UP/UPC CONFERENCE (MUNICH 2017)

Welcome

Dr. Martin Köhler (replacing *Willem Hoyng* as conference chair)

Ladies and gentlemen, good morning. We are very proud to host more than 35% more than last year and I want to praise the vision of Mr. Battistelli and thank him for hosting us again. Have a fruitful day and I will now hand you over to Mr. Battistelli. Thank you.

Opening Address

Benoît Battistelli – President, European Patent Office

Good morning to all of you. It is a pleasure to be with you this morning. As has just been said, it is becoming now a tradition for distinguished IP professionals to gather in early July every year to exchange and update about unitary patents. Thank you all for your presence and thank you to Premier Cercle for organising this meeting. I will make a few general introductory remarks, and then we will provide you with more precise and to-the-point interaction during the morning. I would like, first, to update you concerning the EPO. As you know, this unitary patent will be granted by the EPO following the EPC so it is important for you to be updated about the EPO itself. Then I will say a few words, more specifically, about the unitary patent. Since last year the situation at the EPO has improved significantly. We continue to receive a higher and higher number of applications every year. Last year, we reached the level of 160,000 applications. In terms of filing, it is more than double, and these applications come from all over the world. Roughly 50% from EPO member states and a little more than 50% from non-EPO member states. The US continue to be our largest clients, but what is interesting is that if you compare a patent closely with a trade balance we import three times less applications from the US than we export EPO applications to the US. The ratio is one to five with China, one to two with Korea and we are balanced with Japan. This way of presenting the flow of patent applications doesn't pretend to have a scientific value, it is just to show that Europe is able to generate innovations and Europe is able to spread those innovations all over the world. As with any Patent Office, these applications are more and more complex and more and more composed of different technologies. As the EPO, we are developing our efficiency, quality and strategy and the results are very positive. At the end of last year, we were slightly over 4,300 Patent Examiners whereas in 2010, we were less than 2,000 Patent Examiners. This has been done without increasing the overall staffing level at the EPO which remains at the level of 7,000 people, which means that we have been able to redeploy within the EPO. This is a 10% increase in the number of Patent Examiners since 2010. We are also working hard to increase our databases. We have multiplied the agreements with our colleagues all over the world who have daily automatic transfer of knowledge exchange of data, including non-public data, and now we have more than 730million documents (patent and non-patent) in more than 160 databases. Most of these documents are not written in English, or German, or French so we have to be able to translate them. We cover 32 languages - 28 from Europe, Chinese, Japanese, Korean and Russian. Last year, our production (e.g.

search reports, written examination, opposition) increased by 8.5% which is almost 400,000 products. In 2010 we were at less than 300,000 products, so it's an increase of one third in seven years. In addition to this increase in production, we have also improved our timeliness. We have launched our early incentive initiative and are now able, on average, to produce a search report for applications within less than six months. Last year we were at 5.3 months. In terms of examination, our target is 12 months. We are around 22-23 months and we are expecting to reach this target by the year 2020. In terms of opposition, our target is 15 months and we are still around 24 months so we still have some progress to make by 2020. We have reduced our backlog in activities by 25% in two years. These are, if I may, our positive results. I would like to extremely clear that quality is our first objective and there are many indicators to show that we continue to increase and improve our quality. We have recently published our first quality report where you can find all statistics and information that justifies what I am saying, that we have increased our quality. This is also regularly confirmed by external surveys. Additionally, over 90% of IP professionals consider our quality as excellent. We continue to have a three person examining division which allows us, not only to supress any kind of bias, but also to multiply different competencies in order to access more and more complex applications. Another point is that we do not outsource any of the core business. We are developing internally all the expertise we need for our core business. The last element on quality is that we have multiplied the interaction with users, not only in Europe but also worldwide (Americans, Japanese, Chinese etc.) and we have a specialised sub-committee on quality since 2016.So, this is the news from the EPO and I can add that the figures from the first months of 2017 are exactly the same trend as the ones that I have just summarised for 2016 – continuous increase in production, continuous increase in quality and continuous increase in our efficiency and strategy. Concerning the Unitary Patent itself, we are fully ready. We are technically ready. Thanks to the committee chaired by Jerome, and I thank Jerome who will present here today, we have adopted all the financial rules, we have developed specific applications, we have developed a specific department that will be in charge of unitary patents. So, we are ready and we are waiting for the 13 outstanding ratifications, including Germany and France, plus the 13 provisional agreements which are complicated in terms of procedure in some countries but we are progressing step-by-step. The UK has launched its outstanding order in Scotland and in Westminster. Normally after 15 days this should be totally finalised. Then we have Germany, and suddenly some people have brought some questions as to the constitutionality of the unitary patent and of the process of the ratification by Germany of this Treaty. A question, in Germany, is whether the unitary patent will be of the same quality as the German patent? Will it be something that will create unfair competition for the German professionals? Are we going to lose our business? Can we trust this European patent? Well, the answer is that I am extremely optimistic that the UPC's success will be quick and efficient. Each year, when I met you, I say it will be for next year. I am convinced that is becoming more and more true. Thank you for coming to Munich today.

Latest news from the Committees dealing with the preparation of the Unitary Patent and the UPC

- Preparatory, administrative and select committee: the state of play
- Unified Patent Court: opening by the beginning of 2018?
- Judges' selection process and profile of candidates: quality of the Court

Chair: *Prof. Dr. Ansgar Ohly* - University of Munich

Jérôme Debrulle - Belgian Ministry of Economy

Good morning ladies and gentlemen. For me, it is a pleasure to come back to this conference and to provide you with information about the unitary patent. I will present a set of limitations at four different levels. I will start with the legal implementation, the financial implementation, the IT implementation and the accompanying measures. I would like to thank the EPO for providing me with the required matter to be able to present on these implementations. Let's start with the legal implementation by saying that the committee has completed the procedure that the EPO shall use to administer the unitary patent protection to the member states e.g. filing, collect of payment. Regarding the second implementation, the committee has completed its work by adopting, in December 2015, three important sets of rules. The rules relating to unitary patents, the rules relating to fees and the judiciary and financial rules are available on the website. Concerning the financial implementation of the unitary patent, I would like to stress that the approach taken by the committee is a business friendly approach. For example, it will be possible for users to file a patent application without paying any fee. The second example is the level of fees. If you consider all costs, it is less expensive to validate a unitary patent covering 26 EU member states, than validating national patents in four EU member states. Regarding the IT implementation, I will give very general information because this afternoon there will be a presentation made by Hans Christian Haugg, the director of the recently created unitary patent division of the EPO, who shall describe the procedures in more detail. For example, the EPO has developed a new fully automated online filing procedure that is very straightforward and is designed in a way to avoid any form of errors. The last level of implementation concerns the accompanying measures at national level. Measures that will accompany the unitary patent protection at national level are ongoing and documented. A second committee has addressed, for instance, Supplementary Protection Certificates (SPCs) and safety nets. In conclusion, the implementation of the unitary patent protection (UPP) is complete at the legal, financial and IT level and so are the accompanying measures at national level. So, the entry into the operation of the UPP depends of ratification by all member states. Thank you.

Dr. György *Kozma* - Permanent Representation of Hungary to the EU

Good morning ladies and gentlemen. My task today is to summarise the preparatory work of the UPC preparatory committee and due to the time available, I have created a slide to show you (Rocket Launch Slide). I picked this slide firstly, because I sincerely believe that the UPC itself is as complicated as a space shuttle and its launching is very much comparable to the complications of the launching of a space shuttle. Secondly, I wrote the slide because it represents, clearly, how I feel about where we stand with the project. We are not as complete as we would like but the UPC is on

the launch pad awaiting the green light of ground control. What has happened since we have been here together last year? Well, first and foremost, the preparatory committee has completed its work. Therefore, we have not had preparatory meetings since then. However, numerous smaller scale meetings are happening practically every week. I can say that only external conditions now stand in our way - surprises such as Brexit, elections and Constitutional complaints. So, what is going on in the different work streams? Firstly, the IT team is quite busy in setting up the case management system of the court. The integration with the CMS of the EPO is almost there. They are trying to get ready to welcome the 'opt outs' finding solutions for archiving and backup and they have already composed a test team which is composed of users from all perspectives and the test will be soon starting. The production release of the case management system is planned for 2017. You will hear details from my colleague, Mr. Morganti, later today. The second big task of this IT team is the IT integration of the different processes. He will speak about corporate functions, more specifically the payments made to the CMS, the IT security and other technical requirements. It is important to note that member states are ready to finance this exercise. Secondly, the biggest challenge for the finance team is to put together the most realistic and accurate budget. This is a threefold exercise because; on one hand we need a budget for the period of allocation including the initial contributions from member states. Then we need a budget for the first accounting periods, and then we need to have long-term planning as well. We have difficulty when unexpected costs related to IT, logistic etc. pop up from time to time. The other headache for the finance group is the delays that we are suffering. The other task of the finance team is to contribute to the setting up of the corporate functions of the court, about budgeting, remuneration, banking procedures etc. Thirdly, the registry group are putting all efforts into the daily operations of the court. For example, establishing data processes and contributing to creating an internal data platform for the UPC administration. Contributing to the Case Management System (CMS) and IT integration, taking care of data storage, taking care of the exchange of information between the UPC and EPO, establishing a list of translators and drafting templates and guidelines etc. Finally, the HR Work Stream is very busy. Since we have last been in this room, we have done the pre-selection and the geographical balance and will hear the details very soon of that pre-selection exercise. We are also planning the interviews which will take place in the future seats of the court - London, Munich, Paris and Luxembourg. These facilities are already there, ready and waiting to conduct the interviews. We are also composing the interview panels which will be composed of three members each. Regarding training, trainees will be trained after they are appointed. We will have four blocks, one small block to train the staff who will take care of the administration. Then we will provide judge craft training for the technically qualified judges. Then we will move to advance training for all the judges. Then there will be comprehensive training on the case management system. We are now establishing the final number of trainees, making sure that the facilities are available, setting dates, checking budgetary implications and putting together the content of the different training sections. The rules of the social security coverage of the court are awaiting the green light. We have managed to conclude some minor issues such as the logo and robes of the court. This is still a work in progress, it is quite difficult, but we are progressing quite well. Last but not least, we have the corporate functions group. This is the group with the most interdependencies with the other groups and this group is now putting all efforts into making sure that we have a properly set up and functioning accounting, HR, payroll and other ERP systems. We are now having detailed and very complicated workshops with the providers to map the needs and set the systems. So, as you can see we are bringing the final touches to the extremely complicated launch. This was a glimpse to our work. We

have planned our next meeting for early September and we all believe that by then we are in very favourable external conditions and that the court will be able to launch in 2018. Thank you.

