



EU patent reform

In 2014, as in 2013, the unitary patent and Unified Patent Court (UPC) dossier has been among the Federation's highest priorities, following the long-awaited agreement between the European Parliament and Council in late 2012 which resulted in the unitary patent and language Regulations being adopted in December 2012, and signature of the UPC Agreement on 19 February 2013.

In 2013, the main focus of the Federation's work was on the UPC Rules of Procedure, for example PP15/13 commenting upon the 15th draft. The 16th draft published in March 2014 accommodated some, but not all of the Federation's concerns. In response (despite closure of the formal consultation process) the Federation submitted PP 8/14 on 1 September 2014 to the Preparatory Committee dealing mainly with:

- Rule 14 - language
- Rules 37 and 118 - bifurcation and grant of injunctions
- Rules 19, 336 and 340 - general case management / joinder of actions
- Rules 101 and 113 - timings
- Rule 220.2 - procedural appeals.

The Federation's points on language, bifurcation and procedural appeals have all been accepted by the Rules Committee. Concerns remain, however, about the lack of any dispute management powers (including powers to transfer actions between divisions, or between branches of the central division) and timings (length of proceedings and length of oral hearings in important cases). The Federation was invited to the hearing on the Rules of Procedure in Trier on 26 November, and Bobby Mukherjee and Alan Johnson attended. They intervened on each of the five issues mentioned above, expressing support for those changes made to the 17th draft which were in line with the Federation's position (first second and fifth points above), and reiterating its position on the third and fourth points.

In addition the Federation responded to two consultations on the UPC during 2014.

The first was PP 7/14 submitted on 24 July 2014 in response to the consultation on the proposals by the Legal Working Group of the Preparatory Committee on the draft European Patent Litigation Certificate (EPLC), closing on 25 July 2014.

The second was PP 9/14 submitted on 2 September 2014 in response to the IPO's Technical Review and Call for Evidence on draft secondary legislation implementing the Unified Patent Court Agreement (UPCA) closing on 2 September 2014.

Also, a delegation from the Federation met with the UK IPO (Sean Dennehey et al) to discuss concerns about the ambiguities of Article 83 UPCA (transitional provisions). This issue has arisen again in sharp focus as a point of critical importance due to the inadequacies of the drafting of this key provision which determines the treatment of every single European patent in force when the system goes live. In short order, the key points are:

- Will the opt-out be effective, or will the UPC retain non-exclusive competence, including to revoke patents centrally?
- If patents are not opted out, what will be the effect on the ability to enforce in the UPC of "torpedo" actions brought nationally under Article 83(1)?

The Federation's position is that these issues must be resolved, and that the first issue should be a "red-line" which should be clarified before the UK ratifies.

The most striking development during the year when looked at overall, has been the slowing down of the timetable toward a start-date. When the UPCA was signed (February 2013), the Commission optimistically stated that the new system would be up and running in early 2014. The (then newly-formed) Preparatory Committee put back this date to early 2015. Since then it has adjusted the date to not before the end of 2015. Recent pronouncements suggest an intention to have the system ready to start by April 2016.

One example of the reason for the slower than hoped for progress is the IT system. Latest estimates are that it will be put out for tender in February 2015, and the contract placed in July 2015 with a view the system being supplied ready for use by 1 January 2016. It is widely believed, however, that this timetable is optimistic, and is one of the reasons why late 2016 is generally regarded as the earliest likely date for the system to go live, and that 2017 may be more realistic.

Another reason for uncertainty as to timing of the start date is the progress on ratification by the UK and Germany (both ratifications are mandatory for the system to start - the other mandatory country, France, ratified in March 2014). Early indications were that the UK would ratify (if not deposit its instrument of ratification) before the General Election in April 2015. However, this target has been put back, in large measure by the requirement to negotiate and agree a hosting agreement for the UPC. This, it is understood, will have to be a multilateral agreement rather than a bilateral one, and will add an uncertain amount of delay. Potentially more serious, however, is the position of Germany. It is understood that Germany is unlikely to ratify until proper costings for the system are available.

