Kluwer Patent Blog

‘The Unified Patent Court is an opportunity to build excellent quality’

Kluwer Patent blogger · Wednesday, September 23rd, 2015

‘Europe can become a more attractive forum for patent enforcement than the US’, according to Wouter Pors, partner of Bird & Bird. Kluwer IP Law interviewed him about the new draft proposal for the Rules on the European Patent Litigation Certificate and other appropriate qualifications. ‘We shouldn’t just focus on the minimum requirements.’ Pors expects the Unified Patent Court to start functioning mid-2016.

What are the most striking changes compared to the first draft?
‘The most important change is Article 16 section 3, which introduces disciplinary removal from the list of representatives upon a decision by a competent authority. This matches the ongoing development of a Code of Conduct for representatives (both lawyers and patent attorneys), which is to be enforced by the currently existing disciplinary authorities and not by the UPC, except for this necessary provision.

The other important change is shortening the transitional period from three years to just one.’

Why do you think this transitional period has been shortened?
‘Obviously, since the Agreement requires a litigation certificate for which the requirements should be set by the Administrative Committee, the normal situation will be that a patent attorney who wants to obtain a certificate needs to follow the Litigation Course, which is intended to be tailored to the needs of the UPC.

There are people who have taken a course in the past of which they might reasonably expect that it would also meet the conditions. During the transitional period they can claim that. The future Litigation Course takes just 120 hours; under the Bologna declaration, a university education requires 1680 hours of study per year. So, I think the idea is that you can easily complete the litigation course in one year, meaning that the transitional period does not need to be longer.’

Many EU member states will not have qualifying institutes for the EPLC. Isn’t that a problem?
‘The list of institutes only provides the existing programs which are recognized under the transitional provisions. That’s just the current situation. Going forward, any university and other non-profit educational body of higher or professional education established in a Member State of the European Union can apply for accreditation of their UPC litigation program with the Administrative Committee.

Wouter Pors

It will be interesting to see which universities will do so. Of course, if there is a need among European Patent Attorneys for such a program in their home country, they can also approach a university. In fact, I'm already discussing this with a Dutch university, since I think that The Netherlands should play a role in every aspect of UPC development.'

Christof Augenstein of Preu Bohlig & Partner has criticized the 'low threshold' for representatives of the UPC in an article on the EPLAW website. He thinks the 120 hours of legal training for EPAs is far too little. He wrote: "It is embarrassing that the Preparatory Committee completely disrespects the enormous challenge all representatives must comply when they actually want to serve their clients at the UPC. It is far more difficult to argue on the basis of several jurisdictions. It is far more demanding to fall back to general principles of civil law proceedings, which every representative must do, if there is no established case law as it will precisely be the case at the UPC." What is your opinion about this?
'Christof of course has a point. 120 hours is certainly not enough. But the same goes for lawyers. Lawyers are not automatically equipped to do patent litigation and also not to do international litigation, for which you need to have a certain level of understanding of various relevant legal systems. On top of that, UPC law is a totally new, autonomous, mix of civil and common law systems of procedural law and also of substantive law on infringement. Everyone deeply involved so far has certainly spent far more than 120 hours studying this system and its development. Lawyers and patent attorneys who think they can pick it up easily once the UPC opens for business are in for a surprise.

So, 120 hours of study will not create the perfect representative, but there is a limit to the mandatory requirements for access to the system, certainly taking into account that this is required of people who have a busy private practice and also other permanent education requirements. So, you need a balanced political decision and I think this one is acceptable.

However, I'm quite in favour of free competition amongst professionals and I certainly would not want to be seen to use formal requirements to distort competition. In fact, most parties in patent litigation are perfectly able to select proper representation. These decisions do not depend on minimum requirements, our clients make a much more sophisticated decision and apply higher standards.

The companies at risk are mainly the SMEs, who may be involved in patent litigation just once in their lifetime. But they also run a risk when they hire a lawyer. That's why in The Netherlands we are currently setting up a specialization association for IP litigators, which will require additional professional education, an exam and experience to qualify as a full member. Over time, the sum of this will certainly equal more than 120 hours. I think that's an example that could be picked up in other countries too. It's our own responsibility as patent litigators, it doesn't need to be imposed by governments or the UPC.'

Aldgate tower, UPC location in London

When do you expect the first litigation at the Unified Patent Court?
'In my view, the UPC will most likely start mid-2016. The European Commission published a progress report on 15 September 2015 that mentions

that the work of the Preparatory Committee may be finalized by mid-2016. That means that the Administrative Committee will take over by then, which happens when the UPC Agreement enters into force. This is consistent with other information that I have. The IT system is also well underway to enable the opt-out register to open by 1 January 2016 and the court itself by mid-2016; we had the first rather successful IT workshop in London on 9 September, with others to follow across Europe within the next months.'

Exciting times ahead?
'This is the first time in European history that we will have a supranational court for civil claims that has its own, equally supranational, procedural and substantive law. And we are now starting to educate the judges and the representatives at a supranational level. We shouldn't just focus on the minimum requirements, but on the opportunity to build excellent quality. With the right level of effort, Europe can become a more attractive forum for patent enforcement than the US, which will in turn stimulate research and development.'

For regular updates on the UPC, subscribe to the free Kluwer IP Law Newsletter.

To make sure you do not miss out on regular updates from the Kluwer Patent Blog, please subscribe here.

This entry was posted on Wednesday, September 23rd, 2015 at 10:51 am and is filed under European Union, Unitary Patent, UPC
You can follow any responses to this entry through the Comments (RSS) feed. Both comments and pings are currently closed.