

Rules of Procedure for the Unified Patent Court

Introduction

The IP Federation represents the views of a significant number of major innovative UK companies in matters concerning intellectual property policy. A list of members is attached. Not only do our companies own considerable numbers of IP rights, both in Europe and internationally, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions.

The consultation

At the last meeting of the Commission's judges and lawyers expert group in February 2012, it was agreed that a small drafting committee would prepare a first draft of the Rules of Procedure of the Unified Patent Court (UPC). A first draft of the Rules of Procedure has now been issued by the drafting committee, with a request for comments by **23 April 2012**.

IP Federation response

The IP Federation wishes to make the following comments on Rules 361 and 362, relating to Privilege in the Unified Patent Court (see the text which follows):

- (a) Rules 361.2 and 361.3 are inconsistent in use of "patent attorney" and "patent agent". "Patent attorney" in Rule 361.2 (two occurrences) should read "patent attorney or agent", and "patent agents" in Rule 361.3 (two occurrences) should read "patent attorneys or agents".
- (b) In Rule 361.4, "lawyer" should be replaced by "lawyer or patent attorney or agent".
- (c) The semicolons at the end of Rules 361.2 and 361.4 should be replaced by a full stop.
- (d) In Rule 362, "or agent" should be added after "attorney".
- (e) In Rule 362, the following sentence should be added:

Internal confidential communications of the client concerning proceedings reasonably anticipated or pending before the court are likewise privileged.

Without this sentence, it would appear, for instance, that one party would be entitled to seek discovery of board minutes of the other authorising commencement, defence, or settlement of the litigation including fall-back positions, which would make it hard for either party to manage the litigation.

- (f) If for some reason the drafting committee do not think agents should be covered at all, then “attorney” or “attorneys” should be used throughout; but the Federation strongly supports the use of “attorney” and “agent” in the alternative.

IP Federation
11 February 2013

**Preliminary set of provisions for the
Rules of procedure of the Unified Patent Court**

Rule 361 – Attorney-client privilege

1. Where a client seeks advice from a lawyer he has instructed in a professional capacity, then any confidential communication (whether written or oral) between them relating to the seeking or the provision of that advice is permanently privileged from disclosure, whether in court or arbitration proceedings of any nature or in the face of any compulsory information gathering powers of any body.
2. This privilege applies to communications between a client and a lawyer employed by the client and instructed to act in a professional capacity and a client and a patent attorney (including a patent attorney employed by the client) who is instructed in his professional capacity to advise on patent matters;
3. This privilege extends to the work product of the lawyer or patent attorney (including communications between lawyers and/or patent agents employed in the same firm or entity or between lawyers and/or patent agents employed by the same client) and to any record of a privileged communication.
4. This privilege prevents the lawyer and his client from being questioned or examined about the contents or nature of their communications;
5. This privilege may be expressly waived by the client.

Rule 362 – Litigation privilege

1. Where a client, or a lawyer or patent attorney instructed by a client in a professional capacity, communicates confidentially with a third party for the purposes of obtaining information or evidence of any nature for the purpose of or for use in any proceedings reasonably anticipated or pending before the Court, such communications shall be permanently privileged from disclosure in the same way and to the same extent as provided for in Rule 361.

IP Federation members 2012

The IP Federation represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. Its Council also includes representatives of the CBI, and its meetings are attended by IP specialists from three leading law firms. It is listed on the joint Transparency Register of the European Parliament and the Commission with identity No. 83549331760-12.

AGCO Ltd
ARM Ltd
AstraZeneca plc
Babcock International Ltd
BAE Systems plc
BP p.l.c.
British Telecommunications plc
British-American Tobacco Co Ltd
BTG plc
Caterpillar U.K. Ltd
Delphi Corp.
Dyson Technology Ltd
Eli Lilly & Co Ltd
ExxonMobil Chemical Europe Inc
Ford of Europe
Fujitsu Services Ltd
GE Healthcare
GKN plc
GlaxoSmithKline plc
Hewlett-Packard Ltd
IBM UK Ltd
Infineum UK Ltd
Merck Sharp & Dohme Ltd
Microsoft Limited
Nokia UK Ltd
Nucletron Ltd
Pfizer Ltd
Philips Electronics UK Ltd
Pilkington Group Ltd
Procter & Gamble Ltd
Rolls-Royce plc
Shell International Ltd
Smith & Nephew
Syngenta Ltd
The Linde Group
UCB Pharma plc
Unilever plc
Vectura Limited