

Verbatim protocol for Legal Affairs Committee meeting of 5 November 2013:
State of play Debate on the implementation of the unitary patent package

– English version –¹

<http://www.europarl.europa.eu/ep-live/en/committees/video?event=20131105-1530-COMMITTEE-JURI> (from 15:37:45 of the recording, last access on 22 May 2014.)

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Statements were made by the following individuals:

- Klaus-Heiner Lehne (EPP group, rapporteur on the agreement for the court system),
- Pierre Delsaux (European Commission, Deputy Director General Directorate Internal Market and Services),
- Jérôme Debrulle (Chairman of the Select Committee),
- Margot Fröhlinger (European Patent Office, Principal Director Patent Law and Multilateral Affairs),
- Paul van Beukering (Chairman of the Preparatory Committee of the Unified Patent Court),
- Johannes Karcher (Coordinator Working group Legal Framework of the Unified Patent Court),
- Winfried Tilmann (Drafting Committee for the Rules of Procedure),
- Thierry Sueur (Business Europe).

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1 **Klaus-Heiner Lehne:**²

2 „My dear colleagues, dear experts, ladies and gentlemen in this room, I welcome you to our hearing on the implementation of the provisions from the European patent package.

3 May I particularly welcome the rapporteurs, the three who are present today, as well as the other colleagues. Among the experts, Mr Pierre Delsaux, who is Deputy Director General of Directorate Internal Market, Mr Jérôme Debrulle, the Chairman of the Select Committee, Mrs Margot Fröhlinger from the European Patent Office, Mr Paul van Beukering, who is Chairman of the Preparatory Committee of the Unified Patent Court, I am referring to the English title, Mr Johannes Karcher, Coordinator of the Legal Framework Group of the Unified Patent Court, Mr Winfried Tilmann who is a member to the Committee in which the Rules of Procedure are prepared and developed, and Mr Thierry Sueur of Business Europe.

4 Given the time, I would suggest that we make a start and I would ask Mr Delsaux to explain to us briefly the position on the current development for GD Internal Market. After that we continue with our agenda. Mr Delsaux, the floor is yours.”

¹ Speeches given in English language are reproduced in transcribed form, speeches in other languages were transcribed in their original language and then translated into English.

² Translation of the German original speech, from 15:38:03 of the session recording.

5 **Pierre Delsaux**:³

6 “Many thanks, Mr Chairman. Thank you also to your Committee for the organization of the hearing on a very important topic, which also has a strong symbolic value for the creation of the internal market. On this occasion, I would also like to thank the Committee and the rapporteurs for the excellent work which has finally led to the compromise proposal which was adopted in winter last year.

7 Yes, now we indeed have a compromise proposal at hand, but the task or the challenge for all of us is to translate this solution into reality, so that the European enterprises can profit from this chance.

8 For this, first of all, one thing is necessary: The member states have to ratify the Treaties, as well as the Agreement on a Unified Patent Court. As you know, a ratification in 13 member states is necessary, including France, Great Britain and Germany. So far, the Agreement has only been ratified in one country, namely in Austria. In some countries, for instance in France and Belgium, the matter is well advanced, but it is also clear that other countries will need more time.

9 In Great Britain, for instance, ratification is not to be expected before the end of 2014. Ireland will have to carry out a referendum which, presumably, will also be necessary in Denmark. All this should cause delays to the ratification process. At the beginning, we were very confident. We hoped that the first European patent could be granted prior to the elections for the European Parliament. Today, I think, we have to look at things realistically. As a new time for the entry into force, we do now aim for 2015. But we need to stay on the ball and uphold the pressure in order to make sure that the ratification in the member states will advance as planned.

10 The second great challenge, which is not less important, is to create the necessary structures, so to say the ecosystem for the new European patent. Was does that mean? First of all, this means the creation of the Unified Court system. As you know, the Preparatory Committee of the member states is currently dealing with this question. The Chairman of this Committee, Paul van Beukering, is here today and will inform you in detail about the latest developments.

11 The second aspect, which is also very important, is the design of modalities for the grant and administration of the future unitary patent by the European Patent Office. These questions are currently dealt with by a so-called Select Committee of the Administrative Council. On the one hand, it is responsible for adopting the Implementing Regulations for the unitary patent, on the other they also have the important task of defining the annual fees for the future unitary patent, it will come back to this at a later stage. Also in that regard, the negotiations should be complete in summer of 2014. From our view – the Chairman of this Committee, Jérôme Debrulle, will comment on this shortly –, from our view it is decisive to strike the right balance in order to ensure, on the one hand, the attractiveness of the system, but also its sustainability on the other.

12 So, what is the role of the Commission in this context? We do not want to disavow the member states’ individual responsibility, but the Commission is monitoring the activities in the participating member states very closely. Furthermore, we are observers in the Preparatory Committee and in the Select Committee and will, in this capacity, continue to participate in the discussions. Above all, we keep an eye on the decisions not to deviate from what has been agreed together by Parliament and Council, and especially not to violate EU law.

13 But the role of the Commission even goes beyond that: As you know, in July of last year, we have presented a proposal for the amendment of the “Brussels I” Regulation, as an indispensa-

³ Translation of the French original speech, from 15:39:36.

ble prerequisite for the entry into force of the unitary patent. We hope that Council and Parliament will reach agreement on this extremely important issue by the end of this year.

