# Kluwer Patent Blog

## EU Patent Makes Next Step – But Whereto? Success or Abyss?

Thorsten Bausch (Hoffmann Eitle) · Friday, October 12th, 2012

On 27 September 2012, a new consolidated version of the Draft Agreement on a Unified Patent Court (Document 14268/12) was (finally) published. The consolidated text includes some of the amendments agreed upon on 5 December 2011 as well as on the 29/30 June 2012 EU Council summit, and also presents further amendments and quite a few corrections in terms of language. Here is a comparative version to the predecessor document (no. 16741/11).

The draft sticks to the ambitious yet, as we dare predict, completely unrealistic timetable to basically let the patent package system enter into force on 1 January 2014. 13 countries, including Germany, France and the UK, must have signed and ratified the Agreement by that date (Preambles 14 and 15, Art. 59). Parallel thereto, the Regulations on the EU patent and on the translation requirements must have been agreed upon and enter into force. Considering that (a) ratification proceedings of international agreements alone can take about two years or more in some European countries and (b) decisive questions still have to be agreed upon, in particular costs, i.e. the annuities for the Unitary Patent and the court fees for the Unified Patent Litigation System (UPLS), it would come close to a miracle if 2014 were to actually see the start of the Unified Patent Court.

The strategy of the political forces pushing for the speedy enactment of the UPLS seems to be to first agree on the "political" questions and then, during pending ratification proceedings, the financial "details". Given that it is, on the one hand, not very popular in these days to impose further costs on the taxpayers, and on the other hand that the Unitary Patent and the UPLS can and will only be widely accepted if they are less expensive than the existing system (indeed this was the key motivation to introduce it and was promised over and over by politicians to the users of the system), it is to be expected that these financial "details" will not exactly be "peanuts". This may in turn provoke significant delaying tactics by Member States with regard to the ratification until a clearer picture of the costs has emerged.

In these days, the Legal Affairs Committee (JURI) of the European Parliament is again discussing the Regulation for the Creation of Unitary Patent Protection (latest documents: 17578/11 and the report of the Parliament A7-0001/2012). The main point of discussion will probably be to find a solution with regard to the Council's proposal of deleting Articles 6-8 of the Regulation, which relate to direct infringement, indirect infringement and limitations of the effects of the patent respectively. The deletion was proposed by the EU Council in order to avoid the Court of Justice of the European Union (CJEU) having to make decisions on substantive patent law, but has met with

fundamental resistance within JURI and the European Parliament who insist that the CJEU must be able to act as the European Union's Supreme Court for everything agreed by (part of) the EU member states, including the unified patent law. According to what has been reported on a preliminary opinion of the Legal Service of the European Parliament, the deletion would be contrary to EU law, and in particular would not be in line with Article 118 (1) TFEU, i.e. "to provide uniform protection of intellectual property rights throughout the Union" (unfortunately, the opinion seems not to have been made available to the public yet – is it really so appallingly substantiated that one must hide it to the eyes of the public?). On the other hand, the EU Council did recommend this deletion, most probably driven by concerns against the CJEU that were particularly voiced by the government of the UK, yet were apparently also accepted by the other EU Head of States.

Finding a face-saving compromise that pleases everyone might therefore again not exactly be an easy undertaking. The numerous voices from IP practitioners, industry, academia and judges that caution against CJEU jurisdiction on substantive patent law might be all too conscious of the fact that anything in an EU Regulation that looks unclear, ambiguous or appears to be just diplomatic mumbo-jumbo will ultimately have to be interpreted by that very court (i.e. the CJEU) that those critical voices wish to be restrained from adjudging substantive patent matters. Will then the CJEU really restrain itself from looking at substantive patent law and leave such questions of harmonised European law entirely to another (subordinate) EU court, the UPC?

It seems to the authors of this blog that a cleaner solution to this problem might perhaps be to reconsider and, above all, to reform the current set up, working and business distribution scheme of the CJEU. If the CJEU had its own panel of renowned specialist judges who permanently decide on all patent (and SPC!) cases, then most of the users' concerns against CJEU supreme jurisdiction would in our opinion cease to exist. And in such a case, the UPC would not even need an own Court of Appeal! This would be good for the parties, who will get a final decision much earlier, and good for the users of the system and the taxpayer since it would obviously save costs compared to the existing proposal.

Maybe this is wishful thinking. Yet if we want the Unitary Patent and the UPLS to be a success for Europe, a little bit more creative thinking and a little less haste cannot hurt. Just pushing for quick "patch compromises" on the basis of the existing draft Regulation is a fairly risky strategy.

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