‘EU authority or EPO should be charged with granting unitary SPCs’

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Establishing a unitary SPC is one of the recommendations of the study carried out by the Max Planck Institute for Innovation and Competition for the European Commission. Either an (existing or a future) EU authority or the European Patent Office can be charged with granting these unitary SPCs.
According to the study, the choice between an EU authority and the EPO is a matter of policy that is up to the legislature. ‘However, one important aspect to consider is that if an EU authority is put in charge, appeals must be directed to the General Court, whereas in the case of the EPO being mandated, it would be possible to direct appeals to the UPC [Unified Patent Court, ed], thus consolidating jurisdiction for the grant of (unitary) SPCs as well as for infringement and validity in the same forum.’

Although the first option is more easily implemented, the second option ‘appears preferable from the point of view of expertise and consistency of the system’, according to the researchers. ‘The majority of the stakeholders consulted in the Study favoured a system in which (i) a team of experts from the NPOs (virtual office or virtual Unitary SPC Division) examines the application and grants the certificate, and (ii) the UPC hears appeals lodged against decisions rejecting the application.’

‘In addition to creating a unitary SPC system, we recommend that guidelines in the

form of soft law as well as implementing regulations (to be issued by the European Commission) be developed in order to bolster the evolution of consistent and transparent practice in the Unitary SPC Division and the national offices.'

Concerning the language regime, the study points out that: 'As the purpose of the legislation is to create a unitary title, account must be taken of Art. 218 TFEU, including the unanimity requirement of Art. 218(2) TFEU with regard to languages. This may require that the prerequisites of enhanced cooperation have to be observed anew.'

The study furthermore recommends creating a unitary SPC with dynamic territorial scope. It is 'feasible, in accordance with proposals advanced by stakeholders, to grant a unitary SPC on the basis of a bundle of national MAs [market authorizations], with its territorial scope being restricted accordingly. Within this model two options are explored: the option of an SPC with static territorial scope that could be combined with national SPCs; and the option of a unitary SPC with a dynamic territorial scope that could extend to any other Member State where an MA is granted before the expiration date of the patent.

In the field of plant protection products for which no Union authorisation is available, the model of a unitary right with dynamic territorial scope is clearly recommended. With respect to medicinal products, the choice is less obvious. In most cases it will be possible for the applicant to make use of the centralised procedure. For the remaining cases it may be acceptable to resort to a bundle of national SPCs.'

The option for creating a manufacturing waiver for SPCs, also discussed in the Max Planck study, was the issue of this and this post on the Kluwer Patent Blog.

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