

# Kluwer Patent Blog

## The Proposed EU Patent before the European Parliament – A Report and Not (Yet) a Vote

Thorsten Bausch (Hoffmann Eitle) · Monday, February 6th, 2012

As could almost have been predicted, the European Parliament has cancelled its First Reading and its vote on the creation of unitary patent protection. It has instead now scheduled just a [brief hearing for 14 February 2012](#), to be held between 9:00 and 10:20 a.m. Members of the European Parliament will present their reports in this hearing on the proposal for a Regulation on unitary patent protection (Rapporteur: [Bernhard Rapkay](#)), on the proposed Regulation on translation arrangements (Rapporteur: [Raffaele Baldassarre](#)) and on the court system for patent litigation (Rapporteur: [Klaus-Heiner Lehne](#)).

Negotiators of the European Council and the European Parliament claim to have substantially agreed in December 2011 on a compromise paper submitted by the Polish presidency (see press release [No. 18115/11](#)). This (purported) compromise by a “large majority of the delegations” was backed up by the Parliament’s Legal Affairs Committee on [20 December 2011](#) but must still be endorsed by the full Parliament and the Council before it can become effective.

However, agreement could not be reached as to the location of the proposed central division of the planned Unified Patent Court (UPC). As far as we know, Budapest, The Hague, London, Munich and Paris (in alphabetical order) have applied for the seat. This seat seems to be a major political issue at least for some Member States. On the other hand, it recently became clear from the debate before the Scrutiny Committee of the UK Houses of Parliament, of which [IPKAT](#) has a very useful summary and record, that this is not the only remaining issue. In fact, Member States still seem to be negotiating not only about the seat of the court but also on various “technical issues”. For example, the UK still seems to attempt to get rid of Art. 6 to 8 of the planned EU Regulation which contain substantive provisions on the effects of the planned unitary patent. These articles would effectively make patent infringement decisions by the UPC subject to review on the merits by the CJEU. In other words, the CJEU would be the final (third) instance to decide on patent infringement matters. Patent practitioners in Germany, the EPLAW and FICPI organisations and representatives of the European Patent Judiciary have also vehemently criticized this arrangement, as it would unnecessarily prolong patent infringement proceedings and decrease predictability of decisions, given that the CJEU does not have specialised patent panels and not much experience in this difficult field. Yet Art. 6 to 8 still seem to be part of the currently proposed “compromise”.

Further, for Germany the “compromise” proposal providing that more infringement cases can be heard by the central division than previously agreed upon is an issue. The proposal provides that if the defendant is domiciled within the European Union and the alleged infringement has occurred in

the territory of three or more regional divisions, the defendant should have the possibility to request a transfer of the case to the central division. However, Germany is afraid that this proposal might draw away too many infringement actions from (German) local divisions that (may) prefer to decide upon the cases as they did in the past, i.e. by deciding on the infringement part of the action only and refer the invalidity counterclaim to the central division. This skirmish hides one fundamental flaw of the entire UPLS, i.e. that the Member States have not really reached an agreement whether the future UPC shall apply the previous German and Austrian two-tier system separating infringement and validity (at least to a large extent), or rather the one-tier system applied elsewhere in Europe. Currently, each local or regional division of the court may do what it wants.

With regard to the financing of the UPC, the European Council and Parliament at least seem to have recognized that the proposals of last fall need to be elaborated in much more detail and that it is simply unrealistic to expect that the entire UPC can be financed by the users of the system. Indeed, as we observed in an earlier [blog](#), this would have ended in disaster. Now, the compromise proposal at least acknowledges that Member States are required to make financial contributions in the setting up phase (first 7 years). However, even according to the latest proposal, in principle the system should still be able to be financed by the fees of the parties using the court system. How this is to work out in practice and at the same time satisfy the objective that the court should be accessible for parties with limited resources, that the fee system should be straightforward and predictable for the users remains to be seen. It seems that no concrete numbers were put on the table so far; but in our opinion, this is an absolutely critical issue. Cloudy diplomatic language expressing the best intents, but not really explaining how these objectives are to be achieved, should – in our respectful opinion – not be a basis for the future Unified Patent Litigation System. Somebody will have to pay the bill in the end, and if the users of the UPLS are to one-sidedly carry this burden, then this may risk the success of the entire plan.

Of similar importance is the level of the renewal fees due for the future EU patent. The present “compromise” seems to propose that the fees are fixed at a level so that all Member States are allowed to keep their income, while at the same time those Member States that currently have a low renewal fee income will significantly raise their fee income. The bill for this will again have to be paid by the users, and most probably this means that the renewal fees for the EU patent will be substantially higher than for the “average” EP patent today. Whether this will be an attractive option remains to be seen when more concrete numbers are made available.

To conclude, it can probably be said that those who predicted that the unitary patent will “surely” come within the first half of 2012 have, one more time, been proven overly optimistic (or pessimistic, depending on which view one takes with regard to the currently planned system). This is reflected by the decision of the full legal committee of the European Parliament to defer the vote planned for February 13 to 16, 2012, to an “indefinite time”. The legal committee will only put this matter on the agenda once again once the Member States have concluded an Agreement on the Unified Patent Court. The EU Council stated that this should be the case “in June at the very latest”. However, given the latest developments in the UK and the increasing criticism on the proposed UPLS in Germany and other states, it remains to be seen whether this is so realistic, let alone desirable on the basis of the current proposals.

Thorsten Bausch with contributions by Anja Petersen-Padberg

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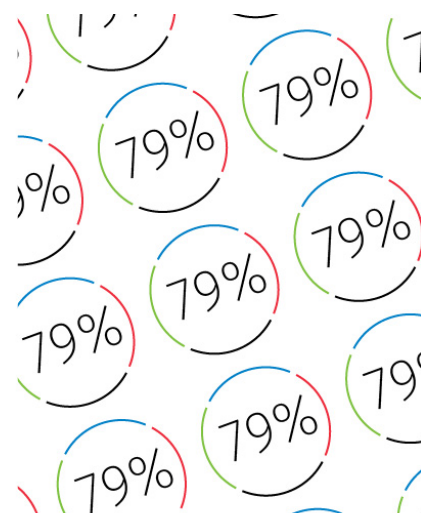
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