The Rt. Hon. Professor Sir Robin Jacob - University College London, Faculty of Law

It's not quite like the space shuttle because the crew will consist of 100 initially with the possibility of more coming. The crew, of course, are the judges. I am in charge of the small committee that went through the applications. We broke ourselves up into pairs and rated them. Some were simply unqualified altogether. It was a process that was as fair as we could do it but nobody can say it's been perfect. We had 841 applications and a fantastic tool, created in Sweden, called ReachMee and the whole of my panel think it is a genius system for doing an employment exercise. It hasn't finished yet because the next stage is coming up. What we've done is break down the applicants, looking at how many are technically qualified only, how many are technically qualified and legally qualified applicants. Some for the court of appeal only, some legally qualified only. What we decided to do is not to consider appointment for the court of appeal separately from the point of view of interviews. Anybody being interviewed may possibly be a candidate for the court of appeal. In the end, we have picked 110 E-qualified Legally Qualified Judges (LQJ), 117 E-qualified Technically Qualified Judges (TQJ) and 7 E-qualified both LQJ and TQJ candidates. Interestingly, six of them are Brits and one is Dutch. The result is that we have 234 applicants to interview. György has been tremendous in driving this. We have settled on interviewing five per day. I think that the interview process may possibly be the biggest hold up. Every one of these judges should know something about the system. They're supposed to and we have to test that out a little. The way it's going to work, as György said, is that it is going to be in the four centres, the central division and the court of appeal. The candidates will have to book in for interview and earlier booking is better. Those who want German speaking will have to do their interview in Munich, those who want French will have to do it in France or Luxembourg and we'll see how it goes. The London interviews will take place in the new court building in London. The court buildings are more than adequate everywhere. We were required to have some regard to nationality. As you know, being qualified to be a LQJ, you are either qualified by experience or by training. The training, which took place in Budapest in two separate sessions, was surprisingly successful. They had to go through quite a tough course. They had to do an exam at the end and they had a mock trial where they had to write a judgment. I have to say that I am very encouraged that there are people who have not had much experience with patent law that really understood the principles. There are plenty of judges out there who do hear cases but don't know much about patent law at all and this court will not be like that. The LQJ candidates to be interviewed include 36 from Germany, 16 from France, 12 from Italy, 10 from the UK plus five are TQJ also, and nine from The Netherlands plus one is TQJ also. I have not done the smaller countries. Some people will be disappointed, but it can't be helped in a slightly rough and ready process like this one. We were required to have some regard to geographical spread and we have largely done that. The upshot is to appoint 50 LQJs and 50 TQJs plus 50 of each in reserve. The reason for that is because we do not yet know how busy this court is going to be. We also do not know how many are going to be full time and how many are going to be part time. Initially only a few full-time are expected. The last thing we want to do is appoint a lot of full time judges on full time pay with no one coming in because they have no cases. It happened in New Zealand when they created their supreme court. So, seven of us will be part of the 25 people doing the LQJ and TQJ interview process.

I want to break the panels up and move them about so that we can compare panel results. There is going to have to be quite a bit of discussion about who each panel's top candidates are, and who should go through to the final selection. I believe that this is going to be the biggest hold-up in the creation of the court. We have not yet announced the dates when interviews are going to start. Nonetheless, the job will be done and, at the end of the day, we will create the best patent court in the world.

Tony Huydecoper - Netherlands Supreme Court

The quality of the candidates that have applied is encouragingly high. Our committee selects from very high quality candidate indeed, and that gives me full confidence that we will be able to turn out a court that will stand out among the best in the world, possibly the best in the world. It will be an encouragement to hear that we have established an interview protocol that looks very sensible – sensible questions to be sensibly answered - which should give us a good impression of the candidates. I agree with Robin that this could well be one of the stumbling blocks regarding timing but we do have the mechanisms set up for the system to work once we get the dates. The question that might well arise is that you have very good candidates but do you have good people to select them? It is hardly up to me to say that, but I have read in the Treaty that the Advisory Committee must be people of impeccable credentials and impeccable experience. As far as I am concerned is that my main claim in Dutch practice, I'm from Holland, is that I was the lead counsel on what was perhaps that most important patent case in the past 50 years and I lost it. I can vouch for my committee members that have already been involved, they are excellent. I hope that the rest of my committee members, we are going to have a lot of new members, will be just as excellent. Let us express full confidence on that account. A final remark is that it was an experiment and adventure to go into training for the people who have applied and who insufficient knowledge of and experience in patent matters and it was amazing to see how well they did. I was on the panel that examined the results of the trainees in The Netherlands. There they were requested to write a decision on a genuine trial rather than a mock trial and some of the candidates wrote excellent decisions, so they certainly have a good chance of appointment. All in all, there is of course reason for concern, when isn't there, but there is great reason for optimism too. We are on the right track and we are going to make a marvellous court for you. Thank you.

Q. The question is for Mr. Debrulle. At one meeting I attended, you spoke about the problem with national prior rights. Has a solution now been found or not?

A. There is a practical solution established – to provide a top-up search before the granting of the unitary patent in order to avoid running the risk of discovering a prior national right. There is also a legal question and the idea is to leave this question to the UPC in order to interpret the litigation concerning the effect of the prior national right on the scope of the unitary protection. So, this is the stage of this question for now. It is something we have also discussed with the European Commission, but for the time being this is our approach concerning this question.

Q. Alan Johnson. Could you tell me about the policy of having judges from those countries that haven't actually yet ratified, excluding from that the UK and Germany, but the likes of Slovakia and Greece when may or may not join the system. Are you going to make provisional appointments for those judges too?

A. (Sir Robin) Well, Greece and the others, we are assuming are coming in still. We can carry on with our process and if at some point they decide that they are not going to come after all, then they won't get in, as far as I know, but for the moment we have kept them in.

(Jerome) Just to add some elements to what has been said by Sir Robin, how about judges from member states that haven't ratified yet, the policy that we are following is that we keep all potential member states judges and we will do the interviews but the appointments normally happen after the instruments of ratification has been deposited by all member states. So, we have 13 ratifications and then we appoint. Up until that stage we will keep will keep all the judges, and candidates and applicants in.

Q. Peter Thompson. As we all know, the new court will have to deal with language issues. Can you tell us what you foreseeing for the translation facilities?

A. We have basic rules and, as I told you, the different work-streams are working on providing necessary facilities for that. You will hear details about this later today, we will hear from the coordinator of that work-stream. I told you that the register group is putting together a list of translators and interpretation and translation will be provided in the court.

(Sir Robin) At the London court there is already an interpreter's booth waiting for the interpreter.

Q. Daniel Thomas. Sir Robin just said that citizens that are not members of the UPC will not be appointed as judges. After grant, a unitary patent can be opposed at the EPO. Does that mean that the position divisions at the EPO will have to be only manned with citizens of the member states of the UPC?

A. (Sir Robin) Yes. I am very glad that the Opposition Division at things at the EPO is going to speed up. We are going to debate the position between the EPO and the UPC and will follow what this new court does. Will this court, in effect, become the top court? It ought to. Sooner or later, I think that the position may be that the opposition system will have to be rethought. There is another possibility which is that the work of the Opposition Division may fall. The reason is the existence of this court. Because you won't be able to go to central divisions to attack a patent, you may say 'well why do I bother to oppose when I don't really know if this patent matters yet?' There is some history that is you can attack a patent at any time, people only attack it when they think it is really important. It happened in my country. We had an Opposition Division until 1977 and after 1977, the grounds of opposition were widened to be exactly the same as the court and there was no longer a three month period where you had to oppose, and it all went away. So, in the UK, people only attack a patent when they need to, and this may happen. It changes the whole dynamic if you can attack a patent centrally, in a very valuable way. Bad patents are going to have a bad time.

Q. This question of the technically qualified judges. Is there a common understanding as to as to what the role of the technical judge will be because presumably that's relevant to the recruitment process to decide which candidates would be suitable as technical judges?

A. (Sir Robin) Well, that's a very good question. As a matter of fact, we are going to be debating it later this week. There is a meeting of some of the European patent judges taking place in London on Friday/Saturday this week, and one of the issues is indeed going to be 'what is the function of the technical judge?' On one view, the technical judge does all the technical bits, and writes the main judgement and so on. And, in some countries, that's how it works but I don't think that's how it's going to work in this court. In our selection process, we looked for people who had the technical qualifications and also commercial litigation experience. I think that the technical judges will have to play a full part in the judgment process and a lot of them will have quite a lot of experience in patent law because most of them are patent attorneys. I think that they are going to be a very valuable input into the case. The function of the TJQ, as I see it at least, is to help the other judges, but not to be the judge of technical matters.

(Tony) I would expect the technical judge also to debate with his colleagues on the legal aspects of the legal aspects of the case, and the procedural aspects of the case which is why we are emphasising on candidates who also have some judging experience. I certainly would not expect that a technical judge be asked only technical questions, and to cease his contribution as soon as there is a non-technical question on the table.

(Sir Robin) Don't forget the technical judge is not an expert in the very technology of the case. They have a general (quicker) understanding of what the technology is about but there is no way that you could have technical judges who actually have expertise in most of the subject matter of the cases. Why should they? It's just the same as being a patent attorney. When we looked at the candidates, their expertise is much more broad that just one technical area. We selected candidates accordingly.

Q. What is the purpose of the technical judge?

A. (Sir Robin) It's very simple. The purpose of the technical judge is to help the legal judge understand the technicalities. He's an interpreter. He will not be an expert is what I said. That is not the same thing as understanding the technology. There are some cases where hardly any experts in the world really understand the technology but that does not mean that a good patent attorney can't grasp what you need to know, and he will translate it to the legally qualified judge.

Q. A practical question on the recruitment procedure. In the local division, you always have two judges that are from the same country, at least here in Germany. In other countries it can be only one. How do you select the foreigner that those into those panels? I mean in Germany, we have at least four foreigners who will come for a long period of time. I think that initial selection period is valid for seven years, so are there any criteria that you have established on how to select those foreigners who get sent away to other countries to build up local divisions?

A. (Sir Robin) We haven't thought that far yet. That is going to be for the president of the court of first instance. They are going to have to ask around who is willing to go. Personally, I think that all the judges could go anywhere, in principle. The pool of judges is effectively the same for those who also might go and sit in a local division. I think we may find that to be necessary. I think that one of the most important things is that the court doesn't have the same three judge panel, every time. Move them about. That's how you get uniformity and avoid eastern districts of Texas.

Q. Martin (chair) – I would briefly like to ask Sir Robin of his comments on the situation in the UK.

A. The UK government, before the election and after the election, have said that they are going ahead with this. They could have said 'no, no Brexit means Brexit', but they haven't and I think that is quite significant. So, we are in now and I guess we will stay in. I think we'll be there. We've got a lovely courtroom ready.

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Latest news from the countries preparing for the implementation of the Unitary Patent and the UPC

- Are the capitals ready to start?