14 Apart from this, I can tell you that there is and will also continue to be the possibility to discuss in more detail, from the perspective of the European Union, legal aspects not falling directly within the competence of the Preparatory Committee or the Select Committee. One example: For instance, there is the question on the interaction of the future unitary patent and supplementary protection certificates which allow to prolong the term of protection for certain types of patents, i. e. of products. For this, the Commission has created an additional forum which we have named "Contact Committee" and the first meeting of which took place on 14 October. Within that forum, member states can bring up for discussion any question which does not fall within the competence of the Preparatory Committee and the Select Committee, respectively.

15 And finally, let me refer to article 14 of the Regulation on the unitary patent which provides, within the scope of a working arrangement, for a closer cooperation of the Commission and the European Parliament, as to guarantee the functioning of the system. Also here, we would like to make the best possible progress.

16 In summary, I would like to emphasize again that there are two key challenges waiting for all of us in relation to the European patent:

17 Firstly, we must make sure to equally guarantee the attractiveness, coherence and financial reliability of the system. The unitary patent's cost will be an important aspect for the future users and they will surely make a comparison with the actual cost of a patent. The price has to be attractive while, at the same time, the sustainability of the system and the financial balance of the European Patent Office and the member states must not be put at risk. For us, the financial aspect therefore is an important one.

18 The second challenge that we have to address is to secure that the new system is guaranteeing reliability and legal certainty to the users. Here as well, trust is essential which means that all efforts should be made to ensure that users and inventors can have confidence in the Patent Court and in the quality of its decisions. In this regard, the Rules of Procedure play a very important role. They must be solid and balanced, exclude the possibility of forum shopping and prevent procedural abuse as far as possible.

19 We consider the quality and training of the judges likewise important, although we are certain that the participating member states will make sure to staff with court with competent judges only. Therefore, these two aspects are of essential importance for us and it is crucial to ensure that these two requirements and the expectations of the users are fulfilled, also in the future.

20 In light of the foregoing, we should not lose our optimism. Although we will not have the new patent prior to the European elections in 2014, we hope that the newly elected Parliament will manage very quickly to make a European patent a reality, for the benefit of all enterprises. Thank you."

21 **Klaus-Heiner Lehne:**

22 „Thank you very much for this statement, Mr Delsaux. Next is Mr Jérôme Debrulle, the Chairman of the Select Committee. The floor is yours.”

23 **Jerôme Debrulle**:⁴

24 „Thank you, Mr Chairman. Thank you also for giving us the opportunity to report to the JURI Committee of the European Parliament, which played an important role in the conclusion of the final package on the unitary patent protection.

25 Firstly, I will briefly recall the legal framework of the implementation of the EU Regulation on the unitary patent protection. Then I will describe in general terms the state of implementation, in particular the creation of the Select Committee, its activities and its timetable.

26 As you know, the EU Regulation 1257 defines a European patent with unitary effect as a patent granted by the European Patent Office under the Rule of Procedures laid down by the European Patent Convention which benefits from unitary effect in the participating member states by virtue of the EU Regulation 1257. The European patent with unitary effect relies thus on two legal instruments: The EU Regulation on one side and the EPC on the other side.

27 The EU Regulation 1257 defines the condition and the scope of the unitary effect that will be attributed to a European patent granted under the rules of the EPC. It is in this context that article 9(1) of the Regulation lays down that the participating member states shall give the European Patent Office administrative task related to the unitary effect. Article 9(2) of the Regulation imposes also an obligation on the participating member states to set up a Select Committee in the framework of the European Patent Organization. Within that Select Committee, the 25 participating EU member states will ensure the governance and the supervision on the administrative task that will be entrusted to the EPO. They will also have to set the level of the renewal fees and to define the distribution key of the share of the renewal fee that will be attributed to the 25 EU participating member states in accordance with the provisions of the EU Regulation.

28 It is in this framework that the 25 participating EU member states have created on the 20th of March 2013 the Select Committee. As I just said, on the 20th of March 2013 the Select Committee has held its inaugural meeting. Since then, the Select Committee has held four more meetings, respectively on the 29th of May, the 25th and the 26th of June, the 18th of September and the 30th of October. The next meeting is foreseen on the 10th and 11th of December. Between the 20th of March and the 25th of June, the work of the Select Committee has been mainly focused on institutional matters, the creation of the Select Committee, the definition of its composition and the adoption of its Rules of Procedure. In accordance with the EU Regulation, the Select Committee consists of representatives of the 25 EU participating member states and the Commission as an observer. The Select Committee has also granted the observer status to two non-governmental organizations, representing the users of the European patent system, namely Business Europe and EPI.

29 Since the 26th of June, the Select Committee has begun to work on issues of substance. The first issue of substance to be dealt with by the Select Committee is the draft rules relating to the unitary patent protection. These draft rules relate mainly to the procedure that will be administrated by the EPO in carrying out the task that the participating member states will entrust to the EPO in accordance with the EU Regulation. They concern administrative procedures like the filing of a request for unitary effect, the filing of a statement of license of rights, the administrative rules related to the payment of the renewal fees and the entries in the register for the unitary patent protection. Discussion within the Select Committee considers the number of comments received both from member states and users of the patent system. Several future meetings of the Select Committee will be dedicated to the examination of these draft rules before their formal adoption. The second issue of substance concerns the financial and budgetary aspect of the implementation of the unitary patent protection.

