of procedure—and to report on the Oral Hearing organised by the Preparatory Committee of the Unified Patent Court, which gathered more than 80 participants representing national institutions, judges and stakeholders when it took place in late November 2014 at ERA's Congress Centre in Trier.¹⁵ ERA, which is following very closely the ongoing discussions under the AUPC, is currently preparing innovative training projects adapted to the future needs of judges and legal practitioners.

¹⁵The video of the Hearing can be seen by clicking on the following link: <http://upchearing.era-comm.eu/>.