Chair: *Dr. Martin Köhler* – HOYNG ROKH MONEGIER

Max Brunner – French Ministry of Justice

I am very happy to be in front of you today. Last year, the mood was not too good in this room because there was the result of the referendum. Yet, within the past year we did a lot. Gyorgy already presented all the work that we have done, and I have to say that it is also thanks to the good spirit of Alexander Ramsey because he strongly believed in this project and we are now ready with the preparatory committee. This project will work if we believe and we want it to work. We need to have some stamina and have some green lights coming from the preparatory committee and the other member states to go forward. This morning Prof. Ohly used the image of the ship and first, I have some good news for you. In Paris, there is no storm and there is a small harbour which is ready to welcome the future UPC ship. Once we knew that roughly 60% would be the court of first instance in Paris, we decided to move to another building and we will move next year and then there will be plenty of space available. On the administrative level, it was very good. We have a lot of possibility to further but the decision will be taken at the highest level. We wanted to have some non-permanent offices and so we rented some premises just on the other side of the river, so it takes five minutes to walk from the premises to the court. It has been decided that if there is litigation with a huge amount of publicity, the litigation will go to the palace of justice. So, for the premises, we are ready. A few things still need to be done regarding translation and IT but everything will be ready when it will be launched. Regarding the ratification, France was the second member state to ratify. We ratified the agreement and the project of the protocol will go before the Supreme Administrative maybe this summer. In France, it is totally separate. Even if we don't have the ratification of the protocol of the Supreme Administrative, we can launch the court anyway. What we have to still work on is the communication. I can't tell you exactly where it is and we had a new government as you know. Our minister of justice took up position three weeks ago and the cabinet is not totally ready and it is very difficult for the administrative people to directly communicate with the ministry of justice. We have to go through the cabinet and I think that by September we will have communication on the premises. We would like to have an inauguration of the premises during the fall. In a general context, as you know, the president was before the minister of economics and he knows the subject of the UPC and we hope that one day that we will have the support of the president on this project. That would be extremely great. Thanks a lot.

Louise Akerblom – Luxembourgish Ministry of Foreign Affairs / Unified Patent Court

Good morning. Well, Luxembourg is ready. There will be no local division in Luxembourg. We have done our homework in terms of ratifying the treaty. We have ratified the protocol of the provisional application and I expect the EPI to go to parliament later this year, although this is not required in order to launch the UPC. So, what you see here is a picture of the court house. We won't take up the full house. For those of you that know Luxembourg, this is also the picture of the European platform in Luxembourg. The tall building is the building of the council, and the four towers host translators to the European parliament and the European court of justice who work in 24 different languages. The question about translation was raised before today. We will receive work in three languages. Many of the things so far that we have produced have been towards France and Germany, translated into those languages and like with so many other aspects, we have the full support of the EPO. They have promised to help us in the beginning and we will see how much help we need, but we are very safe in the knowledge that we can reply of the experienced patent translators/ interpreters to help us through the first phase. We do cover litigations and hearings and we have also showed that we have the possibility to work with European translation centre which works with European bodies when it comes to translation of documents. So, the picture down in the corner was actually from the 1970's but has been seriously updated inside. We will actually be located on 'minus five' and to explain that, you enter the building on minus one so it is not the far down. The Luxembourg administrative court is in the same building. There are translator booths in the courtroom. The court building is set in the green and we hope the surroundings will be soothing. So, the registry and the procedure of the UPC will be in Luxembourg, and that's also where the corporate functions will be centralised. The heart of the UPC will be the CMS system which you will hear more about later. We have readied 650 square metres of office space at the moment for the court and we will also have space in the building to grow, whenever that is needed. We will have the corporate functions ready. We are working with ERP providers to build solutions we need for handling human resources, finance, budget etc. The timetable of course, is the cliff-hanger. We still need to know that and that's the big question on play. Under the current circumstances it is very difficult to say when we will be ready or when we should start, but we hope sometime towards the end of this year. To sum up, I can say that Luxembourg is ready, or was, or will be. It's a little bit like having to abort launching the spaceship at the last minute you have to go back a little bit to get started again. However, the preparatory committee and all the national teams are resilient and so, if at first you don't succeed, try and try again. Thank you.

Liz Coleman – UK Intellectual Property Office

Just to explain, I am responsible for the Unified Patent Court project in the UK, so I am a member of what we call a UPC executive group, which I guess is mission control if you have to be on the space shuttle slide. I am going to talk about two things. First of all, what we are doing around the London premises and secondly, about the legal processes. The premises have been secured at the beginning of 2016. They are very nicely furnished and waiting to be occupied. The only thing we still have to do is connect internet in the building, which has taken several months already and would be useful to have connected before the judges interviews take place. It is situated on the edge of the city district in London. Our judges have been very approving of the location and so, it's ready to go. I will now

speak about the legal framework so that you will see where we've got to get to. I think we take our legal processes in a slightly different order from some of our European colleagues, so in the UK it is government policy not to ratify any agreement until you have passed all the necessary legislation. That is a policy, not a legal constitutional issue, so we actually passed all the legislation necessary for the Unitary Patent and Unified Patent Court in 2016, and then we had the small matter of a referendum and two elections as well. After that we had to wait a bit before we could take more steps. We couldn't sign the protocol on Privileges and Immunities because that was produced subsequently to the UPC agreement, so it only became ready for signature just before the referendum. I'm afraid that the UK authorities didn't feel that it would be right to sign at that time. Fortunately, we have since picked up again. We have signed the protocol on Privileges and Immunities in December and that will now be translated into implementing legislation which has reached the Westminster parliament. We have to have a separate ordering council for Scotland. The latest indication of a time table is that the relevant committees will not meet before the summer so we will have debates in parliament in the autumn which means that is not impossible that we will be able to ratify the UPC agreement towards the end of the year. That is still on the cards. The other is the protocol on Provisional Application which, as far as we are concerned, only refers to the provisions of the EPC agreement which the UK has already passed. We need provisional application to raise contributions from member states because a number of us have given large sum to this project and we are looking forward to seeing the finances worked out. So, that's another reason to move forward at all possible speed. Our team have got it in their objectives to have parties for ratification and parties for opening the court, so there are plenty of incentives for us to keep going. Thank you.

Dr. Britta Heidkamp-Borchers – NRW Ministry of Justice

Good morning ladies and gentlemen. Thank you for inviting me. It is a pleasure to be here. Dusseldorf is one of the four local divisions in Germany, with Munich, Mannheim and Hamburg. I have a picture of the premises where our local division is situated. The building is the higher court of Dusseldorf, right next to the Rhine. Dusseldorf has a very high number of patent infringement cases. On a national level, the legislation for the ratification of the agreement and the additional laws passed. It is now up to the president to sign the law and also to get notification for the protocol of provisional application and that process is currently on hold due to the recent constitutional complaint. We don't know much about the constitutional complaint, only that it will be a short one because otherwise, on the legislative level everything has been completed so that Germany can move forward. At the Dusseldorf premises, we are now getting ready for the judges and the support staff, the IT staff. The premises will have the advantage that we will be able to share the services with the library, security and the canteen. We have had a workshop on the management system with the practitioners, judges and lawyers in Dusseldorf and one point of discussion was the security which we will hear more about from the IT panel later today. The state is responsible to provide the support staff for the first seven years and we have interviewed candidates for those posts. We have selected four people for the beginning. Those people have knowledge of the English but we will also provide additional language training on a state level so that people who contact the court will get answers. A high number of Dusseldorf patent judges have applied to the UPC. From the administrative side, this means that once the judges have been appointed, and we don't know how

many and where they will be assigned, so we will need very high flexibility because at the same time we will have to maintain the local patent chambers. As you might know, our legislation also provides for double protection, so we believe that the local patent courts will still play an important role. We will have to see how quick the UPC picks up and then adapt in a flexible manner to the staffing of the local chambers and also to the UPC judges. In connection with that there are a number of very practical questions such as working hours, holidays etc. One question that we are currently discussing is the language regime. We have the possibility to offer an additional language in addition to German. We are discussing if it would make sense to offer English as a second language with the understanding that offering that second language should not be to the detriment of the quality of the judgments and the discussions in the oral hearings. I would be very interested in knowing your opinion. We have talked to the patent community in Dusseldorf, and they seem very in favour of being able to handle the case in English in the courtroom. There will be questions such as translations services arising in the regime. What will we need to provide on a local basis and by the UPC. I think we will try to answer those questions as they arise, but I can assure you that the project of the UPC is very much of the interest of the state and state government. We have had full support and financing all along the way. We, on a local level in Dusseldorf, are ready and very happy to see the UPC rocket flying off very soon. I am happy to answer any questions you have. Thank you.

Q. Martin (chair). Language-wise, what is the current plan for the local divisions?

A. (Liz) In the UK, the plan is to deal in English. Of course, there will be translation services, and translation booths have been added to the courtroom. That's as far as I know the details. It remains to be seen how cases take off.

(Max) What we decided in France is that we have to deal in three languages. It has been a political decision that three languages will be used in the central division in Paris. I can't tell you regarding the judges, but there will also be translation booths.

(Sir Robin). You asked the question whether Dusseldorf should be offering English. The answer is undoubtedly. We have to realise that this is not a European court. The majority of litigants in this court will be from outside Europe. This is where the Japanese, the Chinese, the Americans and the Koreans are going to litigate. They are not going to want to do it in German. That's a fact. If you say, we are a German only court, they will go elsewhere.

Q. There is an exception for local divisions, that the judge can give the oral proceeding in the national language. That's the English exemption or whatever it's called. How often do you think that will be the case? Do you have an idea?

A. Rule 42 EPC is the exception that the judges can hold the oral hearing in the national language, in our case in German, and then the judgment will be written down in German but then a certified translation has to be provided. At the same time, it is my understanding that the court will have to handle all the grantings and the pleadings in English, so it is really only kind of a partial exception. The question is will that be of any use? Then, the judges will not have to write down the judgment with all the technical implications and that might be a half way between the strictly national regime and the all English regime. That might be a solution for an interim phase. But again, it really is what does the patents community and the practice want. I feel that we should all be aware that the quality of the hearings and the judgments should remain as high as we are used to. So, yes I agree

that is an international court and we have to respond to that but we need to make sure that judgments will be of the same quality in excellence as they have been before.

(Sir Robin) I have spoken to some of the German judges about having to work in English, and some have expressed some reservations about their ability to do that. I think that those reservations are misplaced. They are better than they think they are. It is indeed possible that they might write in English more intelligently that sometimes translators into English, by doing it directly. It is one of those subjects. A big subject that we are going to be discussing in London is the writing of judgments. It is very important that the judgments are intelligible. It's not easy. We have got to get a common structure for the judgments. We have got to invent a rational, common style for all the judges. I don't see that any of the current models of judgments across Europe are satisfactory. French, too short. British, too long. German, too complicated.

Q. The question is less about what can happen in Dusseldorf. I am more thinking in smaller states. Let's say in Lithuania or in Italy. The judge might want to write in Italian or Lithuanian. That's also part of the question. How much do you think that will be used?