⁴ Transcript of the English original speech, from 15:46:55.

- 30 At the end of October, a first meeting of the Select Committee has been held to start discussion on those financial and budgetary aspects. The financial and budgetary aspects of the implementation of the unitary patent protection concern mainly the level of the renewal fees for the unitary patent, the definition of the distribution key for the share of the renewal fees that will be attributed to the participating member states, but also the budgetary aspects of the administrative task that will be entrusted to the EPO and the implementation of the compensation scheme for the reimbursement of translation costs of European patent applications into an official language of the EPO.
- 31 During this meeting of the 30th of October, three topics have been presented and preliminarily discussed within the Select Committee.
- 32 The first presentation concerns statistical information about the current validation and maintenance practice of European patents and current renewal fees foreseen in the national level by the 25 EU participating member states.
- 33 The second presentation was a more prospective one. It was a modelling of financial factors that could be taken into account by the patent holder in the decision to opt between the unitary patent and the classical European patent. This modelling is mainly based on a comparison of the costs of the classical European patent and the possible costs of the unitary patent. The need to integrate in this modelling of the economical factors has been underlined by several members in the Select Committee.
- 34 The third presentation concerns the compensation scheme for the reimbursement of translation costs of European patent applications into one of the official languages of the EPO. At this stage, the presentation has mainly described different options for the practical arrangement of the compensation scheme, for example when the request for compensation will have to be submitted, at the filing of the application or at the filing of the request for unitary effect when the patent has already been granted? What will be the form of the compensation? A flat compensation or a compensation per page with a ceiling?
- 35 The discussions of the basis of concrete proposals for the financial and budgetary aspects are expected to start at the beginning of 2014. Concerning the timetable of the work of the Select Committee, we can say that the work of the Select Committee has to proceed in parallel to the work of the Preparatory Committee on the creation of the Unified Patent Court. Given the timetable of the Preparatory Committee, we envisage an entry into operation of the Unified Patent Court early 2015. The timetable of the work of the Select Committee needs to ensure that the implementation of the unitary patent shall be completed in due time before the entry into operation of the Unified Patent Court. The current roadmap of Select Committee foresees completion of the work of the Select Committee by June 2014.
- 36 In conclusion, I can say that we can expect that for the end of 2013, the Select Committee will have handled all institutional aspects, of course its creation, the definition of its composition, the adoption of its Rules of Procedure. Also for the end of 2013, the Select Committee will also have finalized a first review of the implementing rules of the unitary patent protection and shall have initiated a preliminary discussion on the financial and budgetary aspects of the implementation of the unitary patent protection. By the beginning of 2014, the Committee will continue its work on the issue of substance in order to take a final decision on this issue by June 2014.
- 37 I hope I could give you an overview on the state of the implementation of the unitary patent protection within the Select Committee. Thank you for your attention and I remain at your disposal if you need further information. Thank you.”

38 **Klaus-Heiner Lehne:**

39 „Many thanks for providing us with those detailed observations. Next is Mrs Margot Fröhlinger, visiting us for the European Patent Office; in former times, she used to be here frequently in a different function. You have the floor.”

40 **Margot Fröhlinger:**⁵

41 „Thank you, Mr Chairman. Honorable members of the Committee, I can be brief in order not to overlap too much with the work of the Select Committee as reported by the Chairman of that Committee. The EU Regulation on the unitary patent protection asks the participating member states to entrust a number of administrative tasks to the European Patent Office. It is not the EU Regulation which entrusts these tasks. The member states are asked and obliged to entrust these tasks to the European Patent Office and the member states are entitled to do so, because this is foreseen in the European Patent Convention itself.

42 Among these tasks are, for example, the reception of requests for unitary patent protection, the processing of such requests, the reception of other entries into the register, the maintenance of a register on unitary patent protection, but also, as already mentioned by the Chairman of the Select Committee, the compensation scheme for translation costs or the collection and distribution of renewal fees. The European Patent Office will carry out these tasks not autonomously. The Regulation explicitly foresees that the member states have to ensure the governance and the supervision of these tasks by the European Patent Office and this is the task of the Select Committee.

43 In addition, decisions of the European Patent Office are subject to appeals to the Unified Patent Court. In that respect, the Unified Patent Court, which is normally a civil court of the member states dealing with private party litigation, in the respect of decisions, administrative decisions of the EPO, this court has also the function of an administrative court. The European Patent Office is currently internally preparing the implementation in technical terms, because we have, for instance, to build a new IT system for dealing with requests for unitary patent protection and with other entries into the register. We have to create the register and, as the chairman of the Select Committee has explained already, everything should normally be ready in due time before the entry into force of the Unified Patent Court and our calendar is therefore June 2014.

44 We have also still to fix all the technical detail concerning the procedures before the European Patent Office, because the EU Regulation lays down criteria and the broad principles of the procedure, but the technical detail has still to be fixed. For instance, if a request for a unitary patent protection has been submitted too late, if the deadline of one month has been missed, can this be corrected? If some procedural requirements have not been met, if a translation, for instance, which during a transitional period has still to be provided, if this translation is missing, can this be corrected? All these detailed technical questions have still to be laid down. This will be the subject of implemented rules, which have been prepared by the European Patent Office, which are currently under discussion in the Select Committee and under consultation also with our user observers, among them Business Europe.

