

'Innovation, not the income of national patent offices must be key factor in Unitary Patent renewal fee level'

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Cost reductions obtained by introducing the Unitary Patent package should not be nullified by the setting of renewal fees at a high level. This would amount to the patent offices 'clawing back' the savings obtained instead of passing them on to innovating businesses. Lucia Caudet, spokeswoman for the European Commission told this in an interview with Kluwer IP Law. The EC supports the 'real TOP 4' fee level, which has been pleaded for by European business organizations.

How does the EC keep itself up to date about developments leading to the Unitary Patent and Unified Patent Court?

The Commission played a decisive role in the advent of the Unitary Patent (UP) by putting forward the proposals that resulted in the final adoption of the so-called 'patent package' in December 2012 including the two EU Regulations creating Unitary Patent Protection (Regulations No 1257/2012 and 1260/2012). In the current implementing stage, the Commission continues to actively participate in the work carried out to turn the UP and the Unified Patent Court (UPC) into reality. (...)

First, the Commission enjoys observer status at the Select Committee (SC) to the Administrative Council of the European Patent Organisation (EPO). (...) The Commission has so far participated in all (13) meetings of the SC and been actively involved in all discussions, both on the legal and financial issues.

Second, the Commission was also admitted as observer at the UPC Preparatory Committee. (...)



Overall, the status of the Commission is that of an 'enhanced' observer in both fora. It is in particular the guardian of the conformity of all implementation acts with EU law. (...) The decisions of the SC shall be taken with due regard for the position of the Commission (article 9(2) 4th paragraph of Regulation 1257/2012). Also as regards the setting up of the UPC, the formal opinion of the Commission on the compatibility of the Rules of Procedure of the Court with EU law will be requested (article 41(2) of the UPC Agreement).

Finally, the Commission closely monitors the process of ratification of the UPC Agreement by the participating Member States and is in constant contact with all the key players, namely Member States and the EPO.

Last month, EC commissioner Bienkowska seemed to criticize the UP renewal fee levels as proposed by the EPO Select Committee, stating among others that the EU's competitiveness should be the main concern, over and above revenue considerations. She also said young start-up companies could end up as the victims of high fee levels. Is she concerned about the way the UP package is developing?

The level to be set for the renewal fees of the UP will be a key driver of the success of the project. The UP and the UPC will mechanically result in the considerable decrease of the costs borne today by inventors validating their European patents in several Member States (disappearance of national validation costs, single stop shop for litigation etc.).

However, the level of the renewal fees to be paid for maintaining the UP will be also critical to the price-attractiveness of the UP in a context where the UP will coexist with the current system (bundle of national validations of the 'classical' European patent).

Today a European patent is on average validated in 4 participating Member States (the most validated are DE, FR, UK and NL). This means that if the costs of maintaining a UP are much higher than the current cost of maintaining a European patent validated in these 4 countries, the actual financial incentives to switch to the UP will be limited.

The Commission has therefore, from the outset, clearly stated its position during the discussions on the UP renewal fees at the Select Committee: the rate of the renewal fees should be close to the sum of the renewal fees paid in the four participating Member states where the European patent are mostly validated (DE, FR, UK, NL). In addition, the Commission pleads for a specific rebate for specific entities such as SMEs, non-profit organisations, natural persons, Public Research Organisations and Universities all along the life of the patent to be considered.

The main principles which should govern the decision on the UP renewal fee levels should be the EU's price-competitiveness as compared to comparable trade partners and the need to guarantee the access of SMEs to the UP, to foster their internationalisation and their ability to make the most out of the Single market. In sum, the cost reductions obtained should not be nullified by the setting of renewal fees at a high level: this would amount to the patent offices 'clawing back' the savings obtained instead of passing them on to innovating businesses.

This ambition to set the 'cost' of the UP at a sufficiently attractive level has been strongly asserted by the Commission at the SC. This explains the comments of Commissioner Bienkowska, who is highly committed to the success of the UP as a driver of the EU's competitiveness.

Is the problem that Member States expect too high an income from the renewal fees?

Some participating Member States have indeed expressed strong concerns about the risk that their national patent offices might see their revenues eroded by the success of the UP, whose maintenance cost would be set 'too low'. Also at the time of the adoption of the package, the participating Member States issued a statement according to which the national patent offices should keep the same level of revenue as the one they got when the package was adopted.

Admittedly, the EU Regulation creating the UP sets out that the level of the renewal fees should be sufficient to guarantee a balanced budget of the EPO. However, a key driver of the decision should clearly be the ambition to foster innovation and the competitiveness of European-based businesses (article 12(2) regulation 1257/2012).

As a consequence, it is the Commission's view that the participating Member States should set the renewal fees at a reasonable level and decide on the best possible distribution key to achieve the objective they seek. Discussions at the SC should not turn into a 'reverse engineering' exercise consisting of defining first the desirable revenues for the NPOs of the participating Member States in order to derive the requisite rate for the renewal fees.

Organizations such as Business Europe and Eurochambres have criticized the proposed fee levels and explained that for many companies UP patent protection will not be cheaper. What should happen with their criticism?

The Commission is defending a line that is very much in line with the ones expressed by BusinessEurope and Eurochambres as well as by other professional organisations and businesses, which plead for a so-called 'real TOP 4' fee level (i.e. a fee level corresponding to the sum of the renewal fees currently paid in the 4 participating Member States where the European patents are most validated). This corresponds to the 'average European patent' identified by Article 12(2) of Regulation 1257/12 as the desirable benchmark when fixing the renewal fees. BusinessEurope and epi (the European patent attorney association), who are also observers at the Select Committee, have defended similar positions.

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