



EU Patent Reform

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. The agreement resulted in the Unitary patent and Language Regulations being adopted in December 2012, and signature of the UPC agreement on 19 February 2013. It will be recalled that all EU countries but Spain and Poland signed the agreement at this time (although Bulgaria signed a little late), and notably Italy was also among the signatories, despite its not participating in the Enhanced Cooperation arrangement which gave rise to the Unitary patent regulations. Indeed, in July 2013, Italy indicated informally an intention to join the Unitary patent regime as well as the UPC.

The main focus of the Federation's work has been upon the UPC Rules of Procedure. In February, the Federation issued PP1/13 regarding the important issue of patent attorney privilege. The major efforts, however, followed publication of the 15th draft which was put out for public consultation on 31 May. In collaboration with the UK IPO and CIPA, the Federation hosted a public meeting in London on 3 September. This was chaired by President Bobby Mukherjee, with speakers including Lord Justice Christopher Floyd and Chairman of the Rules Committee, Kevin Mooney. The event was attended by not only 100 or so in person attendees, but around 2000 others from around the world tuning in to the webinar link.

The Federation also submitted its own comments on the draft Rules (PP15/13). Issues of importance identified included:

- The opt out regime;
- Language arrangements;
- Bifurcation and the grant of injunctive relief before invalidity defences have been adjudicated;
- The desirability of permitting the Court of Appeal to grant permission to hear procedural appeals so as to encourage harmonisation; and
- Fees.

It is understood that around 110 sets of submissions on the rules were made, and that a public consultation will be held in Brussels in late February 2014, with a view to a final set of rules being published in summer 2014.

Other issues addressed by the Federation have included the deeply unsatisfactory draft recast Brussels 1 Regulation. As explained in PP14/13 issued in October, if left unchanged, this will surely result in references to the CJEU for clarification of the priority to be given to national and UPC actions concerning European patents not opted out from the new regime. This issue was also raised with Kerstin Jorna of the Commission during a meeting in Brussels on a variety of issues including the UPC on 28 August.

Looking ahead, the UPC Preparatory Committee, formed in March, is now hoping that the new regime will come into force in "early 2015". This is, in reality, merely a target date, and some of the practical tasks it has to undertake are formidable, notably commissioning the Court computer system, a responsibility allocated to the UK.

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The EPO has also started work toward agreeing its rules concerning the grant of unitary patents. The thorny question of renewal fees for UPs and the distribution key allocating fees among participating states may, however, take very many months to resolve.

Some clarity is also emerging 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 and Belgium. Regional Divisions are expected to be formed by at least three groups of countries, namely: the Scandinavian and Baltic countries; the Czech Republic and Slovakia; and most intriguingly by Romania, Bulgaria, Slovenia, Greece and Cyprus. Also of great note is that many of these Divisions will designate English among their languages. Indeed, the Scandinavian / Baltic division is likely to have English as its only language. As expected, Germany is proposing to have four local divisions, and lobbying is continuing in the UK for there to be additional divisions outside of London, at least in Edinburgh, but possibly also in a northern city such as Leeds or Manchester and perhaps in Wales too. Whether the UK is entitled to this number of divisions depends on the esoteric question of how one counts patent cases, as well as the political will to fund more than one division. In total there might be as many as 16 local and regional divisions, with up to a dozen 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. Happily, progress is also being made concerning appointment of judges, with expressions of interest being requested by 15 November 2013, and with a first selection of candidates and training beginning in 2014.

The key point in terms of process, however, remains that ratification of the UPC agreement (an international treaty) is required by the UK, France and Germany and 10 other states. So far only Austria has ratified. It seems highly unlikely that the UK and Germany will ratify before the fee arrangements are clear and some economic impact analysis has been completed. The UK is currently enabling ratification via the IP Bill, and its present position is that its target date for ratification is April or May 2015 (notwithstanding the promise of an EU membership referendum if the next election results in a Conservative government). Since the agreement says that the new regime comes into force 4 months after the last relevant ratification, this points to an earliest date for the start-up of the new system of autumn 2015, although 2016 or even later may be more realistic. The timing of German ratification is particularly uncertain, with rumours circulating that they are unhappy with their share of work allocation to the Central Division and wish to renegotiate this allocation before ratification so as to include more automotive work. The difficulties of such renegotiation are enormous, since the allocation was enshrined in the UPC treaty itself (in Annex II). If these rumours are well-founded, and given the difficulty of re-opening any element of the package, this suggests a great deal more potential delay. Despite this, at present there appears to be considerable political will throughout Europe to press on, such that it is likely only a matter of time before this project becomes a reality.

There is still, however, one other major obstacle in the way, which has become known as the second Spanish challenge. In April 2013, the CJEU rejected a first challenge (brought by Spain and Italy), but before then (in March) Spain had already launched a more legally persuasive attack on the draft Regulations. The thrust of this is that the Commission has overstepped 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? We will be given some reasonable clue in 2014 when the Advocate General's opinion is released, although the decision itself is unlikely to be reached before spring 2015. Despite the legal merits, the most probable outcome seems 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 had when articles 6-8 were present. If it does, this will send further shudders down the spine of industry given the CJEU's dubious track record in areas such as trade mark law.

Alan Johnson, 31 October 2013