45 What will be very important is that we create the system in a way that it is expeditious, efficient and not costly. We will use our best endeavors to ensure this, the importance of the price of the unitary patent has already been highlighted by the European Commission. We have for instance, the European Patent Office, we have proposed that for this administrative procedure, requesting the registration of unitary protection, there will be no administrative fee. So this should be free of charge for the patent holder.

⁵ Transcript of the English original speech, from 15:56:46.

- 46 Other technical details need to be fixed concerning the compensation scheme. The chairman of the Select Committee has mentioned already certain questions, but there are other questions. You remember the discussion that this compensation scheme should be limited to SMEs, public research institutions and individual inventors. Now the question is, for instance, shall we request the patent holder to produce evidence, shall we have a complicated procedure to prove all this, or shall we just work with a self-assessment declaration which is also common custom for SMEs subsidies at EU level? So, these are all questions which are under discussion. We have made proposals, we have presented options to the member states, and this needs still to be decided.
- 47 But I would like to make some remarks also on a separate, but related issue, which is our machine translation program. Because the availability of high-quality machine translations for all EU languages has been an important component in the finding of the final compromise concerning the applicable translation arrangements. We have therefore in the European Patent Office made a special effort to roll out the machine translation program.
- 48 We have machine translations available from and into English, into almost all EU languages now, except for the three Baltic languages and for Croatian, but the launch of these language pairs is imminent. For us, machine translations are not only for the implementation of the unitary patent, they are also a very important element of our patent information policy and of our patent quality policy. Therefore, apart from the EU languages, we have developed also language pairs for Chinese and Japanese, and Korean and Russian are underway.
- 49 To give you an idea about the importance of machine translations, we receive daily around 10.000 requests for machine translations on our site. These machine translations are available to everybody, free of charge, at a simple click of a mouse. And, on a monthly basis, for instance, we have 40.000 requests for translations from German into English, more than 15.000 per month from French into English and but also several thousand for English to Italian or English to Spanish. Even for Bulgarian and Romanian which have been launched very recently, we have several hundreds already per month, requests for translations.
- 50 So this gives you an idea about the importance and the interest in these machine translations. We are very confident that the quality of the machine translations will be such that, in some years, we will be able to phase out the additional translation which during the transitional period still has to be provided by the patent holder, and by this we can achieve further cost savings for holders and applicants for the unitary patent. Thank you very much for your attention.”
- 51 **Klaus-Heiner Lehne:**
- 52 „Thanks a lot, Mrs Fröhlinger. Next is Mr Paul van Beukering. He is Chairman of the Preparatory Committee of the Patent Court. The floor is yours, Mr van Beukering.”
- 53 **Paul van Beukering:**⁶
- 54 „Thank you very much. Like Mr Debrulle I recall the very important role this Committee has played in the creation of the patent package. Also therefore, I appreciate it very much that after slightly less than a year you take the interest in where we are.
- 55 It was the desire of the contracting states of the Unified Patent Court Agreement that a Preparatory Committee composed of representatives of the contracting states would be tasked with preparing all practical arrangements for the early establishment and coming into operation of

⁶ Transcript of the English original speech, from 16:05:47.

the UPC. To this end, the Irish Presidency convened an inaugural meeting of the Committee on the 26th of March. That was slightly more than a month after the signing of the Agreement and I think that is a sign of the determination of the contracting states to really create this court.

- 56 At its first meeting, the Committee elected the Chair and Vice-Chair, coordinators were elected and a secretariat was installed. It was also decided that early 2015 would constitute an ambitious, but realistic target date for the entry into operation of the court. To date, the Committee has held three meetings, at which, amongst other issues, it established its roadmap, it launched a pre-selection procedure for the future judges of the UPC, it launched a public consultation on the draft Rules of Procedure of the UPC and discussed the financing of costs in the preparatory phase.
- 57 We have broken down our work into five areas, each of which a coordinator is responsible to lead a sub-group of contracting states and report back on the group's works. A comprehensive overview of the preparatory work that needs to be done can be found in the Committee's roadmap which was agreed at the second meeting of the Committee. All this can be found on the dedicated website of the Committee which is www.unified-patent-court.org. It is the Committee's objective to make sure that the court is, from the outset, operational in early 2015. We shall [inaudible] that we will need sufficient experienced judges, it will be required staff, a legal and financial framework, adequate facilities and electronic case management or filing systems. Patent holders wishing to opt out their patents shall have the opportunity to register their opt-out in advance.
- 58 Preparing the Rules of Procedure is the most urgent and extensive task of the Legal group and Mr Karcher will explain on that later on. Further work of this group includes the setting up of an Arbitration and Mediation Centre, a Patent Attorneys Litigation Certificate, a schedule of court fees, rules governing the registry, rules on legal aid, rules on advisory budget and administrative committees.
- 59 The working group on financial aspects is preparing drafts of financial regulations, draft budgets for the first years of the UPC and draft rules for the contributions of member states. Concerning salary and pension schemes, it has been considered whether this can be outsourced.
- 60 It is the challenge of the IT group to procure an electronic filing and case management system. A range of options for procuring such a system have been explored, from a bespoke turn-key system at the one extreme to a standardized commercial off-the-shelf system at the other. A promising approach is the use of a proprietary cloud-based system that minimizes cost and development time, but ensures an adequate level of tailoring to meet the court's needs. We plan to decide on the way forward on this this year.
- 61 With regard to facilities, possible premises of the different divisions of the court are identified by the contracting states and a working group is identifying which costs are to be borne by countries that host a division and which costs are to be borne by the court itself. And we are defining common minimum specifications for the divisions.
- 62 As it has been said before, the availability of a sufficient number of high-quality judges is key to the success of the court and work in the Human resources and training group has prioritized preparations for the nominations of the first group of judges and organizations of the first pool of judges. In these tasks, the human resources and training group is assisted by an advisory panel, composed of experienced or active or former members of chambers of appeal of Supreme Courts or former lawyers with recognized experience in patent litigation. And this panel advises on both the assessment of the qualification and experience of candidates and in the establishment of the training requirements for the candidate judges.