A. (Martin) It's probably difficult for us here to comment. My impression here is the openness to conform to other languages and that might differ from place to place. I am not sure if anyone can speculate as to what will be the use of that exception.

Q. Does that mean 'forum shopping'?

A. (Martin) It could mean forum shopping, of course, it's a very important factor and we must wait and see how it plays out. Maybe English will be a factor that makes it quite attractive, maybe not. It all remains to be seen in the long run.

Comment - Coming back to the language question, I think you should not only consider English, but also French. As much as we can stick to the language procedure of the patent it would be a big favour because it will avoid a lot of translation problems and we all know to what a translation problem can lead. So, I think in offering only one language, you limit the possibility and you will encourage forum shopping. It is better to stick to the language of the procedure to avoid all these problems.

Q. Is there any indication of how long it will remain unclear what the constitutional complaint is about?

Brittta – I'm sorry, we don't have any further information on the nature of the complaint, or on the grounds or on the person who filed the complaint at the constitutional court. What I have heard has all been speculation and I don't want to add to that. All I can say is that we don't have any further information on the constitutional complaint or its merits or the timeline that we are looking at.

Perhaps one can add one piece of information. The request to the president not to sign the laws at the moment is apparently related to the request for an interim measure and the decision on the interim measure may be expected the decision in substance. So, it might be that in a few months one may know whether this request for interim measure is allowed or not allowed and this is then connected with the request not to sign and if it's not allowed then the president can sign the law

before the decision in substance is given. So, that's the legal structure that's normally kept in these kinds of proceedings.

Q. I am coming back to this language issue. I was just wondering where this committee or the procedure of selecting the judges at all included a language skill component or not at all? It seems important. Germany is certainly capable of German and English, and perhaps French also. I don't know about the other countries.

A. (Sir Robin) Of course we did. We would be completely hopeless if we hadn't done that. If the candidate judges had done foreign language exams, they had to put in their results. They are going to get a bit tested during the interview process. We intend to test anybody who claimed to speak a language by someone who is a native speaker in that language, to ensure they are not exaggerating.

Q. Martin (chair) I would like to ask one further question to each panellist. To what extent each country would allow double protection and what would be the conditions? Please make a quick comment on that from each of your perspectives.

(Louise) Luxembourg will have a safety net provision, which we expect to come into force next year.

(Liz) The situation in the UK is very similar to Luxemburg in that a European patent is automatically coming into effect in the UK, and it is only when you have missed the renewal fee payment and you haven't taken advantage of an additional six months that you have, that the patent finally lapses. So, for the moment, we haven't provided any other safety net and are not allowing double patenting. It may be worth reminding people that the process for avoiding double patenting is that when the patent examiner becomes aware, at some point in the future, that there is a parallel European patent and GB patent, they then initiate the action. So, we can look at how that process works depending on how many accidental double patenting might arise.

(Britta) The German legislation does provide for double patenting under certain circumstances. That is, a German national patent can exist parallel to a European patent with unitary effect.

Q. Wouldn't it be a good idea for the member states to talk to each other about the validity and find one solution instead of 27?

A. (Sir Robin) Double patenting itself raises hugely complicated legal questions. Are the claims going to be exactly the same? If the claims are not exactly the same what then? We had an objection under our old Act. It was called prior claiming. You wouldn't have two patents for the same idea, and we had terrible case law trying to figure it all out. When they created the European patent system, they debated whether they should have a double patenting rule, particularly arising out of co-pending applications. They agreed, sensibly, that we don't have double patenting problems in the European patent system. The earlier is novelty destroying as against the later one, but not on the basis of obviousness, and we didn't have double patenting because it's a legal tangle and I am very sorry that Germany has got it.

KEYNOTE ADDRESS

Margot Fröhlinger – European Patent Office

Thank you very much Martin. Good morning ladies and gentlemen. This year has passed so quickly. I remember, as if it was yesterday, last year's conference when I also had the honour and the pleasure to give a keynote address. If you remember, last year, at this time, we were all somewhat shocked by the result of the referendum in the United Kingdom and we were all wondering will be the effect on the UPC and on the Unitary Patent? In the early days after the referendum, many commentators predicted that the result of the referendum would mean the end of the UK's participation in the UPC. Some even predicted that it would mean the end of the UPC itself. For others it was clear that the UPC would have to go ahead. Too much work had been carried out. Too many investments had been made. Too many expectations had been raised for the project to simply come to a halt. The question was only whether the project would go ahead with or without the United Kingdom? One year later, fortunately, we know that the project is going ahead with the United Kingdom. Liz Coleman has explained the legislative process in the United Kingdom and that it can be expected that the UK can complete the ratification of the UPC agreement before the end of the year. Of course, we all hope that the UK ratification will not only pave the way for the entry into the operation of the UPC and the UP. We also hope that it will pave the way for the long term participation of the UK in the project. Whether the UK can, and wants to, stay in the UPC and the UP is a political decision which will have to be addressed by the UK, by the remaining member states and by the European Union. WE, at the EPO have no political view on this. We can only point to the view of large parts of our user community which have made it very clear, in numerous letters, that they're preferred option is for the UK stay in the UPC and the UP even after the exit from the European Union. The reason for this position from our user community is that first of all, with the UK in, there will be one of the most important markets for technology and innovation in Europe. So, the broader geographical coverage would make the UPC and the UP much more attractive. Moreover, what is equally important is the participation of the renowned UK judges and UK professionals which would be highly beneficial for the system. In the early days after the referendum, many commentators also expressed doubts with respect to the legal possibility of the UK's participation after the exit from the European Union. These doubts were based on earlier opinion of the European Court of Justice concerning the predecessor of the UPC, the Agreement on European and Community Patents Court. This agreement was found by the European Court of Justice to be incompatible with these EU Treaties. In 2011, it was indeed interpreted very quickly as excluding the participation of non-EU countries from the UPC. This interpretation was never founded on detailed and thorough analysis and it wasn't much discussed at the time. Following the referendum in the UK, a number of legal professionals have analysed the opinion of the European Court of Justice more in detail and have come to the conclusion that the participation of the UK would indeed be possible, even after the exit from the European Union. For those of you who wish to study this issue in more detail, I would like to point to a very interesting article published by Prof. Ohly in January this year. Of course there will be a need for some legal arrangements. There will be a need for some amendments to the agreement. There will also be a need for an additional agreement to extent the territorial scope of the UP, but if there is political will, these legal arrangements can easily be made. If there is a will, there is a way. Concerns have also been raised about a possible legal uncertainty in case the UK will have to leave the UPC and/or the UP after the exit from the European Union. Fears are expressed by some about the possible impact of cases pending before the UPC or about a

possible loss of patent protection in the UK. To me, these concerns are not really founded. Legal certainty and the protection of acquired rights are general guiding principles of law – at national level, at European level and at international level. In the guidelines for the Brexit negotiations, from the European Commission for the guidance of the European Council, the protection of acquired rights figure very prominently. We can be sure that in case the UK should want or have to leave the UPC and UP, or should any other member state want to leave in the future, there will be the necessary legal arrangements put in place which will avoid any negative impact. Consequently, there is no need to worry about this situation in the UK. However, as has been said already this morning, there is now a new worry. There is now an issue with Germany which adds to the never ending saga of the unitary patent and the unified patent court which lasts now for more than 50 or 60 years. In Germany, the government has received parliamentary approval for the ratification but the ratification is currently put on hold. The signature of the ratification needed by the president is put on hold following a complaint by an unnamed individual filed immediately after the vote in the German parliament. The compliant, as Britta has explained earlier, has not been notified to the German government and no information is publically available. There are only speculations about the content of the complaint. Contrary to others, I will not refrain from addressing these speculations. According to some rumours, the complaint concerns the vote in the German parliament or precisely the Bundestag, the upper house of the parliament. In the Bundestag, the ratification was passed very late at night, at around 01.30am, and because of this late hour only very few MP's were present. It seems, that the complainant pretends that a two third majority of the members of the German parliament - not of the members present but of the members of the parliament – who be required for this vote because the ratification of the UPC Agreement involved the transfer of sovereign rights to the UPC. Without wanting to go into any detail, to me it seems that a two third majority was not required because a two third majority is only required in very exceptional cases and these conditions have been met, and this was quite obviously also the assessment of the German Bundestag and its legal administrative departments because otherwise the vote would have been scheduled earlier in the day. It would not have been difficult to reach a two third majority, because there was hardly any opposition to the ratification of the UPC Agreement. Now, in the worst case scenario, should the constitutional court find that there is a need for a two third majority, then the German ratification would have to be passed a third time in the parliament. Some of you might know that the first round of ratification took place early last year. It was voted in the fall and after the vote a procedural error was detected. The second ratification bill was launched in December and this was voted in March, and if there is really a procedural error then it would not be too difficult to repeat the vote in the parliament a third time. There are also rumours that the complaint concerns the EPO system. In particular, alleged absence of independence of the EPO appeal system. However, the German constitutional court had to deal with such complaints against the EPO appeal system already in the past, and has always rejected these complaints, as have other national courts. Moreover, it is very difficult to see a link between alleged problems in the EPO appeal system and a ratification of the UPC agreement. There is no institution or other legal link between the UPC and the EPO and if there are any problems at the EPO, which I don't think there are, not ratifying the UPC agreement would be no remedy to this. For those not familiar with German constitutional complaints, it also needs to be stressed that in Germany, constitutional complaints are very frequent. There are plenty of laws that are the subject of constitutional complaints. Many, if not most of these complaints are rejected by the constitutional court and most of them are not even admitted for a decision on the merits of the case. It is also not unusual that the

court, before they have to look into a case, informally ask the president to make his signature. So, therefore my personal view is that there is not too much reason to worry about the situation in Germany either. The only worry is the timeline. Since the complaint has been lodged in the beginning of April after the vote in the parliament, there is speculation that the decision would take place in the fall. If the decision takes place in the fall and the request for preliminary measures is rejected, then this would not even delay the ratification of the UPC agreement in Germany because the ratification will not take place before the ratification in the UK. However, there will be a delay concerning the start of the provisional application. As Liz Coleman has already explained, we need a provisional application of the institutional administrative and financial provisions of the UPC Agreement for a number of months, six to eight months. This period of provision is required for the court to gain legal personality, for the government bodies, the administrative committee, the budgetary committee, the advisory committee of the court to be set up. It is also required for these bodies to formally adopt all the legal text such as the procedures. It is required for fixing the budget and requesting a budgetary contribution from the member states. Last but not least, it is required for the recruitment of the judges and the administrative staff of the UPC. This period of administrative application was expected to start in July. Now, there is obviously a delay. Before the constitutional court has decided, Germany cannot ratify, and therefore the provisional application cannot start. Moreover, the period of provisional application has to be planned and organised very carefully in advance. Robin Jacob has already pointed to the importance of the candidate judges to keep their diaries open for the interviews. It is only one issue. There are many issues that cannot be currently planned in advance because of the uncertainty concerning the constitutional complaint. This could lead to a delay to the start of the provisional application. Nevertheless, we also must acknowledge that this additional time is not lost and will be put to good use. It will be used to bring all the preparatory work streams close to perfection. I am sure that you will agree that the state of preparation is very reassuring and impressive. The process of interviewing and selecting judges will be the most important process of the provisional application period. They have to get this process right because the quality of the UPC largely depends on the quality of its judges. I hope, like me, after you have heard about the extremely thorough planning of this process you are convinced that the UPC will be disposed of high quality world class judges. It was also reassuring to hear about the state of preparation of the countries, who respectively host the seat of the central division, the sections of the central division, and the court of appeal and also one of the most important local divisions in Dusseldorf. I think that we can all be reassured now that the premises of the UPC and its infrastructure will be of top quality and will match the judges. Thank you.

