
Kluwer Patent Blog

Procedure to select judges for Unified Patent Court will start in earnest

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The procedure to select judges for the Unified Patent Court (UPC) will start within two months. An announcement and an online application form will be published on the UPC website at the end of February or beginning of March 2016 at the latest. The 2013 call for ‘expressions of interest’ in becoming a judge and the ensuing approval of a list of potential candidate judges, will not be used. Sir Robin Jacob, chairman of the UPC Advisory Committee, said this in an interview with Kluwer IP Law.

While the start of the Unified Patent Court is nearing – many observers expect the court to open its doors for cases in the first half of 2017 – more than a year has passed without any news about the procedure for the selection of technically and legally qualified judges.

In 2013, there was an initial call for ‘expressions of interest’ in becoming a UPC judge. This was not the formal job application (for one thing terms, pay and conditions were far from settled), but an initial assessment prior to the formal application process. It resulted in a far higher number of responses than expected, over 1300. The UPC Advisory Panel reviewed these and drew up a list of 354 candidates eligible as legally qualified judges and 341 candidates as technically qualified judges. From the 354 candidates for legally qualified judge 171 were eligible as such, while 183 were eligible after training.

A group of about twenty of these 183 aspiring judges followed a training program in Budapest last year. They were people who had no prior experience of patents and the course was confined to basic patent law. That will be the only way the list is going to be used: the UPC Advisory Committee will shortly start the selection procedure proper. Candidates can apply regardless whether they are on the earlier list or not and whether or not they replied to the expressions of interest letter.

As Sir Robin Jacob, chairman of the committee, explained to Kluwer IP law: ‘The ‘expressions of interest’ are more than two years old and were sent in a period that nothing was known about salaries, pensions and other terms and conditions for the future UPC judges. Moreover it was no-where indicated that that anyone would be precluded from appointment if they did not respond to the letter and it would not be fair to exclude anyone who decided to wait for the formal appointment process. Apart from that, there was an overwhelming amount of information, mostly on paper which had to be scanned and it was hard to categorize. It was a bit of a mess, really.



Sir Robin Jacob

We concluded the list could not be used for the actual selection of judges. It was in any event always intended that there would be a formal application procedure which provided people with all the information they need. A formal online application system which we have seen and is approved by us will be used. People will now know exactly what they’re applying for and how much pay they will get as well as all the other things involved in a proper job offer.’

‘For us – particularly for the Human Resources and training working group which is in charge of the selection – a great advantage is that the online application form will immediately show which legal and technical expertise candidates have, for instance, and in what languages they will be able to run a case.’

According to Sir Robin Jacob, the intention is that there will be a 5 or 6 week period from the date of the advertisement for applicants to respond. How long it will take to go through the applications will depend on numbers, but probably several months. The selection process will involve a shortlist of people selected for interview, followed by interviews – perhaps some by Skype.

About fifty legally qualified judges and fifty technically qualified judges are expected to be appointed, most of them part-time. Sir Robin Jacob: ‘I’m a supporter of the idea of part-time judges. There are some problems however. Under the Statute national judges can be part-time on the Court, but lawyers can only be permitted with special permission. That is a potential problem for countries which have a tradition of using lawyers also as judges on a part-time basis (e.g. Deputy High Court Judge in my country). Fortunately that can be overcome by permission. More fundamentally however it seems that the Constitutions of some countries do not permit their judges to be part-time. This is not a problem we can solve. The countries will have to change their laws or their judges will not be able to be part-time judges of the new Court.’

Initially the number of appointments (especially of full-time judges) will be small – depending on most up-to-date estimates of the likely initial workload. But a pool of appointable candidates will also be created so that if work takes off they can be appointed readily to cope with it.

Will the Unified Patent Court be an improvement for European patent law? ‘The jury is still out’, Sir Robin Jacob reacts. ‘It is not obviously better than what we have now. It will all depend on the judges, who will have to overcome the many defects in the structure of the UPC, which were introduced due to bickering politicians who all defended their own national interests.’ He is critical of the many divisions of the court and sees a risk of forum shopping, for instance.

Also, he thinks it is unrealistic to think that the UPC will in the longer term be self-financing. ‘If lots of patents are opted out, the UPC may be able to live on the fees for a while. But you need buildings, you need judges, you need secretaries, a lot of other staff, an IT system. This is all very expensive and it is well possible that the UPC fees will not be enough. In that case the participating states – and their citizens – will be the ones that have to pay for the UPC. Unlike the Court of Justice of the EU, the UPC cannot rely on EU funding. We have the absurd spectacle of the EU creating 28 new judges for the General Court when only ten were needed, whereas this vital court will be starved of funds at best.’

Asked about the [European Commission’s plan for a European litigation insurance](#) to protect SMEs against the risk of very expensive litigation before the UPC, Sir Robin Jacob is adamant: ‘An idea of the civil servants ignoring commercial reality. Insurance companies are unlikely to find this good business – we have had the system in the UK for 25 years and it never took off in a big way. Rubbish. What may happen at the UPC is what you see in the US: that external financiers or lawyers pay for court cases and take a big part of the gains, if the case is won. That could happen with SMEs before the UPC, and it wouldn’t be a good development at all.’

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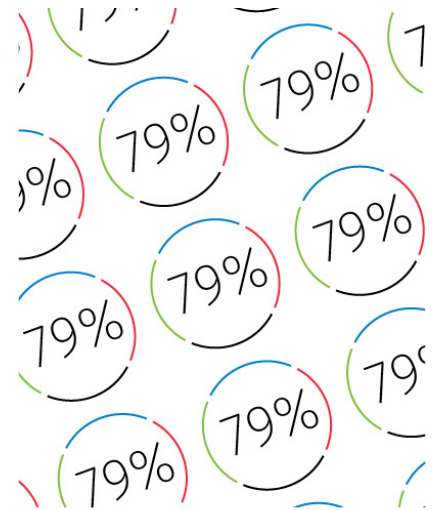
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