- 63 Recently, we have launched a pre-selection procedure calling for the expression of interest of candidates, both on a part-time and full-time basis, both for legally and technically qualified judges. This pre-selection process is without prejudice to the formal appointment procedure. The aim of the pre-selection procedure is to draw up a provisional list of suitable candidates, allowing the candidates to participate in a training programme.
- 64 The training for legally qualified judges will consist of advanced courses in patent law and patent litigation, possibly combined with mock trials and internships at experienced patent courts as well as courses on the UPC Agreement and the Rules of Procedure.
- 65 For the technically qualified judges, the training will consist of basic concepts of patent law, relating in particular to the validity, and basic concepts of civil procedure, as well as training on the UPC Agreement and the Rules of Procedure. And for both technically and legally qualified judges, language training will be provided.
- 66 As it has been said before, in probably all contracting states work is on the way to make the necessary preparations for ratifying the Agreement, Austria has already ratified the Agreement on the 7th of August. The Agreement gives contracting states the possibility to setting up Local or Regional Divisions and many contracting states are in different stages of their decision-making progress in this regard.
- 67 In conclusion, one can say that still much work needs to be done. But nevertheless, it can be said that the Preparatory Committee...our work is way on track and the first results can be shown. I think, generally speaking, our work finds good reception amongst practitioners and users and I hope Mr Sueur will confirm that later on. Moreover, I think I find it very encouraging that work is being done by many colleagues and experts in different member states throughout Europe, this making this a true European project. I thank you for your attention and remain at your disposal for any questions that you may have.”
- 68 **Klaus-Heiner Lehne:**⁷
- 69 „Thank you very much, Mr van Beukering. Indeed, I think this is a really big project and I think you have pointed out quite correctly all the things which have to be taken into account for getting this up and running. Now we move on to the area of the Legal Framework group. I welcome Mr Johannes Karcher, he is coordinating the Legal Framework group and I would ask him to speak to us now.”
- 70 **Johannes Karcher:**⁸
- 71 “Thank you very much, Mr Chairman. In its sub groups, the Working group Law is dealing with a number of questions on the legal implementation of the patent package. Mention can be made of the Internal Rules for the Committees of the court, rules for the Registry, the structure of court cost, rules on legal aid, a litigation certificate for patent attorneys and rules for mediation and arbitration. Apart from these tasks, the central issue are the Rules of Procedure for the Court, this is also a topic here today.
- 72 In terms of the Rules of Procedure it can be summarized that the discussions are led on the basis of a draft prepared by an expert group of the Commission in May 2013. Between June and October 2013, there has been a written consultation on this by Preparatory Committee. In this consultation, more than 100 statements of associations, business organizations, law firms and universities were received.

⁷ Translation of the German original speech, from 16:13:50.

⁸ Translation of the German original speech, from 16:14:15.

