

General introduction to the Unified Patent Court and the work of the Preparatory Committee

Keynote speech on the occasion of the inauguration of the Training centre for judges of the Unified Patent Court

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Your Excellency's, ladies and gentlemen,

It is a great honour and pleasure for me to speak today at this conference on the training of the judges of the Unified Patent Court. I would like to start by thanking the Hungarian government and the Hungarian Intellectual Property Office for organising this conference. Slightly less than one year ago, our ministers signed the agreement on the Unified Patent Court. In the meantime the Preparatory Committee has been working hard to implement the agreement and make all the practical arrangements for the entry into operation of the court. Setting up a training scheme for the future judges of the Court was and still is one of the priorities of the Preparatory Committee. Having well trained judges is essential for the success of the Court. I am therefore very pleased that today we can mark the start of the training centre and moreover discuss how we should further shape it.

The Unified Patent Court training centre is not the only training centre in Hungary. About 40 kilometres west of Budapest in the village of Felcsút, the FerencPuscásFootballAcademy has been founded named after the famous Hungarian football player and it is the place where young talented Hungarian football players can learn the so called Puscás move: a trick whereby by suddenly changing the direction of the ball, you can easily pass your opponent. If you look at the history of the patent package, many Puscás moves were needed to get where we are now: in the position to score. But being in the position to score doesn't mean that we have reached our goal yet. The final steps must still be taken.

Setting up a training scheme for the judges is essential for the success of the Court. Oliver Vårhelyi, responsible for coordinating the training and human resources section of the Preparatory Committee will explain about that. But the Committee is doing more. This morning I shall update on what we have been doing so far and where we are.

It was the desire of the Contracting States of the Unified Patent Court Agreement that a Preparatory Committee, composed of representatives of the Contracting States would be tasked with preparing all practical arrangements for the early establishment and coming into operation of the UPC. The Committee was inaugurated in March last year.

In order to organise its various tasks, the Committee has broken down its work into five areas, each with a coordinator to lead a sub-group of experts coming from the Contracting States and report back to the Committee on progress. This structure allows us to share the hard work that needs to be done and have involvement of the Contracting States right from the start.

It is the Committee's objective to ensure that the Court is from the outset fully operational. The Court will need sufficient experienced judges It will require sufficient staff, a legal and financial framework, adequate facilities, and an electronic case management and filing system. As you may be aware, under the transitional regime patent holders can opt out their European patents from the

jurisdiction of the UPC. Patent holders wishing to do so shall have the opportunity to register their opt out in advance.

Preparing the Rules of Procedure is the most urgent and extensive tasks of the Legal Group.

Fortunately, we don't have to start from zero. We are preparing the Rules of Procedure with the invaluable help of a the Drafting Committee, composed of very experienced patent judges and litigators and chaired by UK lawyer Kevin Mooney. The Drafting Committee prepared a set of over 380 rules in which the procedures before the UPC are very precisely described.

The 15th draft of these rules was published in the spring last year, which was the start of a written consultation. With over 100 submission, most of which were very serious and precise, the Rules received much attention from interested circles. It shows how serious future users are taking the project and how important the rules are in creating the new litigation scheme. This may not be surprising, since it is in the procedural rules where it is to a large extent put down how we want the Court to operate.

Reactions from users are generally positive towards the project, but show some areas of concern. Concerns that may differ dependent upon sector or provenance of those who submitted the comments. Let me go more into detail of some of these issues.

Many questions relate to the transitional regime. How will it work? As I mentioned before, during the transitional period it will be possible for patent holders to opt out their patents from the jurisdiction of the UPC. Litigation with regard to these patents will be dealt with by national courts. The choice users will be making can be motivated by strategic reasons relating to the patents that are at stake, but also by the trust users will have in the UPC.

Is this a threat to the UPC? Will patent holders opt out massively? Frankly I am not that afraid. Patent holders may take a cautious approach and may opt out some of their patents, but they will also see the advantages. For the Court it will be a challenge: it must gain the trust of the users. And it can do so by delivering good judgements. Rather than a threat, I regard it as a stimulus that will help us achieving what we want: a high quality court.

It will be made possible to register the opting out of patents before the courts gets operational. This will allow patent holders to consider carefully and deal with it properly, rather than rushing collectively to the Registry on the first day of the Court being operational. It will thus avoid logistical problems for the Court in its first days of existence.

