

Kluwer Patent Blog

The Unitary Patent system: 13, 17+ or 25 Member States?

Kluwer Patent blogger · Friday, February 5th, 2016

The big picture for the Unitary Patent (UP) and the Unified Patent Court (UPC) may be clear for the patent attorneys, lawyers and other experts who will soon have to deal with the new European patent system. However, there'll be many surprises in the details.

During the second day of the [Unitary Patent Package Conference](#), 4 & 5 February 2016 in Amsterdam, three workshops were on the programme: patent strategy, costs and the court procedure. They had one thing in common. Often the answer to questions was: 'We'll have to wait and see', 'only the UPC can decide that.'

Staying in or opting out of the jurisdiction of the UPC was one of the issues that led to discussion and question marks. 'Isn't it illegal to require companies to act and to pay to stay out of a system they never asked to become part of?', one attendant argued. 'It would be more logical if they had to opt into the UPC.'

Others wanted to know who can do the opt-out. The correct answer: 'Someone who is entitled to do so.' But then, what if something goes wrong? And does a small mistake in an application make the opt-out invalid? Or a big one? Little is known about the consequences and that may cause problems. Another issue: what about third parties? Can they invoke mistakes in an opt-out? Or challenge the unitary effect of a patent?

An exclusive licensee can sue for infringement, but how about a licensee with exclusive rights only in Germany. Or a sole licensee? 'These are both questions for the UPC to answer.'

Most attendants however seemed positive about the Unified Patent Court. As Jacques Combeau of Air Liquide said: 'We have no fear of the UPC, we're happy with the UPC, and we're happy to litigate at the UPC. Air Liquide will not opt out its patents, or only a very few.'

In the meantime, Combeau was one of the most critical voices. He thinks the Unitary Patent renewal fees may be too high. 'The fees should be reasonably attractive to European patent owners. It seems that the fees for the first ten years clearly support that. But it is not so clear that the same applies for the later years.' Combeau pointed out an important difference, which makes the UP 'extremely costly': you cannot drop part of the UP protection and pay less maintenance fees after some years, as is a common practice with European bundle patents.

Combeau touched on another possible problem as well. 'There is still some uncertainty as to the precise territory that will be covered by the UP system.' It is clear that several of the 25 member

states will not ratify the UPC Agreement any time soon. ‘If we end up with only 13 ratifications (the minimum number to trigger the start of the UPC, ed.), I don’t see a bright future for the UP system. It wouldn’t be a good sign and it would make the UP less attractive, because you would have to pay extra fees in all countries that didn’t join.’

Wouter Pors, partner of Bird & Bird, thinks the initial number of countries in the Unitary Patent system will be 17 and probably a few more. ‘Nine states have already ratified. Estonia, Germany, Ireland, Italy, Latvia, Lithuania, the Netherlands and the UK have indicated they will ratify. I expect some of the remaining countries to ratify reasonably soon as well.’

Pors doesn’t see it as a problem that the remaining states – Bulgaria, Cyprus, the Czech republic, Greece, Hungary, Romania, Slovakia , Slovenia – stay out for now, as there is little IP litigation in these countries.

According to Pors, many people who are likely to be judges at the future Unified Patent Court see it as a top priority to live up to the UPC’s promise of fast procedures and decisions within a year. ‘So if you have a month to file documents and it is December, you’ll have to skip your Christmas holiday.’

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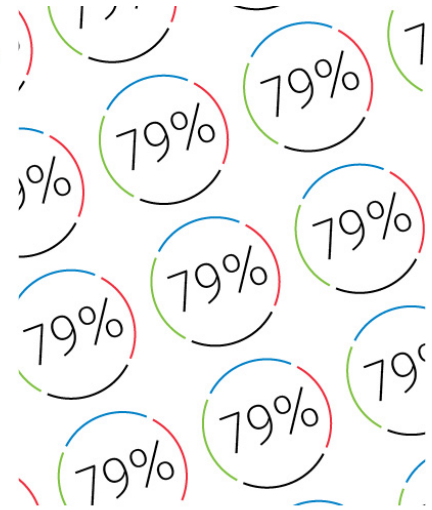
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