- 73 The further course of this work is such that until the end of 2013/beginning of 2014, the obtained statements will be analyzed by the mentioned expert group, including amendments and proposals for amendments to the draft. At the beginning of 2014, the Working group Legal framework will take over this work and will deal with it in the sub group Rules of Procedure. It is also planned to have an oral consultation by the working group. Until summer 2014, a revised draft should be available and the approval of the Rules of Procedure by the Preparatory Committee shall be requested.
- 74 I would like to emphasize that my comments here today are to be understood as my personal opinion, as the negotiations of the Rules of Procedure in the working group did not yet start, so please understand that the position in terms of details must remain reserved to the working group
- 75 As to contents, it is to be noted that the basis for the Rules of Procedure is article 41 of the Agreement on the Unified Patent Court. This legal base stipulates that the Rules of Procedure shall comply with the Agreement. This is important insofar as the Agreement itself sets out a number of concrete requirements for the design of the Rules of Procedure which have to be observed in the arrangement of the latter. In this respect, for instance, mention can be made of a few of procedural principles, the principle of procedural fairness, the principle of public hearings, the principle of party disposition, the principle that the parties are obliged to present facts and evidence, the principle of a right to a fair hearing or the free appraisal of evidence by the court.
- 76 On competence, the Agreement provides that, as a common court to the participating EU member states, the “Brussels I” Regulation 1215 from 2012 on jurisdiction, recognition and enforcement has to be applied. In that regard, Mr Delsaux has indicated that currently, there are ongoing negotiations on the adaptation and amendment of the Regulation for the sake of clarification.
- 77 The division of the proceedings into three sections – a written procedure, an interim procedure and an oral procedure – is created in the Agreement already. Also the admissible evidence, the principles of considering evidence and the active role of the court in taking evidence are set out in the Agreement. The court can as well order the presentation of evidence, order measures for the preservation of evidence or the seizure of assets. These provisions serve for the implementation of the “Enforcement” Directive EC/2004/48 which, thereby, the member states render applicable to their common court.
- 78 Even for the case of an infringement action and counter claim for revocation, the procedural options of the court are set out in the Agreement. This aspect has even been the subject of very intense negotiations which were decided as follows: As it is described in the Agreement, the court seized can, at its own discretion, decide both actions together or it can refer the counter-claim to the central division and continue with the infringement action or it can stay the proceedings.
- 79 Also with regard to appeals, specifications are set out in the Agreement. In general, appeals do not have a suspensive effect, although the court can order such effect. Basically, only decisions in first instance in proceedings on the merits or preliminary injunction proceedings can be appealed. Other decision of the court, like measures of procedural instruction can, in principle, only be appealed together with the final decision. The Rules of Procedure have to observe these requirements from the Agreement, of which I have only mentioned a few, and can set out details within this scope.
- 80 Some general remarks on the present draft. From my perspective, the draft contains a very good basis for the design of efficient and transparent proceedings, leading to a final decision within a reasonable time and thus also to legal certainty for the parties. The present draft includes elements of different European legal traditions which, on the whole, are condensed into

a very convincing synthesis as a single procedure. Although there is, of course, a need for debate in terms of details, it can be noted that, in total, the suggested procedure is welcomed by the users. I think this is shown quite clearly in the received statements.

- 81 The draft Rules of Procedure address five different stages of the procedure. Part 1 of the Rules of Procedure deals with the arrangement of the three procedural sections. For each type of action, the submissions and respective time limits are defined. The task of the judge-rapporteur, who is responsible for the efficient preparation of the oral hearing in the an interim procedure, is governed in detail. He can questions of understanding, suggest additional offers of evidence and can thus identify the focus of the proceedings between the parties. The oral hearing and the talking of evidence are then led by the Presiding judge of the court. The decision can provide that its enforcement is made subject to the provision of a security. Also, the enforcement of a measure can probably be avoided by the provision of a compensation payment.
- 82 As to the law on evidence, this is the second part of the Rules of Procedure, there are some parameters to highlight. Uncontested statements of fact are held to be true. The court will determine the matter on which testimony is heard. There are also obligations of the parties in relation to the offering of evidence, if the facts supporting their claims are disputed. The evidence of witness is conducted by presenting a written statement of the witness, but the court can also hear the witness. According to the draft Rules of Procedure, experts are instructed by the court.
- 83 Preliminary injunction proceedings, this is section 3 of the Rules of Procedure, provide for a summary procedure, establishing full evidence is not necessary. Here as well, we have a written and an oral part, of course, with shortened time limits, due to the urgency of this type of proceedings. The grant of preliminary measures is subject to the discretion of the court, while the court has to take into account the interests of the parties, this is also a principle of fundamental importance. The court can order the provision of a security for the compensation of damages, in case the injunction should be lifted later on. It has to do this if the court decides without hearing the other party, which is also possible.
- 84 For an appeal there are procedural rules similar to those applicable in first instance which, in the interest of time, I would rather like to skip, coming to the end; not without pointing out that in the last part of the Rules of Procedure, there are a number of general provisions, covering completely all procedural elements. This relates to provisions on the service of decisions. The rules on representation are set out here as well as a stay by the court. The calculation of deadlines is covered. Also how to deal with a plurality of parties and a change of party. Provisions on enforcement are included in the draft. Court cost and legal aid. All these general decisions and preconditions are there at the end of the draft Rules of Procedure.
- 85 I think I shall leave it at that overview for now. Thank you very much, Mr Chairman.”

86 **Klaus-Heiner Lehne:**

87 „Thank you very much, Mr Karcher. We now turn to Prof Winfried Tilmann who is a member of the Drafting Committee for the Rules of Procedure. Prof Tilmann, the floor is yours.”

88 **Winfried Tilmann:**⁹

89 “Mr Chairman, members of the Legal Affairs Committee! The fact that we are here today is largely owed to your strong resistance last year which prevented the creation of a Regulation without a claim for an injunction and thus one without a legal base in Union law. You have

⁹ Translation of the German original speech, from 16:23:47.

developed here article 5 of the Regulation which, in my opinion, is an injunction claim fully rooted in Union law and all of us hope that this position will be shared by the European Court of Justice in relation to the two actions of Spain pending there against the two Regulations, Union patent and translation regime. Interestingly, the battle about the injunction claim still continues in relation to the simple European patents, I will come back to this shortly.

