

The error in the new UPC system

The Contracting Member States promised to the users of the new Unified Patent Court (UPC) that the proceedings and judgements will ensure highest quality. To this end, the Agreement on the Unified Patent Court (UPCA) requires that judges should comply with highest standards in patent litigation. Unfortunately, representatives do not need to fulfil this standard, as the new draft for the European Patent Litigation Certificate (EPLC) confirms.

The UPC will establish a completely new system for civil law proceedings. It will be the first court on a European level that decides about claims between private parties. Therefore, it will not only harmonize partly national procedural rules, but also needs to harmonize completely different legal traditions. This will be a challenge to every lawyer that is in charge of any matter at this new court.

The Contracting Member States to the UPC always promised to the users of the new system that the highest quality will be ensured. To this end Article 15 UPCA requires:

- “(1) ...Judges shall ensure the highest standards of competence and shall have 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.”

For judges with no experience from countries with little or no patent litigation a training program is established covering hundreds of hours of practical and theoretical training.

Unfortunately, the Preparatory Committee is of the opinion that parties' representatives do not need similar qualifications. In the current draft of the EPLC the Preparatory Committee sets out that 120 hours of legal training are sufficient. Under the assumption that this training requires the same amount of time for preparation by the candidates, a corresponding program will be completed within six weeks.

Most disturbing are, however, the reasons of the Preparatory Committee. It states:

“This [120 hours of training] shall ensure that EPA's [European Patent Attorneys'] representing parties before the UPC have sufficient knowledge of civil litigation infringement proceedings to deal efficiently with proceedings before the UPC while not making the threshold for the EPLC too high and thus inadequate.”

Given that a legal judge has spent several years at the university and additional practical training (in Germany two years of internships and in the UK normally several years as a barrister or Queen's Counsel) it is surprising to read that patent litigation seems to be that easy that everything more than six weeks of training is “inadequate”. I believe it's adequate that a representative can discuss legal issues with judges at the same level. Six weeks never suffice to argue in front of experienced judges why a particular question is better to be resolved according to German, English or French procedural rules. But that is what judges at the UPC will require. I think it needs far more than six weeks to get acquainted with the principles of civil law proceedings throughout various European jurisdictions, so that one can at least to some extent have the same level of knowledge to properly discuss the case with the judges at the UPC.

The Preparatory Committee seems to generally disrespect the lawyers' qualifications. Article 48 (1) UPCA says that generally lawyers are allowed to represent clients before the UPC. The Preparatory Committee concludes from Article 48 (2) UPCA that patent attorneys do not need the same qualifications as lawyers. This surprising conclusion comes from the

fact that they do not need to be authorized before national authorities. Thus, the Preparatory Committee concludes:

“...Article 48 (2) of the UPC agreement can neither require that **EPAs have the same qualification as lawyers to conduct litigation before the national courts**, nor consider the qualification as a national patent attorney as sufficient per se...” (emphasis added)

Other degrees of law, such as bachelor or master must, therefore, suffice. The Preparatory Committee says:

“Such diplomas generally do not give a right to act as an advocate before the national Courts, but they provide EPAs with a necessary knowledge of private and procedural law, required to conduct patent litigation.”

I can't help but being sarcastic. Patent litigation seems to be a very easy task for everyone. It seems to be generally more understandable and accessible because - even though you don't need to be admitted to a national court – your knowledge is still sufficient “to conduct patent litigation.”

Isn't it the opposite? Did not the Contracting Member States introduce the EPLC precisely to ensure that all the representatives are sufficiently qualified? Do parties at the UPC only require less protection by their representatives than parties at national courts? The simple answer is no, because there is no reason why the protection of the parties might be different. Thus, the EPLC's purpose is to equalize the level of knowledge between national lawyers and other party representatives.

It is embarrassing that the Preparatory Committee completely disrespects the enormous challenge all representatives must comply when they actually want to serve their clients at the UPC. It is far more difficult to argue on the basis of several jurisdictions. It is far more demanding to fall back to general principles of civil law proceedings, which every representative must do, if there is no established case law as it will precisely be the case at the UPC. So it is quite the contrary. Patent litigation at the UPC will be far more complex and burdensome than ordinary civil litigation proceedings at national courts. To conclude that the UPCA requires less is untrue. The interpretation on the mere wording has nothing to do with the purpose of ensuring highest quality at the UPC.

Given that good judgements are the result of a good corporation and a professional exchange between representatives and judges, the low threshold for representatives of the UPC and their lower legal qualifications will result in either poor judgements or parties feeling unfairly treated as their representatives will not be in a position to discuss legal issues with the judges at the very same level.

In order to make the new system a success, representatives should have the very same qualifications as the judges. Thus, they should be either experienced patent litigators or have compensated the lack of experience with training as the candidate judges did. I can only hope that in practice clients and patent attorneys stick to the current system of mixed teams of lawyers and patent attorneys to ensure that the cases are properly handled.