We want the Court to be fast. It is our ambition that a judgement in first instance is given within one year. That requires an active role of the judge-rapporteur in managing cases. It also means that deadlines will be tight. Parties – and in particular their lawyers – shall find that procedures may be tighter than they are currently used to. But that is to a certain extent the price for speedy procedures. You can't have it both ways. It must however, as is advocated by some observers, be safeguarded that especially defendants will have enough time.

Many concerns were raised with regard to non-practising entities, especially by US high tech companies. They fear that the UPC will become the next playground for patent trolls and that we will see happening in Europe the same as we have seen in the US and which is forcing the US

administration to adapt its legal system. We take these concerns very serious, but at the same time, we must be cautious comparing the UPC with the US legal system. A European patent differs from a US patent. And the UPC will be different from the US legal system.

Some users fear for instance that in case a patent is infringed, injunctions will be granted automatically, which is a prospect, patent trolls like to use – or misuse. But this will not be the case: the Court MAY grant injunctions. In deciding on this the Court shall weigh the interests of both parties and – as it is proposed In the latest version of the Rules; the 16th draft, that was published last week – it is further clarified that in doing so the Court shall in particular, take into account the potential harm for either of the parties resulting from the granting or the refusal of the injunction. That is a clear instruction to the Court while at the same time leaving the Court enough discretion to weigh the balance. Some argue however that the wording of the Rules should be more directional.

It is also much debated how the Court will deal with revocation actions as a defence. Will panels decide on validity themselves, or will they bifurcate and if so does that mean that the infringement procedure should be stayed or not. Many views were expressed in the consultation, some of them asking for more guidance to be given to the court in the Rules. Here again the Drafting Committee refrained from giving detailed instructions to the Court. They suggest however that a decision on whether or not to stay proceeding shall always be explicitly motivated by the deciding panel. This may entail a rich case law of especially the Appeal Court.

Last week, the 16th draft of the Rules of Procedure has been published on the Committee's website, along with a digest of the comments that have been made during the consultation and the responses of the drafting committee thereto. This is now being examined by the committee's working group in which contracting states are represented. This group examines the proposal from the drafting committee, in particular paying attention to the issues the drafting left for the Preparatory Committee to decide upon and to the concerns that have been raised in the consultation. It is the intention to organise a public hearing at the fall of this year, which we be another chance for those who are interested to comment. And finally the Preparatory Committee will adopt the Rules of Procedure.

Whatever the outcome of this process will be, I think the examples I gave you demonstrate that a very high trust is being put to the judges and that the ability of judges to deal with these complicated issues requires skills that need to be addressed in the training program.

Another issue that we will be dealing with shortly is the patent litigation certificate. We will be having a first discussing on a draft for the rules relating to the certificate, which will subsequently be published. That will allow all interested circles to take note and comment on it.

We intend to start procuring for an IT system this spring. For a Court that will be operating on multiple locations and intends to work as speedy an efficient as possible a well-functioning electronic case management and filing system will be indispensable. We will be looking for a proprietary cloud-based system that minimises costs and development time but ensures an adequate level of tailoring to meet the court's needs. The system will of course meet the highest commercially available security standards. The IT system will be used by the Court, but by the lawyers and patent attorneys as well. In fact, use of the electronic case management and filing system will in many cases be mandatory. Therefore involvement of these future users will be absolutely necessary.

Rules on the Court fees and rules with regard to recoverable costs will be taken up this spring and work will continue on the setting up of a Mediation and Arbitration Centre, the legal and financial framework of the court and the facilities needed for the court. It is not only in the framework of the Preparatory Committee that a lot of activities are taking place.

In the Contracting States work is underway to make the necessary preparations for ratifying the Agreement. Austria has deposited its instrument of ratification on 7 august 2013, thereby being the first Contracting State to ratify the Agreement, recently followed by Malta. In France parliamentary approval for ratification has been given and the ratification processes in the UK and Belgium are well advanced.

The Agreement gives Contracting States the possibility to set up local or regional divisions of the Unified Patent Court. Contracting States are in different stages of their decision making process in this regard. Last week, Sweden, Lithuania, Latvia and Estonia signed an agreement for the setting up of a regional division.

Much work still needs to be done. Nevertheless, it can be said that the Preparatory Committee's work is on track now and the first result can be seen. And we are seeing quite a result today here in Budapest. Generally speaking the Committee's work finds good reception amongst practitioners and users. Moreover, it is encouraging that the work is done by many colleagues from the various Contracting States, thus making this a true European project.

Thank you for your attention.

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