- 90 The Drafting Committee which I belong to has meanwhile produced 15 versions of the Rules of Procedure. Therefore, you can rest assured that we did not leave any stone unturned that can be turned. Nonetheless, this consultation, which has now been completed, was a great benefit. Not only that many details have emerged there. My impression is that the main purpose of this consultation was that the interested circles have, for the first time, dealt intensively with the Court Agreement and the Rules of Procedure thereby noting that the matter looks much better than they had initially thought and feared. The concerns voiced during the preparatory phase, sometimes in a very strong and exaggerated manner, have practically disappeared. Now, all participants are mainly concerned about developing a workable version of the Rules of Procedure which is balanced, balanced for plaintiff and defendant.
- 91 We have received 110 statements. I have put that down here, the Chairman cannot see it, unfortunately. Or can you see it? Ah, yes. Wonderful. You can see, 110 statements. 20 of these from companies, 10 thereof from the US. In fact, in a touching manner, they indeed care for our European Rules of Procedure. Why? Because they do apply for many of their US patents also in Europe. Then 22 industry associations, mostly IT and pharma, clearly dominated by Anglo-Saxons. 15 IP associations, 39 lawyers/patent attorneys/associations or single firms, 11 single persons and then miscellaneous. I should also have indicated universities, courts, public institutions. Overall, more than 600 individual proposals have been made all of which I have read until this morning and on which I have developed my opinion.
- 92 Which topics were addressed primarily? I only want to mention three topics. Firstly, the injunction order. The companies from the IT industry, i. e. mobiles, have significant concerns here. These concerns originate from America, the USA. There, if the reports are correct, meanwhile more than 50 percent of actions are developed or filed by so-called “trolls”, i. e. by companies which are not active on the market, but which simply hold patents. In the US, this development has led to a limitation of injunctive relief granted by the court, the “eBay” decision of the Supreme Court. In America, this is possible, because there, the injunction order is not based on an injunction claim, but which is, as such, a measure of the court which can be granted if fairness and reasonableness require so, this is called “equity relief”.
- 93 For the Rules of Procedure, these companies – Google, Samsung –, in an unusual unanimity, wish for a limitation of the cease and desist order in a preliminary injunction and in a final judgment. The court is asked to balance interests very carefully and, preferably, in case of plaintiffs without an own market activity, grant damages only, but not an injunction.
- 94 Interestingly, the Pharma industry has a somewhat different position. They are eager to be allowed to assert an injunction even against small generic producers which manufacture their pills in their own garage, in order to prevent their activity on the common market.
- 95 Between these different positions, the Court Agreement and Rules of Procedure must adopt an intermediate approach; this has been specified by the “Enforcement” Regulation. Article 3 of it, on the one hand, demands „effective, proportionate and dissuasive measures“ for the protection of intellectual property rights, but, on the other, also measures that are fair and equitable.
- 96 It is important to recognize that the starting position in Europe is somewhat different. Here, we have an injunction claim rooted in civil law which, in principle, has to be granted by the court which, of course, allows for exceptions. The provision in the Agreement states “may”. An injunction may be granted by the court, but this is not coercive. Mainly, this relates to procedural securities. These are, very briefly, as follows: An obligation to provide a security for enforce-

ment. Then, an obligation to pay damages in case of premature enforcement. Also, an immediate appeal to the “standing judge” at the Court of Appeal and the obligation of the losing party to bear the cost of its winning opponent.

- 97 The second issue which I would like to address is the famous bifurcation. This is the separation between infringement proceedings and nullity proceedings aiming at causing a specialization, namely for infringement at the infringement courts and for nullity at the central division. Bifurcation is a favorite subject of concern for our friends in Great Britain. Here, attempts can be observed to win a lost battle – namely on bifurcation, which is now in the Agreement – at least in part via the Rules of Procedure and the Court of Appeal. In concrete terms, very briefly, this is about limiting the discretion of the chamber in relation to bifurcation. Secondly, it is about allowing an appeal already against the measure of procedural instruction which the Court of Appeal has to admit. This expresses the hope that the Court of Appeal will take the chambers by the hand and steer them from the very beginning.
- 98 The third subject is the famous opt-out. Within the transitional period of seven years, one can, so to say, declare “my patent shall not be handled by this court, but shall be dealt with by the national courts”. So far, the motto of fraidy-cats [German term: “Angsthasen”], as I would call it, was: “We simply make an opt-out for all of our patents. And should we see that the court is working well, we just came back with an opt-in.” But this is not so easy.
- 99 Meanwhile, there is an increasing conviction that it is, after all, good to entrust oneself to this new court. This Agreement causes to a far extent, this is unknown, a legal harmonization. And secondly, the judgment of the court can be enforced in all states. First of all, it has effect in all states, article 43, and can be enforced in all states, article 82. Therefore, we are having sort of a small unitary patent pursuant to the Court Agreement. Of course, the real unitary patent still goes a little further.
- 100 Furthermore, the enterprises and their advisors start to recognize that this opt-out and opt-in poses certain dangers, there are traps into which one can fall. Therefore, the advisor has to consider very carefully whether to advise in favor of an opt-out or not on a case-by-case basis.
- 101 We will assess the 600 proposals in detail and pass them on to the sub group of Mr Karcher. Thank you very much, Mr Chairman”
- 102 **Klaus-Heiner Lehne:**
- 103 „Many thanks, Prof Tilmann. Then we move on to Mr Thierry Sueur – I hope I have pronounced it correctly – of Business Europe. This is, so to say, the representative of the main stakeholder, namely the patent applicants. The floor is yours.”
- 104 **Thierry Sueur:**¹⁰
- 105 „Thank you very much and thank you very much for giving me the floor. In fact, as we have listened to Prof Tilmann, how it may be difficult to represent the industry, because all the stakeholders have some different opinions, depending essentially on the field of activity, from time to time depending on the nationality, too. I do my best, but I can tell that before coming here, I received a few messages saying “What are you going to say?”. Of course, I did not answer, surprise, surprise.
- 106 Before starting, I would like just to point out that since our last hearing we had here, something important happened. It is the publication of this document. It is the study, economic