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Court of First Instance and Court of Appeal of the future UPC: are the judges ready?

- Local flavour or everywhere the same?
- Jurisdictions during the transitionary period
- The Court of Appeal: *de nova or de jure* approach?
- Injunction: automatic or at discretion?

Chair: *Dr. Penny X. Gilbert* – Powell Gilbert

His Honour Judge Richard Hacon - IP Enterprise Court (IPEC)

Thank you. We will each speak briefly to introduce the topic, and then open it up to the panel and to you, to make any comments. I am starting off with this question of whether we will be a local flavour or a harmonised approach, especially the local divisions around. It's an interesting point. Whether they will differ in their approach to deciding patent cases and if so, does that matter and what can be done about it? The first thing to bear in mind is that all the panels of judges will be multinational. That's in the rules, so no one nationality will completely dominate any patent in the local division or central division. With that said, in the UK, France, Germany, The Netherlands and possibly Italy, two of the legally qualified judges of patents will come from the local country. Lawyers tend to be fairly conservative in their approach in the sense that I often find that they think that what we are used to must be the right way forward. So, undoubtedly there is the possibility of a local flavour applying in different local divisions when it's set up. Really, two questions arise – is that a good or a bad thing? Secondly, is it likely to endure? Is this something that will be there at the start but will, over time, gradually disappear? I think that answer, especially to the first of those questions, depends on what kinds of differences you are talking about. For example, one possibility is that local divisions will approach the substantive law in different ways. An example that has been raised is that there could be a local division that is very favourable to patentees. That will, of course, encourage a lot of patent applications to that court. The rules don't give patentees unlimited discretion but as you know there is quite a high possibility of forum shopping. So, what if that happens and what if it gets even more extreme, where there is a race (a competition) in local divisions to be more and more patent friendly so that Europe winds up in a crisscross mass of injunctions? Well, no one suggests that's a good thing and possibly to risk is more in relation to protecting divisions. As you know, in the rules the court need not have jurisdiction of the substantive proceedings. Are we going to get a particular court very liable to grant protective measures and will other local divisions then compete? Well, that kind of difference in approach would potentially be unhealthy. The logically thing is that you would get more patent friendly courts and Europe would cease up with a mass of injunctions, so it's clearly a bad thing. But, there is a solution. The solution will be that the court of appeal will overturn decisions which are taken at the local division which are excessively patent friendly and there may be an initial stage where this will cause difficulty but, over time, the court of appeal will level this out so people will think 'well, there's no point in going to that local division because it will just be overturned' and therefore wasting our time. There are other types of differences that might arise also, possibilities to different approach to procedure. For example, whether one local division is more likely to go for bifurcation, or more likely to grant an order for disclosure of documents, or is more likely to go for cross-examination in the oral proceedings. Those kinds of differences aren't

necessarily a bad thing. Take bifurcation, I know that some people think it's greatly to a litigants advantage to have bifurcation. I don't share that view but if it is, genuinely, what litigants want then they will go to those local divisions that favour bifurcation and other local divisions will take notice. Is that a bad thing? I don't think so. Take cross-examination as another example. In the English courts and Irish courts, the two common law jurisdictions, it is not at all unusual to refuse cross-examination but I suspect that the common law judges will be more ready to have cross-examination in oral procedures. Before now, I have had very interesting discussion with Klaus and other judges, who tend to take the view that cross-examination is pretty much a waste of time. Why do we bother with it? Let's just do the documents. Well, it's going to be interesting isn't it? If there are local divisions that favour cross-examination over others, over time we shall see whether that's of genuine value. As we tend to think in common law countries, are witnesses more cautious about what they say in writing because they know they will be tested in public by questions on it? Now, I think that is not at all necessarily a bad thing. We will be able to compare and see what works. Likewise, whether courts are more or less in favour of ordering disclosure of documents? So, I don't take the view that all divergence is a bad thing. It will be interesting and potentially, if all goes well, very useful to litigants in Europe because the systems that work will tend to emerge. There are some possibilities for review here and there. So, those are my introductory comments. I would like to know if the panel has any comments on this, before we open it up to the rest of the conference.

Klaus – I fully agree that the court of appeal will have the role of keeping things together and also to lay down principles, particularly with regard to substantive law and also with regard to essential issues of procedural law for all local, regional and central divisions. Of course, there is room for local flavour to some extent. I am not sure whether there will be so much room with regard to bifurcation. When I heard colleagues from Germany in this regard, I think they are essentially two reasons why there will not be so many differences. One is that the local division will have a technically qualified judge on-board so they are as qualified as the central division. So, with this background there is no reason to bifurcate. Secondly, let me remind everybody that the system is basically a frontloading system, so paperwork will have to be done by all local and regional divisions, and the central division. Then of course questions come up and evidence is taken, the witnesses are heard and where you might see a difference is not so much in whether witnesses are heard but in the way witnesses would be approached. It might be that at the Intellectual Property court in London, lawyers get two hours to plead the case and also to do the cross-examination. Another local division, for example in Germany, it might be that the judges start asking questions before opening the floor to the lawyers. Of course you can still call this a cross-examination but if the good questions are already asked by the judges, then it's probably not so much left for the lawyers. At the end of the day, the aim is to keep it short and have a regular case done in a hearing in one day.

Penny - Do you think that the procedural aspects will help to create harmonisation in time?

Richard – Yes, undoubtedly. I think that the differences, not talking about being particularly patent friendly as that's an unhelpful difference across Europe, but the other differences that I was referring too such as differences win approach to witnesses and so on, I think they will be interesting and help but over time they will be harmonised by the court of appeal. I would hope that the court of appeal isn't too restrictive and doesn't impose an absolute standard way on very local division.

Rian – To add to that, a lot of difference in approach will also follow from your cultural background and your upbringing in law such as your approach to being a passive judge or an active judge. For example, the tendency to appoint an independent expert in an infringement case, that very much depends on where you were a national judge. I think it is a very interesting and challenging situation because you are in a mixed panel so you learn from each other and you also learn from experiences. Now everybody is used to his/her own way, and you never get the opportunity to experience whether the other way may even be better. So, I think it's very challenging for everybody and in the end I think this will move towards a more balanced and common approach in all of the divisions in the end. I think that will be a natural development that is going to happen. As far as the court of appeal is concerned, if there are major differences in procedural approach then there could be an appeal but many of these aspects are not played out in the rules. The rules don't provide who is going to ask the first question. The rules do not really tell the judge when or when not to appoint an expert, so that really is something that has to develop within the local divisions itself. We will see where it goes, but in the end I am confident that we will have a harmonised UPC all over Europe.

Angel – I agree with Rian. The fact that there are judges coming from other countries or other cultures means that you are forced to explain and make an effort to reason why you are proposing something. Overall, dialogue opened between multinational judges will lead, over time, to a common approach and will also give a chance to address any issues.

Angel Galgo Peco – Madrid Court of Appeal

While we all don't yet quite know how jurisdictions during the transitionary period will work, confidence is shared between the UPC and the national courts. There are three risks for the patentee during this transitionary period including risk of central applications and risk of blocking actions. So, we have different scenarios that could become troublesome. I am not am not going to emphasise on these issues, because it is quite boring and quite difficult. I would like to note that there are some more interesting questions that I am now addressing to the lawyers. First, there is a possibility that we have different courts doing differently in this transitional period. What happens? Another point is that non contracting states courts can deal with unitary patents. So, it is possible for the Spanish court to deal with unitary patents. This can create some troublesome situations. For example, if we have a Spanish infringement in the state of France, they can be sued in Spain. Last, the question of the Spanish torpedo. Don't fear, I guess there will be no sort of Spanish torpedo because these issues are now simplified in the number of courts so it will be quite easy to reach a common understanding. So, don't fear that there will be Spanish torpedo, okay?

Klaus – one case I have in mind regarding jurisdictions during transitional periods. There is an owner, thinking that one of his competitors has infringed, let's say in the Netherlands, in the UK and in Germany. Well, this patent owner has some confidence with the German national courts, so he brings a case about the infringement of the German part to the Munich court. He is successful and says 'okay, well I have been successful and so, regarding the other two (Netherlands and UK) infringements, I have a lot of confidence in the German court. How can I keep the case in Germany before these judges?' The question is now, if the general jurisdiction is now with the UPC when the owner has his place of business in German, can he bring the infringement case in regard to the Dutch and the UK part to the Munich local division of the UPC? It is an interesting question. What's

the answer? There is discussion over this question of course. One opinion is no you may not and the other opinion is that yes you can bring it because it is for the party to decide. On top of this, there are some defences that only work of a national basis. In particular, you can only bring the 'prior use' right. So, no one wants to force someone to bring a case where it is clear that there is a prior right in Germany. So, there should be a way to carve Germany out of this scenario. The third argument would be when you look at the jurisdiction of the European Court of Justice a bundle case may still have to be considered separate. So, at the end of the day, I would say that there will be a tendency to say that it should be possible to have these kind of carve outs with regards to infringement. You can make it even more complicated by asking what is going to be with the validity. Okay, I will leave this question to Rian, because she will give you the answer.

Hon. Rian Kalden – Court of Appeal of The Hague

It is definitely the same position as if you look at the torpedo question because the torpedo is probably not as much of a problem if you would have the carve-out possibility. You could just leave the Spanish part of the patent to the side and go to the UPC to deal with all of the other except the Spanish patent. If we would accept this carve out possibility, a 'carve out' is really not much of a problem. Also, with a situation like this there is even more sympathy that you would allow it, because in the case that Klaus just mentioned, it is the patentee that first chooses to do a national proceeding and then subsequently tries to benefit form a positive decision of that national proceeding. Whereas, if somebody tries to frustrate your position by having you go to the UPC to have a decision on all other territories, I think it's much more sympathetic not to allow such a torpedo to happen. Talking about European patents, the European Court of Justice said that every separate national patent should be looked at separately. That is different from a case where two judges would have to decide on the same patent in the same country. So, that is a really conflicting situation, whereas if you consider national patents from a bundle as separate rights, by definition you cannot have a conflicting decision. The situation might be that it is not an infringement in Germany and it is an infringement in The Netherlands, but since they are considered to be separate rights, they are not, on this theoretical basis, conflicting.

