

Kluwer Patent Blog

‘Swift procedure Unified Patent Court may put a lot of pressure on defendants’

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Prompted by the upcoming Unitary Patent (UP) and Unified Patent Court (UPC), a group of European patent attorneys decided in 2013 to create the European Patent Litigators Association (EPLIT), ‘promoting fair patent litigation in Europe’. Kluwer IP Law spoke to its president, Koen Bijvank. ‘It is unpredictable how the market for patent litigation will change with the advent of the UPC.’

Why was EPLIT created?

‘EPLIT wishes to contribute to making the UPC a success. This is important for our members’ clients and for the future of our profession. European Patent Attorneys (EPAs) who want to litigate before the UPC need an additional qualification, The European Patent Litigation Certificate (EPLC). As not all EPAs will become active before the UPC, it means a new profession will effectively be created. EPLIT wishes to be a platform for EPAs having a litigator certificate. Other patent attorneys, as well as lawyers (solicitors, attorneys-at-law) are welcome to join as associate members. Currently we have about 170 members, including voting and associate members.’

According to the website, EPLIT wants to promote user-friendly, fair, efficient and cost-effective patent litigation. What has EPLIT’s role been so far in achieving this?

‘EPLIT has made contributions to the various public consultations organized by the UPC Preparatory Committee. Also, two of EPLIT’s board members are member of the Expert Panel of the Preparatory Committee.’

Do you feel the UPC will be user-friendly, fair, efficient and cost-effective?

‘The system will be based on a fully electronic docketing system. This is currently being tested. Early impressions are promising and indicate that the system will be easily accessible and thus user-friendly.’

Whether the UPC will be fair will depend to a large extent on the quality of the judges. It appears that many of Europe’s most experienced patent judges will apply for a position as UPC judge. If these judges are able to find common ground on their approach to substantive patent law, the system should at least be as fair as patent litigation in Europe is nowadays. In my view the signs are very good for the UPC system in this respect.

As to efficiency, the draft Rules of Procedure contain many quite strict deadlines to ensure a swift procedure. On the one hand that is good, because parties will have certainty in a reasonable

timeframe. On the other hand, it may put a lot of pressure on the parties, particularly on defendants who did not expect to be faced with the assertion of a patent before the UPC. They will have little time to prepare their defense and possible counterclaim.

EPLIT is happy to see that depending on the commercial interest of the case, the court fees will be adjusted. The system should not be so expensive that SMEs are effectively barred from enforcing their patents or defending against patents of others before the UPC.'



Koen Bijvank

EPLIT promotes 'any measures for improving patent litigation'. Could you explain?

'We wish to remain engaged with the UPC, also when the system becomes operational. Apart from that, we hope to promote a debate among practitioners, commenting on the development of case law and contributing to the training and education of practitioners.'

Will EPLIT have to bridge gaps between the different national practices in Europe?

'EPLIT's membership comes from all UPC member states. While members are competitors in one sense, they face the same challenges in becoming acquainted with a completely new court system. An exchange of information and experiences will help EPLIT members to be more effective as practitioners before the UPC and this, in turn, will help to jumpstart the system. An example of EPLIT's efforts is the [mock trial](#) that will take place in Munich on 22 January 2016 under the UPC Rules of Procedure. In addition, EPLIT organizes an [annual meeting](#), this year on 11 April 2016 in Amsterdam.'

It seems practitioners from 'strong' IP countries, such as Germany, the UK and the Netherlands, will be in a position to extend their practices, to the disadvantage of practitioners in 'peripheral' jurisdictions. Is this correct?

'It is unpredictable how the market for patent litigation will change. There will be fewer cases where the same patent is litigated in parallel in different jurisdictions. After the transition period this will disappear altogether. Nonetheless, there may be an increase in the number of patents that are enforced because UPC litigation may be more attractive than national litigation in that it covers

a much wider territory and market for costs which are likely to be lower than litigation as it is currently run in some member states, e.g. the UK or Ireland.

Experienced practitioners may have an advantage in gaining a market share in the new system. However, I know several very good EPAs and lawyers from countries which are not the more traditional jurisdictions for patent litigation in Europe and I am confident that those will also do well in the new system.’

It has often been argued that the UPC system is important for and should be accessible for SMEs. In the meantime however, it seems that for instance the pharmaceutical and IT sector and big international businesses in general are the ones that will profit most. How do you see this?

‘I mostly agree with this view. An SME who is only commercially active in one member state may be sued before a local division of the UPC where he will be confronted with litigation that may be more expensive than national litigation in his country. Moreover, if he wishes to start a revocation action, he will have to do so before the central division, i.e. in a language that may not be his own in a court outside of his home country.’

What does the UPC mean for you personally: a burden or an interesting challenge?

‘For me it means learning a completely new legal system, which I would very much like to be active in. It opens the door to new possibilities in the form of direct representation before the UPC by EPAs, although it is my expectation that patent litigation will remain teamwork where lawyers and patent attorneys work together. The international dimension, where any lawyer or patent attorney can act before a division of the UPC anywhere in the member states, makes it all the more exciting.’

Koen Bijvank is one of the speakers at the [Unitary Patent Package conference](#), 4 & 5 February 2016 in Amsterdam.

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