Another source of delay is the EPO. Whilst proposals on fees for unitary patents were expected in May 2014, nothing has emerged, and rumours suggest that it may be at least June 2015 before any proposals are forthcoming. If so, this will cause enormous problems for companies attempting to set budgets including unitary patent protection. Likewise, nothing has been said about the distribution key allocating fees among participating states. This, it may be recalled, was one of the two main stumbling blocks which caused the (then) Community Patent system to fail in 2004, despite political agreement under the so-called "Greek Compromise of March 2003. There is even a possibility, therefore, of history repeating itself. At best, this may take very many more months to resolve, and it is possible that June 2015 may be optimistic.

Likewise, there is no news on Court fees, although there is more hope that some news may be forthcoming in early 2015. When opt-out fees will be announced is not yet known, nor what order of magnitude these may be set at.

It had also been hoped 12 months ago that by now some news would be available about the identity of the body of UPC judges. Expressions of interest were received from 1300 candidates in November 2013. In September 2014, the candidates received notification of the Preparatory Committee's view on their suitability, but there is no public list of those who received a positive indication, still less has a process begun for their appointment. One very difficult issue (difficult constitutionally for some countries) is the question of part time legal judges who also continue in private practice. This issue needs to be resolved, but it is unclear how it can be.

The training of judges is another issue where the Federation has expressed concerns. It appears that at least a number of judges (perhaps about 25) will be required from countries which currently have little or no patent litigation, and these judges will be given training in basic patent law by ERA. The course offered is a relatively simple six day course.

There is no news as yet about training of candidate judges in language skills.

As we reported last year, there remains also one other major obstacle in the way of the whole dossier, which is what has become known as the second Spanish challenge (strictly two challenges - one to each of Regulations 1257/2012 and 1260/2012). The thrust of the

challenges is that the Commission has over-stepped its authority in delegating powers to the EPO (in breach of what is known as the *Meroni* principle) and that the Regulations lack legal basis. On this second point, it is notable that one argument espoused by the Commission as to why the infamous Articles 6-8 were required was indeed to give proper legal basis to the Regulations. With their deletion (at David Cameron's insistence so as to avoid increased CJEU interference in patent law) the legal basis clearly became more shaky. The replacement provisions were described in a meeting of the European Parliament's Legal Affairs Committee which took place behind closed doors as "sub-sub-sub optimal", but in public the position taken by all EU officials and politicians is that the legal basis is adequate. Hence the Commission's position is that the second Spanish challenge will fail. Further, could it really be that the CJEU would strike down as unlawful a dossier which has taken 50 years to agree, whatever the legal merits of the challenge? A preliminary positive clue to the Court's decision was received on 18 November 2014 when the Advocate General's opinion was released, advising the Court that the Spanish challenges should be rejected on all counts. Hence, the most probable outcome would seem to be that the challenge will fail, and what will be most interesting is whether in the process (as many suspect) the CJEU will take the opportunity to assert that it has just as much right to review and interpret patent law as it has when Articles 6-8 were present. If so, this will send further shudders down the spine of industry given the CJEU's dubious track record in areas such as trade mark law. The decision itself is expected to be handed down in spring or early summer 2015.

On the more positive side, further clarity has emerged in 2014 as to the number and location of UPC local and regional divisions which may be created. Local divisions are expected in the UK, Germany, France, Italy, The Netherlands, Belgium, Denmark, Finland, Eire, and Austria. Regional divisions are expected to be formed by at least three groups of countries, namely: Sweden and Baltic countries; the Czech Republic and Slovakia; and Romania, Bulgaria, Greece and Cyprus (and possibly Slovenia). Most of these divisions will designate English among their languages (even the German and French local divisions according to latest information). Germany is still proposing to have four local divisions, but despite lobbying, the UK appears likely to have only one. In total there might therefore be 16 or more local and regional divisions, with all but one or two operating partly or exclusively in English, in addition to the three parts of the central division. Since each division will need at least one panel of three judges, taken together with the Court of Appeal, which will sit in panels of five, and the inevitable requirement for multiple panels in each of the three central division seats, this suggests the need for upwards of 100 legal judges, and probably at least as many technical judges so as to cover different disciplines.

Finally, the Federation congratulates Tim Frain (Nokia) on his appointment to the expert panel advising the Preparatory Committee. The other representative of European industry is Udo Meyer (Germany).

Alan Johnson, 8 December 2014