Richard – I agree with Klaus, I think that the 'carve out' option is the most likely solution. I will deal with a short point that Angel raised. What if national courts take a different view of the law of the new UPC? I think the answer to that is that we already have a model for that in that the national courts are not bound by what the EPO says or the courts of appeal or even in the Enlarged Board, but they take those decisions very seriously. I am sure national courts will continue to do that. They will take judgments of the UPC equally seriously. One of the interesting questions will be what if in the law of validity, the UPC drifts in a different direction to the EPO? What then? I think that although national courts are not bound by these other courts, they will take them very seriously.

Penny – Rian is now going to introduce the Court of Appeal.

Well, the first question is will the court of appeal hear the entire case afresh or just review the earlier decision? The answer is, the appeal will neither be a complete re-hearing of the first instance nor will it be strictly limited to points of law. So, does that bring us any further? Well, the only thing we can deduct from that is that it is going to be a hybrid system. The next question is will it be

possible to introduce new facts and arguments on appeal? The website refers us to Art 73.4 of the UPC Agreement, and that provision states that the Court of Appeal will have discretion when 'a party seeking to lodge new submissions is able to justify that the new submissions could not reasonably have been made during proceedings before the Court of First Instance'. Now, that's a bit clearer. Certainly, it's not *de nova*. We have that in The Netherlands. I don't know whether there is any other jurisdiction in Europe where you can have a complete new case on appeal. We can. You can have all the new facts you like. You can have entirely new arguments. You can also have entirely new claims. So, if you were unsuccessful at first instance, you can take a completely different turn and try again. Now, that is not going to be the situation in the UPC. It is also not strictly *de jure.* I think that in all of the jurisdictions in Europe, there is no court of appeal that is entirely *de jure.* So indeed, it is a bit of a hybrid system. Also relevant is another provision in the UPC Agreement which says that the 'Court of Appeal, if the appeal is well founded, will revoke that decision and give a final decision itself and only in exceptional cases…refers back'. I think that is a very important provision because the situation that we presently see, where cases are sent back and forth, is something that we really do not what to see happen in the UPC. Now, that still does not really answer the question of how many new facts and new arguments will be allowed on appeal, and I am unable to provide you with an answer as it will be up to the Court of Appeal to decide how flexible they are going to be. Perhaps I can ask the panel, and you in the audience, how you would like to have it. What would be the idea situation for patentees and users of the system? In order to do so, I maybe can give you some pros and cons of extremes and then you can know which direction you would like the Court to move. In a *de nova* system it's possible to correct any mistakes that you have made. You can also taper your case to changed circumstances. It is efficient that only the facts that are relevant to the decision will be dealt with by each court, and it will never be referred back. The drawback is that it may invite the party to hold back, and come with the real case on appeal, as a surprise. It also maybe invites parties to not fully prepare the case thoroughly because you have a second chance anyway. On a *de jure* you only have one shot and it may lead to injustice regarding the actual situation because you may have to leave out new facts, that you are aware of but not allowed to introduce under the proceedings. It may be more expensive because it may require the first instance judge to deal with all the issues. Maybe a pro is that s provides certainty for the other party. It's not suddenly surprise new arguments and facts on appeal. It also ensures parties prepare well from the outset of the case.

Richard – I would like to very much agree with something Rian has just said. I think the one arrangement that the UPC really should avoid is the ping pong system that happens in the EPO. For example, First Instance decides on novelty, it goes up; it comes back down again and so on. That, Klaus has said with absolute certainty is not going to happen at the UPC. The Court of Appeal will decide, but that would be very unsatisfactory because of the delay. So, how do you avoid it? Well, there's one obvious way of avoiding it and that is the system that we have in England. The First Instance has to decide all the issues so that if the point on which the case is decided goes to the Court of Appeal, if that point is reversed, then the Court of Appeal has a First Instance judgment on all the other points. So, it is very rare for cases to get remitted back to First Instance, and in that sense it's more efficient. But, other First Instance judges from around Europe are horrified by this. They say 'what? I have to sit and decide everything?' They say if they only have to decide on one matter, it's much more efficient. So, how do we get around this difficulty? Well, one way is that Dutch way. The Court of Appeal of the UPC, according to the Dutch model, would be prepared to

decide all the issues undecided by the First Instance judge - new evidence, new arguments, new claims, right from the start. That's one possibility. There is a kind of third, compromising way.

Dr. Klaus Grabiniski – Federal Court of Justice

Well, I am confident that the ping pong is not going to happen at the UPC because it is in the Agreement. The Agreement clearly says that only in exceptional circumstances should it go back to the First Instance, so that's what I reply on for that problem. I think the agreement is that everything should be brought forward by the parties. Arguments, facts and evidence should be submitted in the procedure of the First Instance. That's the place where is should be, and if it's not there then there has to be a justification/explanation for why not. Obviously that it was only available later is a perfect justification but the principle is that it is a frontloading system and the parties should not hold back until the Court of Appeal. Coming back to ping pong, when you look at the structure of the Court, there are two technically qualified judges on the panel and the Appeal level while there's only one at the First Instance level, so I think this is a clear indication the Court of Appeal is perfectly able to deal without having to refer the case back. To come back to the question by Richard, whether we should rely on the common law approach, whereby all of the issues submitted by the parties should be dealt with by the Court of First Instance decision or can they just rely on one issue that matter and decides the case? This has been discussed at length by the drafting committee of the rules and I would like to read this out from the rules and procedures; "In exceptional circumstances refer the case back to the court of First Instance" that is just repeating the text of the Agreement, and then next sentence (Rule 242 B) is a clear indication that the Court of First Instance does not have to deal with all issues. They just have to identify what they think is the deciding of the case, then the case is appealed and the Court of Appeal agrees with the Court of First Instance or they tackle the other issues. I think this should be the approach.

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Industry Panel: Impact of the new Unitary Patent System on patent portfolios

- Whether to opt-out from the UPC
- Patent filing strategies for international portfolios
- The influence on licenses and R&D agreements
- Litigation strategies under the new scenario

Chair: Vittorio Cerulli Irelli – Trevisan & Cuonzo

Maaike van Velsen – Philips Intellectual Property & Standards

Good afternoon. Thank you to all the previous speakers for such interesting and lively day. I am very happy to be here today to learn from all the perspectives that are there and all the developments that are ongoing. Let me share with you all the trends that I see as very relevant for the discussions we have today and the decisions we have to make on how to adapt and how to apply to the new system. I feel that the time is really there to make such a system and that it is the right moment to get it started. I share the hopes of everyone that it will really start next year. Looking into the trends that I find relevant, the first one is IP density, which is increasing. The volume is increasing and with that the predictability of outcome in various countries, for example, is not the same as it was in the past. I think things are getting more complex for us because of the increase in IP density. Another factor that will influence the success of this new system is the speed with which it is implemented and with which procedures run. Around us we see that the speed of innovation is developing at an enormous pace and that has to do with the fact that many companies like ours are moving from selling mostly products in boxes to innovations and services and solutions using software and a more digital environment where the speed of innovation is by nature much higher than what we are used to from the past. This means that the ground process and the enforcement process needs to keep up with that speed and whenever there is harmonisation there is usually opportunity to increase the speed of processes. Speed also comes back in the logistics and market dynamics. Sometimes my day feels as if I am running from one country to another in Europe, trying to stop competitors from copying our products. That is sometimes a bit frustrating. When I actually catch somebody in the Netherlands or in Germany a shipment, fairly shortly after the decision is taken, shows up in Spain. Then I start the same procedure again, and it shows up elsewhere. I must say that market dynamics that are so fast nowadays, and logistics have greatly improved not only across Europe but also across countries like China who have greatly improved their logistics and supply chain. It makes it necessary for us to be competitive and to have a fast injunction for our larger geographical area. Another trend that I think will influence the success of this system is quality. Quality is key to what we do. Quality has been on the agenda of the patent offices for a long time and also in our courtrooms we see quality taking big steps to reach a higher level. I think harmonisation again, the mixture of nationalities in the decision making process will help to step up quality tremendously. Then last but not is cost effectiveness. Everyone needs to watch cost. At least in our company, it's not like anywhere else and we do need to watch the cost. Running multiple procedures at the same time is a very costly habit and it's something that we, as a company, would like to avoid. Our company has a large IP portfolio and I am responsible for the IP portfolio management. To give you an impression of the numbers we have about 79,000 patent rights worldwide, the majority of which are actually in

Europe. So, a lot of the cases we have, we file in Europe. Most of our patents go through the European filing process at some point in the life of the invention. With that actually, we are very confident that a system that is based and has its roots in the European Patent Office and the quality that they offer will have a good chance to succeed. The unitary patent is attractive for us in multiple countries also providing coverage outside the main markets. That is also because whenever I set up my filing policies, and I will talk a bit more about that later, I need to make choices on which countries to go to. I choose two countries for some filings and for others I choose five etc. Not having to make that very difficult choice at a moment where there is still 15 years lifetime of that patent but having the opportunity to provide that coverage for longer term immediately will make my life as a portfolio manager much easier, It will help me to take the right decisions at an early moment in time without worrying that I picked the wrong countries or that I had not anticipated economic growth or logistics to develop faster in another country that what I had thought. So, having that opportunity to make a broad choice at an early moment might be a great development. So, the impact on portfolio strategy is something I have thought about a lot, especially today where I have heard some very interesting suggestions from you in the panels and I think what it means is that we need to design a portfolio strategy by business, and we are doing that as we speak. The nature of our businesses is very different, as we can see from the speakers in this panel. In Philips we have consumer products, sold to the consumer, subject to a lot of infringement and copyright but we also sell highly complex systems such as CT scanners and then we also enable others to use our innovation and technology strengths to actually grow their own market. We license IP to others. It will not be difficult to understand that having broad coverage will be beneficial. So, when I look into the strategy that we will choose, it's probably a mixture of opt-in/opt-out initially. Maybe also in parallel some national filings, and there are some systems that are still attractive to use in parallel as these offer a very quick way to act against competition. Overall what I expect is that we will be a very active user of this system, both in filing and in the enforcement area where we will make use of the Unified Patent Court. How we will do that exactly is still difficult to predict because when I look at a consumer product I usually take into account patents – is there an infringement on my technical right under the patent, I take into account the look and feel of the product, the trademark and design. I also need to look into copyright now that there is more and more software. I make a decision whether to use a particular right or a bundle of those types of rights for litigation. Where to litigate is then determined by a lot of factors. Where can I influence the other party most because very often litigation is about influencing the other party to motivate them to actually stop the infringement? Getting products off the market and getting an injunction is nice and maybe you feel victory, but when you can really confirm that others will not be close to your products anymore and that they actually undertake a kind of action not to copy the Philips product ranges anymore then I have achieved my job. So, we always need to look into the total perspective of all types of IP of which patents is one. However, patents do play a big role in this because as I mentioned initially, the speed of innovation is increasing and there is more and more in play. Technology continues to be the cornerstone of bringing good products to market and growing the company. So, on the strategy there is not a one-size-fits-all but instead, it will depend very much on what the competitive landscape is and in the end what type of value you want to get from your patent. One of the biggest enforcement advantages I see is consistency across Europe in decisions. You see very often that there is a decision in one country that is not the same in the others. I have learned today that is not inconsistency but indeed that different interpretation to national law, which I understand and respect. But, to actually advise my business it is difficult to have that difference of potential

