

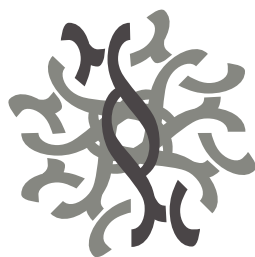


Newsletter Edition 3/2022

Düsseldorf/Essen/Frankfurt/Munich, 25 February 2022

Inaugural meeting of the Administrative
Committee of the Unified Patent Court

EU initiates proceeding against China before the WTO



M I C H A L S K I • H Ü T T E R M A N N
P A T E N T A N W Ä L T E

Inaugural meeting of the Administrative Committee of the Unified Patent Court

After the Protocol¹ entered into force on January 19, 2022, and thus the preparations for the start of the Unitary Patent System officially began, the inaugural meeting of the Administrative Committee was held on February 22, 2022.²

This is, analogous to the European Patent Office, the highest body outside the court and consists of representatives of the member states. However, each member state has only one seat, instead of two as in the European Patent Convention. As expected, the previous chairman of the Preparatory Committee (which no longer exists with the entry into force of the Protocol), Alexander Ramsay from Sweden, was elected chairman, his deputy is Johannes Karcher from Germany.

Among other things, the regulations for the European Patent Litigation Certificate (EPLC) have already been adopted at this meeting. According to reports, the "Hagen Course" as well as its predecessor in Fischbachau are still on the list of courses which will be credited within one year from the entry into force of the Unitary Patent System, which means that the vast majority of German patent attorneys who are also European patent representatives will automatically be entitled to represent before the Unified Patent Court.

The composition of the Advisory Committee,³ which will conduct the application procedures for the judges to be appointed, was also adopted. The application procedures are to begin from the end of March, and as soon as these are sufficiently advanced, Germany will then deposit the instrument of ratification.⁴ Both the rules on the EPLC and the composition of the Advisory Committee will be published soon.

Finally, it was reported that officially the following member states have announced to open a local chamber:

Austria, Belgium, Denmark, Finland, France, Germany (4 local chambers), Italy, Netherlands, Portugal and Slovenia.

The only regional chamber will include the Baltic States Estonia, Latvia, Lithuania as well as Sweden. This means that the (controversial)⁵ "Unilever rule"⁶ of Article 33(2) EPC, according to which,

¹ Exact title: „Protocol to the Agreement on a Unified Patent Court on provisional application“, cf. our newsletters [Newsletter 9/2021](#), [11/2021](#), [12/2021](#), [14/2021](#) and [1/2022](#)

² Cf. here <https://www.unified-patent-court.org/news/announcement-unified-patent-court-administrative-committees-inaugural-meeting>

³ Cf. our Newsletter [2/2022](#)

⁴ Cf. our Newsletter [1/2022](#)

⁵ Cf. the comments on Art 33(2) by Tilmann in Tilmann/Plassmann, Unified Patent Protection in Europe, OUP 2018; Tilmann is of the opinion that this regulation is contrary to European law.

⁶ cf. Hüttermann, Einheitspatent und Einheitliches Patentgericht, Heymanns, 2016, para 391 ff.

In our own affairs

Prof. Dr. Aloys Hüttermann will speak at the 29th [Fordham IP Conference](#), to be held on April 22/22, on "Keeping the cake and eating it when opting out at the UPC? - The *Hüttermann*-maneuver".

if a patent infringement action is pending before a regional chamber but the infringement occurs in the territory of at least three regional chambers, the regional chamber concerned must, at the request of the defendant, refer the action to the central chamber, will for the time being run void.

Accordingly, Bulgaria, Luxembourg and Malta will not open a local chamber nor join a regional chamber. A patent infringement in one of these countries would then have to be asserted before the central chamber.⁷

In total, together with the central chamber, the court of first instance would then have fourteen locations:



- Participating countries of the UPC
- Seat of a local chamber
- Seat of a regional division
- * Seat of a division of the central chamber
- x Seat of the appeal court

⁷ Whereby it should be noted that this is controversial, too, cf. the comments on Art 33(1) by Tilmann in Tilmann/Plassmann, *Unified Patent Protection in Europe*, OUP 2018; Tilmann is of the opinion that this regulation is contrary to European law.

EU initiates proceeding against China before the WTO

The EU has initiated proceedings against China before the WTO on the basis of Chinese “anti-suit injunctions”.⁸

For several years now, there has been an increasing number of cases in which Chinese courts have imposed so-called “anti-suit injunctions” in the mobile communications sector in disputes involving Chinese companies and foreign companies, including European companies such as Nokia and Ericsson. This means that the foreign companies are prevented from taking action against their Chinese competitors in other countries, such as Germany, otherwise high fines of in some cases six-figure euro amounts per day become due. Since Chinese courts often consider much lower amounts than German ones to be sufficient when it comes to granting licenses, the EU believes that this puts undue pressure on innovative European companies to grant Chinese competitors access to their technology on unfavorable terms:

„Since August 2020, Chinese courts have been issuing decisions – known as “anti-suit injunctions” – to exert pressure on EU companies with high-tech patents and to prevent them from rightfully protecting their technologies. Chinese courts also use the threat of heavy fines to deter European companies from going to foreign courts. This has left European high-tech companies at a significant disadvantage when fighting for their rights. Chinese manufacturers request these anti-suit injunctions to benefit from cheaper or even free access to European technology.”⁹

WTO proceedings usually take many years, so that a decision is not to be expected in the near future. However, it is remarkable that the EU has decided to take such a step; usually, e.g. in proceedings in the aircraft construction industry, such proceedings concern (allegedly) wrongly or excessively granted subsidies or, especially in the food sector, import regulations that are regarded as protectionist. Proceedings based on patent law tend to be the exception, and when they do occur, it is usually the U.S. that has taken the initiative in the past.

It remains to be seen whether China will be willing to revise its current practice in the course of the proceedings, possibly by amending its laws accordingly. If the EU is proven right, but China continues unabated, the EU is then allowed to take legal measures such as imposing tariffs.

⁸ Cf here: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm

⁹ Cited from the press release: https://ec.europa.eu/commission/presscorner/detail/de/ip_22_1103

In our own affairs

We wish your relatives, employees, colleagues and of course yourself all the best for the present, still difficult time.

Imprint:

Michalski · Hüttermann & Partner
Patentanwälte mbB

Speditionstrasse 21
D-40221 Düsseldorf
Tel +49 211 159 249 0
Fax +49 211 159 249 20

Hufelandstr. 2
D-45147 Essen
Tel +49 201 271 00 703
Fax +49 201 271 00 726

Perchtinger Straße 6
D-81379 Munich
Tel +49 89 7007 4234
Fax +49 89 7007 4262

De-Saint-Exupéry-Str. 10
D-60549 Frankfurt a.M.
Tel +49 211 159 249 0
Fax +49 211 159 249 20

The content of this newsletter only reflects general information and does not constitute legal advice as per the German Legal Advice Act.

Despite thoroughly checking the content, Michalski · Hüttermann & Partner Patent Attorneys mbB does not assume any responsibility for the validity, accuracy, integrity or quality of the information above.