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Not one single candidate out of 1300 applications fulfils the conditions required to be a candidate judge at the UPC

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My last blog, published on 14 November 2013, mentioned that on the closing date (15 November 2013) set to send expressions of interest for persons wishing to be considered candidate Judges at the Unified Patent Court ("UPC"), only Austrian nationals would fulfil the conditions set by the Preparatory Committee, for only Austria had ratified the Agreement on a UPC. This statement was based on the fact that one of the prerequisites was to be a national of a "Contracting Member State." Dear Austrian readers, I am so sorry to have raised unfounded expectations, for this statement was wrong. After having carefully reviewed the Agreement on a UPC, it turns out that not even Austrian nationals will fulfil this condition.

The reason is that, according to Article 2 (c) of the Agreement on a UPC, a "Contracting Member State" is "a Member State party to this Agreement." This definition is very odd, as it deviates from the definition of "Contracting State" used in the mother of all treaties, that is, the 1969 Vienna Convention on the Law of Treaties, which defines "Contracting State" as "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" (Article 2.1 (f)). But the actual fact is that the drafters of the Agreement on a UPC mixed up the concept of "Contracting State" with the concept of "Party", which the Vienna Convention defines as "a State which has consented to be bound by the treaty and for which the treaty is in force" (Article 2.1 (g)). In other words, in the Agreement on a UPC, a "Contracting Member State" is not a "Contracting State" but a "Party".

This mixing-up of concepts should not come as a surprise in the realm of a system where an "experienced patent Judge" (Article 15 of the Agreement on a UPC) can be a "non-experienced patent Judge" who has overcome his of her dearth of experience "by training" (Article 2(3) of the Statute of the UPC). But then, where is the beauty of the UPC, whose rationale it was to bring legal certainty to stakeholders through very experienced patent Judges?

Going back to the theme of today's blog, the reality is that on 15 November 2013, not one single candidate out of the 1300 (yes, one thousand and three hundred) applications received by the UPC's Preparatory Committee to fill the 40 to 60 posts estimated to be initially needed, fulfils the conditions established in the "Call for Expression of Interest."

On another note, the overwhelming number of applications received may be explained by the flexibility introduced by Article 2 (3) of the Statute of the UPC, which, as mentioned, states that "Experience with patent litigation which has to be proven for the appointment pursuant to Article

15(1) of the Agreement may be acquired by training under Article 11(4)(a) of this Statute." No doubt, this flexibility was introduced, among other reasons, to avoid scaring away prospective contracting states (*rectius*, "parties") whose Judges may not have "proven experience in the field of patent litigation." But, obviously, this begs an interesting contradiction: how on Earth could one have "proven" experience in the field of patent litigation on 15 November 2013, if such experience is expected to be acquired in the future by "training"? Any such experience would be anything but "proven".

On the other hand, what type of experience do we need? Quantitative or qualitative experience? In this author's experience, a Judge who has handled ten patent cases where experts have been examined and cross-examined has more qualitative experience than a Judge who has handled twenty patent cases without having seen what an expert looks like. The drafters of the Agreement on a UPC, by focusing on the quantitative aspects only, are not really helping achieve the goal for which the UPC was meant to be established.

All in all, those fearing that, in the coming months, Sir Robin Jacob, who chairs the Advisory Panel established to select candidate Judges, would be overwhelmed reviewing the vast number of applications received, perhaps are losing sight that, for the aforementioned reasons, he may well send all the applications to the bin…

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