outcome. I think that we could reduce complexity we if would have decisions running through the UPC. I also feel like there are extra layers of complexity that we do need to take into account and see how they map out for companies in the future and that has to do with co-existing national rights. Cost effect is probably going to be positive. I expect that cost will reduce and we are very happy with that. I also expect that internal case management and enforcement in particular will require less effort because we don't need to coordinate across all those countries any more. Quality will be key to success and I am very happy to have seen today how there is a lot of attention from a selection of people for looking into how the best court can come into place. We already know that we have the High Court grant process with the EPO and it gives me a feeling of trust to see that enforcement also in the quality area is a high priority. Speed is essential, I talked about that. Fast decisions are important. Even if I am in the defence, I would prefer to have clarity sooner rather than later. The co-existence of rights might be a complication but also an opportunity. Regarding due diligence, we need to look into validity questions. Initially it may be more difficult to predict but in the longer term I expect stability and consistency to be achieved with the court. So, I hope I have given you some insight into Philips and I thank you for your attention.

Paolo Markovina – Electrolux

Good Afternoon. First of all thank you to the organisers for inviting me to this very important event. I am here to talk about the impact of the UPC system on the industry of domestic appliances such as washing machines, dish washers, cooker, vacuum cleaners and those small appliances that we have in the kitchen. I agree with most of the comments that Maaike has presented although our fields of industry are different. I fully agree that quality, speed and enforcement are three key issues. Just to give an overview of our home appliances industry, starting with the market we can say it is a highly competitive market with relatively low margins. We have many players coming from countries such as China and Korea. Most of them are global. Some manufacturers are based in Germany, France, Turkey and Poland mainly. Sales are throughout Europe of course, but are mainly concentrated on Germany, France, Russia, Turkey and the UK. Regarding innovation, about 6% of activity is concentrated in Europe. In terms of patents, there is a high rate of patent filings in Europe, about 10,000 filings per year. I will just give some figures regarding Electrolux, although Electrolux does not have such a big portfolio as Philips. We have almost 80,000 patents worldwide. Almost 2,000 in Europe are still pending. We file about 200 patent applications per year in Europe. Let's talk about the impact of the new system on the home appliance industry. I think that there are reasons to set good strategies in the companies regarding decision-making on the portfolio both in the filing and the opt-out options. So, what is the impact on patent conflicts under the UPC system? I think the UPC is well recognised as a balanced system which takes into account the interests of patent holders and technology users. As patent holders, companies will easily enforce their patent rights with a single valid action and there is also the advantage of getting an injunction, if possible, for infringement. The same companies and technology users will first of all take care of ensuring access of the technologies no doubt. They will put in place all the defensive measure and protective measures that are needed in order to make sure that the technologies can be used. I think that the focus on speed fits very well with our need to take quick business decisions, as highlighted by Maaike. Just to give some indication, the time to market in the industry of home appliances is

between three and four years. So, the timing of our first business decision fits very well with this timing and allows some important business activities. Thank you.

Thierry Sueur – Air Liquide

Let's start by touching upon what I heard this morning. One point was made about timing. This looks like it is becoming kind of a joke. Each year, we hear next year. There has been a draft by the Dutch government recently about the industry that the European government wants to promote and every other word was about urgency, timing, accelerate, fast track and how Europe is going to be faster and faster. Yet, we see no progress. I don't understand and I will come back to the question I asked this morning which was not answered. It is about Europe and about the policy that we are adopting at a national level. I am talking about practicality. Are we trying to encourage a better system for Europe or are we trying to play our own game for the benefit of others? I am not going to play the Trump game but is it Europe first or myself first? I don't understand. Is it necessary for member states, for patent offices that big brother comes to say that you have to harmonise your jurisdictions together? What not say 'let's have one policy' because it's coming from one unitary patent? I really don't understand. I think we have to step back and take some distance because it's our favourite activity, because we're being working so hard I think we forget that this is a major problem. This is a major project for Europe. We, and I am speaking about France made the choice and it was close but the choice was in favour of Europe. This project is a very important project for the cohesion, the economy, the innovation and the competitiveness of Europe. We should never forget that. It is something that as companies we do not forget, and I will come back on that. We strongly believe that this unitary patent that we have got will be a major achievement to strengthen the European industry position and to have a better Europe than we had before. This is not just nice to have, this is essential. Don't forget that this is a strategy project for Europe, and for the industry. A few words about Brexit. For Europe at large is it is good factor to have 26 or 27 countries going together with respect to the unitary patent. We feel that it is essential that the British should remain with us for the skill and for the territory. They bring a lot. So, where are we? I think that we should say 'well, we are ready'. The decision has been made. The starting point is the unitary patent. As with many strategies, we might have exceptions. We know that there is still significant work to be done to review the existing agreement to have a common strategy on opt-out, have a common strategy, unitary patent and national patent. What about the court? Is it an important factor? I think the court has a number of promising features. I think there is an effective case management system. We should have decisions very fast. That is, of course, very important for the industry. We have seen that we will have panels of judges that we are very optimistic about as we have seen at the European Patent Office that mixed panels deliver quality. Even if we have questions today about the nationality of the judges tomorrow nobody will care because the judges will have been working together so we don't think, in relation to the judges, this will be a real issue. More importantly I think we have to understand that it is our court and it is essential that we make it be our court. I remember when the European patent just started, the American and Japanese were first to file. Let's not do it. We (Europeans) have to be the first within this court, we have to make this court exist so that, at the end of the day, European progress can move forward. Thank you.

Dr. Bettina Wanner – Bayer IP Group

Good afternoon and thank you for the possibility to be here. I would like to take a step back and talk about the expectations of the user of the system. Probably all the strategies we discussed so far we have to apply with regard to what the users expect from this system and it is a future system we probably have to look back at the agreement. So, we see that we will get a new unitary patent in Europe with unitary effect and with a really broad geographical coverage. Having uniform and unitary effect in 26 EU member states is far beyond what we have had so far. So far, to get a broad geographical coverage we have to validate in parallel in many European countries. It is an option to choose, so we still see the already existing system existing parallel. I agree with the previous speakers that our company will evaluate and choose a mixture of patent options. We see that we do not even have to reduce the scope of our patent protection. We will have to choose in addition the conventional European bundle patent to cover states that so far do not take part in the system, for example Spain and Croatia and EPC non-contracting states, for example Switzerland and Turkey. What about the costs? We see that it is an affordable system. Probably when it comes to the translation requirements we hear that there already was quite some progress regarding machine translations so actually also expect less translation costs. Coming to the court and the conditions for the court, first of all we already talked this morning about the language proceedings. Here, I have a little bit of question mark but we will have to see how this works out and also how the translations are provided. We hope for legal certainty by implementing the centralised Unified Patent Court and expect that it will provide us with consistent case law. I think that this is especially important for pharmaceutical cases and for the specific needs of pharmaceutical companies, for example in areas like Supplementary Protection Certificates and in biotech cases. Probably the development of consistent case law will be key for us. We are happy to see that the technical and legal aspects can be taken into account at a European level. We also hope for efficient proceeding at the UPC and hope that it will have the necessary speed and quality. Supplementary Protection Certificates are key for us. It is key that they are possible. Otherwise it will be very difficult for us to move on with the unitary patents. We heard already this morning that the EU Commission has recognised the problem and that they will address the problem. We think that the unitary patent the uniform protection and scope throughout the EU member states, it will help and also be timely to create the same protection for the SPCs. We think that it would be good to see the last ratifications in the UK and Germany so that the ratification process can be completed and also the last approvals so that the sunrise period can be started with the necessary preparations. All in all, I think it would be good if we can soon put into force the unitary patent and the unified patent court. Thank you.

Ruben Bonet – Fractus

Good afternoon everybody. Thanks a lot for the invitation. Let me present the angle of the SME's but before doing that, let me introduce my company which is an SME. Fractus is a company that is working on direct technology. We were created as a spin off from a University in 1999 in Barcelona, Spain. Today, we have 120 patents. The company has been very successful in the market place. We have been collecting more than 100million in licencing revenues from our patents. The mobile phones that all of you have in your pocket incorporates a feature that Fractus invented to go inside the phone instead of being external. We are very proud of our contributions to the industry, winning

and being nominated for several awards. Why SMEs are important is that we tend to segment the economy by industry. There is chemistry, biotechnology, telecoms, car manufacturers but let me segment a different way. There are different definitions for an SME. I have chosen one from the European Commission website which is a company which is less than 250 employees and with an annual turnover of less than 50million. That's an SME by definition. The fact is that the SME is very important to the economy in Europe. The European Commission has said that SME's are the backbone of the European 28 economy. Also, we have more that 66% of the total employment in Europe. In terms of value added with GDP we contribute more than half (57%). More importantly, the SMEs created 85% of the new jobs during the crisis in Europe. So, SMEs are important in the European economy and the European Commission is aware of our contribution are there are many initiatives. Now, let's see what the SMEs are doing with the patent system. The SMEs have more than half of the economy but have just 28% of the patent applications these are the statistics from the European Patent Office. Only 9% of SMEs have any IP right, including not only patents but also trademarks and copyrights. When you look at patents only, we barely use patents. So, for SMEs to use patents is very difficult to find. However, the SMEs that own IP have almost 32% more revenue than the SMEs that do not and they also expand workforce faster and pay higher salaries. So there is the statistic to show that if you, as an SME, use the patent system you perform better. Some reasons to explain why SMEs don't use the patent system so much may include lack of knowledge and access to legal information, the costs involved in submitting patent applications and infringement litigation. I believe that the unitary patent addresses these issues which are lack of knowledge, cost of registration and cost of enforcement. This means that with time, after the transitional period, we are going to have one harmonised European system that with one single application will protect several countries. For example, Fractus has not yet been using the European enforcement system because of the fragmentation of the market even though Fractus has been active in using the patent system in the United States because of their harmonisation of their system. We need to make Europe a place where SMEs can enforce the patent with clarity and in an organised way. So, as a conclusion, I am positive that we can rebirth this anomaly which is that the SMEs are not using the patent system by acknowledging SMEs. There are many start-ups in Europe working in robotics, artificial intelligence, 3D printers etc. All of those companies will have additional tools to compete in the market place against the Americans, and the Japanese and the Chinese. So, we are creating an additional tool for those companies to compete in a very competitive market place. As a final remark, I have heard several times this morning that we are going to have the best patent system in the world. I agree with that. I agree that forum shopping is going to be between Europe, China and the United States most likely. We will have the best patent system in the world to benefit all of us and to make that 100% successful, the SMEs need to be part of the thinking process. Thank you.

