The Unitary Patent and dispute resolution: What Difficulties? What Solutions?

CEIPI Conference 2012
Strasbourg • 26-27 April 2012

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15 minutes, 15 problems, 15 solutions

1. Architecture
2. Primacy of EU law
3. Relationship ECJ
4. Financing
5. Judges
6. Jurisdiction
7. SPC
8. Applicable law
9. Language regime
10. Torpedo
11. Bifurcation
12. Type of procedure
13. Ancillary matters
14. Transitional period
15. Central division
1. Architecture of the court system

2. Primacy of Union law

Draft agreement Article 14a:

"Primacy and respect of Union law

The Court shall apply Union law in its entirety and respect its primacy."
3. Relationship with ECJ

Draft agreement Art 14b

"Requests for preliminary rulings

(1) As a court common to the Contracting Member States and part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the proper application and uniform interpretation of Union law, as any national court, in accordance with Article 267 of the TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court."

4. Financing

Draft agreement, article 18

"(1) The budget of the Court shall be financed by the Court’s own financial revenues and at least in the transitional period referred to in article 58 as necessary, by contributions from the Contracting Member States. The budget shall be balanced.

(2) The Court's own financial revenues shall comprise court fees and other revenues."
5. Judges

Will all the Member States be able to meet the requirement of draft Agreement Article 10?

"Eligibility criteria for the appointment of judges"

(1) The Court shall comprise both legally qualified judges and technically qualified judges. Judges shall ensure the highest standards of competence and proven experience in the field of patent litigation.

(2) Legally qualified judges shall possess the qualifications required for appointment to judicial offices in a Contracting Member State.

(3) Technically qualified judges shall have a university degree and proven expertise in a field of technology. They shall also have proven knowledge of civil law and procedure relevant in patent litigation.

6. Jurisdiction

- Scope of jurisdiction unclear for licence agreements

- Unfair competition related to patent infringement not included
7. SPC

- A SPC is a national property right granted by a national patent office – unlike the Unitary Patent or the current European patent granted by the EPO.

- Strange to have a national property right included in the basket of supranational Unified Patent Court Agreement (meaning that the DE division could have to deal with validity and infringement of a FR SPC?)

8. Applicable law

The language of draft Agreement Article 14e does not make clear which rules of private international law will be applied:

"(2) To the extent that the Court shall base its decisions on national law, including where relevant the law of non-contracting States, the applicable law shall be determined:

(a) by directly applicable provisions of Union law, or

(b) in the absence of directly applicable provisions of Union law or where the latter do not apply, by international instruments containing private international law rules; or

(c) in the absence of provisions referred to in (a) and (b), by national provisions on private international law as determined by the Court."
The Unitary Patent and the Unified Patent Court

9. Language of proceedings: 1st instance

- Regional division
- Local division
- Central division
- Regional division
- Local division

Language of the court (national or EPO language)

Language of the patent

The Unitary Patent and the Unified Patent Court

9. Language of proceedings: appeal

- Language of 1st instance
- Language of the patent (upon the parties' agreement)
- Language chosen by the court and approved by the parties

Court of Appeal

Language of the court (national or EPO language)

Language of the patent
10. Torpedo is dead
(operations for a declaration of non-infringement then for infringement)

The action for a declaration of non-infringement before the central division shall be stayed once an infringement action is initiated within three months before local division.

11. Bifurcation to the discretion of the court

The draft agreement leaves the local or regional division the discretion to bifurcate (i.e. to stay the infringement proceedings pending the revocation action).
15a (2)  
**Concurrence of actions: infringement then revocation**

The local division has the discretion to:
- proceed with the infringement proceedings and counterclaim for revocation (with a technically qualified Judge);
- refer the counterclaim for decision to the central division and proceed with the infringement proceedings; or
- with agreement of parties, refer the case to the central division.

15a (4)  
**Concurrence of actions: revocation then infringement**

The local division may either
- proceed with the infringement proceedings, or
- stay the infringement proceedings, or
- if parties agree, refer the infringement action for decision to the central division.
12. Type of procedure

Front loading system
Not drips and drabs system

13. Ancillary matters

- Legal aid
- Service (notification of summons)
- Enforcement
14. Transitional period

- National courts still competent for EP
- European Patent holders may opt out from Unified Patent Court (withdrawal possible)

15. Where?

will be located the Central Division:

Paris?
Munich?
London?
Thank you

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