Q. What about the insurance that was envisaged by the European Commission for the SMEs? Is it still on the cards or has it disappeared?

A. It is. I know that this is in place. It is not finished but certainly when you ask the European Commission what are the tools that can further support the SMEs I believe insurance is one of the tools that is still on the table.

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Applying for Unitary Patents and filing submissions at the UPC including opt-outs

- UPC Case Managing System
- EPO filing of unitary effect and UPP register
- User's view

Chair: Rainer Hilli - Roschier

Hans-Christian Haugg – European Patent Office

Ladies and gentlemen, good afternoon. I am very pleased to be invited to this conference. I will try to give you a short glance, in my presentation, of the newly established procedures that the EPO will run in respect of its duties under the new UPP machine:

https://drive.google.com/drive/folders/0B3HwYB7KH78ia2E5NXhrZlhJcUE

PLEASE FOLLOW THE LINK ABOVE FOR A DETAILED EXPLANATION OF HOW TO APPLY FOR UNITARY PATENT PROTECTION INCLUDING SCREENSHOTS OF NEW SYSTEM (PART I AND PART II)

In conclusion, we are proud to present a user friendly system. The user community already recognise and are familiar with the existing system so there is no big surprise when you go to use this system.

Christiano Morganti – Net Service Information Technology Ltd.

Ladies and gentlemen, I am pleased to be here today. I will go as quickly as possible through the presentation. My idea is to give a very short introduction on what is the Case Management System (CMS) for the unified patent court. I will give you a view on some tasks that are needed externally, for the professional and the public to profitably join the CMS and hopefully to use it easily:

https://drive.google.com/drive/folders/0B3HwYB7KH78ia2E5NXhrZlhJcUE

PLEASE FOLLOW THE LINK ABOVE FOR A DETAILED EXPLANATION OF THE UPC CASE MANAGEMENT SYSTEM (SUNRISE TASKS AND OPT-OUT APPLICATION)

Chris Mercer – Chartered Institute of Patent Attorneys

Thank you. I am going to talk a bit about UP speed. Information on the Register, I will also talk a bit about that. I might also say something about prior national rights. On the UPC, I'll point out something about actions against EPO decisions and something about opting-out. I will try to take you quickly though these practical points and Patrice will then talk about some ethical points as well. When you talk about UP, what nobody has said here I think, is that you've got to do it fast. We have got only one month to make the request from the notification of grant and that contrasts with three months if you're going to do national validation. You've got two months less to think about your decision so you've got to get on with it and businesses, as we've heard from the previous panel,

really have to think about this. Some of the periods that you get have been shortened so you don't have the normal EPO periods. You can have a deadline of one month for responding so you must be quick. There are no extensions of time limits for UP matters. There's no further processing for a number of these time limits. Also, I refer you to Rule 22, it's worth reading. *Restitutio* is only possible in some circumstances. You don't get *restitutio* in all normal ways that you do under the EPC so this is again something you also have to keep your eye on. Even for *restitutio* the minimum period is two months instead of a year. So again looking at it, it's all got to be done quickly. You've got to have your ducks in a row. There is a procedure if you get your request formally wrong - you don't put in something that the EPO wants, they will send you a letter giving you one month to reply. You have got to reply at the end of that one month. If you don't you don't get unitary effect so it is a very strict time regime that you're working on. You've also got to keep an eye on time limits to pay the renewal fees when it comes close to the date that you get for the unitary effect. Also, you won't have oral proceedings unless the EPO thinks it's a good idea. The whole point of this is that you really want to get this right first time. As the EPO has shown you, they've got very good IT systems. They've done some very good work on getting all the systems up and running. They've written the rules well and we really ought to thank the EPO and the select committee because they have listened to the users concerns and a lot of the problems that we forethought are not there at all. They've done a really good thing. Regarding prior national rights, the EPO has already said that it is doing top-up surges, so these are surges after its done the normal surge and those top-up surges should hopefully pick up prior national rights, so hopefully you will be in a position to know whether or not you have to deal with a prior national right. The thing that you do have to remember about that is if for instance you decided a German prior national right, and you would therefore like to file a set of claims for Germany which takes account of that prior national right, that excludes you from unitary effect. You've got to have the same set of claims for all the relevant member states. So, there are things you can do about prior national rights but you do have to be fairly careful about them. Regarding the Register, we saw bits of the Register and it is mainly very good. If you look through those slides carefully you will see they've got in there everything you need to search for and determine where the unitary effect takes effect, so it's a very good thing. The one thing that Mr. Haugg referred to was this problem about residential place of business at the date of filing. The EPO Register at the moment only puts on the place at date of publication so you don't know from the UP Register where the place of business was at the date of filing and that means that you don't know where the UP will be treated as novelty property. It's one national law. Now, we saw on the slides that there is an opportunity for you to put something in when you apply for unitary effect, to put in the place of business. Can you do that later? If you don't do put it in to begin with, can you put it in later? If you can't put it in later, then what is the effect? Maybe all unitary patents will be treated as novelty property in Germany which is the default position. Do your clients want that to happen? Now, on the sort of border between UP and UPC you have EPO decisions and again this is a change for us European patent attorneys because if the EPO decides not to grant you unitary effect you can't you can't go to the Court of Appeal here, you have to go to the UPC. Now, if you've got a good case they will do interlocutory provision which is a great thing and there are special procedures and rules at the UPC so that you can get a quick decision on whether you can have unitary effect. Again, speed again is at the heart of all of this. It is a big issue. Will it all be decided in three months? Well, if you do it right at the beginning then yes, it should be. It's a very simple procedure and you should be able to get unitary effect but what if something goes wrong and you then have to go to the UPC to get your unitary effect? Will you get a decision on that in three months? Why three months? If

you don't get unitary effect you'll have to go for national validation and your normal bundle patents. Will you be able to do that if it goes beyond three months? Again, there is very good ongoing work on that but it is something that you need to bear in mind. Do you have to have a backup strategy? Regarding the UPC and the opting-out, it's a very good system again. Lots of good work has gone on as in the CMS system we have been shown, but who is going to do the representation for you? Do the lawyers that are interested in the UPC have systems in their offices to allow them to do opting-out? Are they the people who should be doing it? I don't know. Then you've got European patent attorneys with appropriate qualifications who can be representatives before the UPC. Are they the people who are going to do it? If you are an EPA without appropriate qualification, as we were just told you need to have a mandate, is that going to cause a problem? Is there going to be lots and lots of mandates for this? What happens if you put a patents department in your firm with a very good formalities or records department and they must do all the stuff? Is that going to be easy? It doesn't sound very easy from that 10-step procedure up there. There may be things that need to be worked on that. The other question I have is can the system actually cope, especially in the sunrise period. For instance, how many European patent attorneys are there with the appropriate qualifications who would like to become a representative before the UPC? Well in the UK there are probably 2,000 and there are lots of other people throughout the rest of the member states who have the appropriate qualifications and could become representatives before the UPC. Is the system that they are developing going to be able to cope with 2,000, 3,000 or 5,000 applications from European patent attorneys who want to become representatives? There will be quite a number of lawyers, I think, that will want to do it and they are going to want to register as well. There's going to be an awful lot of people just applying to be registered representatives. Is the CMS going to be able to cope with that? What about the number of bundle patents they're going to be opting-out? We know from speakers in the previous panel that there are quite a lot of people who are thinking that they might opt some of their patents out, not all of their patents out. Think of how many patents there are around. Over the past 10 years the EPO has been granting about 70,000 patents per year. That's 700,000 European patents. What would happen if they all opted-out? Would the system fall apart? The chances of them all being opted-out is zero, but even 10% of that is 70,000 patents. Is the system going to be able to cope with that? It is an interesting question. Thank you very much.

Patrice Vidon – Compagnie Nationale des Conseils en Propriete Industrielle

Thank you. I have only two slides so it will be quite easy to finish on time. Just to mention, for the political, the organisational and the ethical role of European patent attorneys, we are the last speaker in this session which is fair because we will be the most regular users. In terms of liability, the judges assumed the responsibility from the very beginning. They take the lead there but they don't have any immediate liability but they are a constitutional power. Lawyers, pure lawyers, who are generally not concerned in the long life strategies of the companies but they work of cases, as European patent attorneys we have to address, assume and support the liability in the good decisions and the good advices and we know that the litigation is not the ultimate aim. The ultimate aim is sound business efficiency. I would like to rely on the California concept which is VUCA. We are in a world of volatility, uncertainty, complexity and ambiguity and the ones that will have to address this with their clients are European patent attorneys in most cases. There is no need to mention that the volatility and the saga is the fact that we are not sure how do we speak to our clients? This is not

so easy. There is uncertainty with Brexit and the outcome of Brexit. The outcome of Brexit doesn't make it very clear what will happen and Margot addressed this issue directly this morning. But, we should not only address the issue but define it, look at it and anticipate solutions. What will happen if really the UK is going? Is there really uncertainty or not? What about the current cases that will be ongoing at that time and the current patents? For the sake of our clients and our companies I think we should address this. It's just like a good contract, you should anticipate the bad options and if they never come true then it's not that bad. We have also complexity. Of course a *suis generis* composite jurisdiction is a *suis generis* law. I think that it is quite difficult to organise and then to advise on it, but this can be a success. I think it was Martin who explained how the European criminal law was made as a composite law and that it was really a success and there is no big problem with this. We can make it but we do have to address it. Then there is ambiguity which is the last issue of the VUCA concept and we need also to address it and to advise our clients on this ambiguity. Today, hearing from the judges, we still have to face the fact that there is interpretational ambiguity for example and the quality outcome is certainly not totally predictable. We must also wonder what will be the main driver of our panel of judges over time. Will it be looking for the truths like in some other continents? Probably not. Will it be trying to mediate pro or anti patents? We don't really know. Will they try to open a socially responsible court? We don't know but of course I believe that they will have some ideology in the way they work. Now, what are the duties of the European patents attorneys? Well, we need to be very rigorous and organised and we have a duty to provide information that is complete. We should have traceability of instructions we receive from our clients to develop a strong credibility and reliability. To do this we should have a very predictable system right from the beginning, but it will be quite the contrary. We will also have to be very imaginative and mind-flexible to ensure that we develop a strong credibility. Finally, we need to be European. I am just here to tell you, as the vice president of the French profession, that the French profession has decided to play European without reserves. Thank you.