¹⁰ Transcript of the English original speech, from 16:34:11.

study published in September, organized by the European Patent Office and the OHIM, which is very important. I think for us, it is a big change, because before, IP was more a question of “You believe” or “You don’t believe”. I think now we have a business case, we have some facts, we have some figures. Everything may be challenged and I have not seen any economic study which cannot be challenged, but at least we will have a base for discussion in the future. Thus, I think it is important to rely on that and to see what we do, what we learn, because there are some impressive figures about the number of jobs created thanks to IP, the share of export in Europe. So let us keep that in mind.

- 107 Now, going back to our patent and court. And let us start first with the unitary patent. We think still that it is an essential step for Europe, for European companies. And we believe that we will be able in the future to get protection in the same way as our American friends or Japanese or Chinese or are having access to protection which means at an affordable cost. But there is a big “if” attached to the benefit of the new system for the industry.
- 108 We will [inaudible] the benefit of the system if the cost for obtaining the unitary protection is affordable. Already today, with the European patent, we know that, due to the high cost that we have, there are some holes in protection with consequences, very bad consequences. In [inaudible] companies which, because they could not afford obtaining protection in the 28 countries, were leaving some holes and, of course, it is in these holes that infringing products were exported or imported.
- 109 The major cost factor for the unitary protection will be the fees an innovator has to pay per year to keep the unitary patent in force, the so-called renewal fees. Article 12 of the Regulation provides guidance to the participating member states, the Select Committee, but it is general guidance, no precise enough in my mind.
- 110 In fact, there are three main players in this game whose interests must be taken into consideration: The European Patent Office, the member states and the innovators. What is not clear is how these various interests will be reconciled, very difficult. As regards the EPO, there seems to be a general agreement that the additional administrative cost generated by the new task entrusted to it must be compensated and that the overall balance of the EPO budget must not be jeopardized.
- 111 Then, the real issue is likely to be elsewhere. It will be the expectation of the member states regarding the revenues they will draw collectively and individually from the new system. To put things simply and maybe bluntly: The more they will want, again collectively, over and above of what they get at present with the EP system, the less attractive and beneficial the new system will be for innovators and for the competitiveness of Europe.
- 112 At the end of the day, the question will be: Was the new system designed to improve the situation of innovators in Europe or was it designed to increase the revenues of national patent offices? We have to answer this question. Let us be clear, this is likely to be a make or wreck issue for the future unitary protection.
- 113 Now, let us turn to the court. You mentioned the question of Opt-out/Opt-in. This is a hot issue and this is one point where my colleagues were asking me “What are you going to say?” I was going to say opting in or out –...no, no, I will not give the answer... – will generate costs. Somebody has to pay for it. This question is: Is everybody supposed to pay for the benefit of the system or will those who are opting in and out pay for it? This is the simple question, considering also that we should talk about cost, not about cost plus, to minimize the impact of this financial question.
- 114 Now let us turn to the real project, a really exciting project, because it will eventually lead to a litigation system for Europe, based on a single court, comprised of experienced judges, having its own procedures and handing down decisions producing effect for the whole territory of the

Union or almost, as we know. But the formidable challenge is, although most based on best experience and the practices available in the member states, that this unified court will be an entirely new body to be fully organized before the entry into force of the patent package. All the topics handled by the five working groups, mentioned by Paul before, are essential and we look forward to review them and comment on them as soon as the work has sufficiently matured.

- 115 In fact, we had such an opportunity with the consultation and we have seen the big number of answers you received. One central issue seems to be the degree of discretion given to the court and the judges in conducting all aspects of the litigation procedures. Many commentators apparently believe that the draft Rules offer too high a degree of discretionary powers to the judges. When it comes to proposing limits to these powers, however, it is clear that the different needs of industrial sectors and the different traditions in national systems lead to widely different approaches. You have been showing that during your presentation. The task before the Drafting Committee and eventually the Preparatory Committee is daunting. We can simply hope that they do not lose sight of the forest for the trees. We also believe that we should not ignore the basic treaties in IP, the Paris Convention and TRIPS.
- 116 This leads to what I believe is the most crucial aspect of the setting up of the Unified Court. The court is only as good as its judges are. The whole concept of a unified court was based right from the start on the premise that it would be populated with experienced judges. This is still, and more than ever, the single most important condition for the success of the court and its usefulness for the benefit of the European economy.
- 117 Let me put it bluntly: While there is no reason to exclude a competent and experienced judge, whatever his nationality from any participating member state, it is essential that no insufficiently competent or experienced judge [inaudible]. With that in mind, we urge the member states to start as soon as possible the selection –we have heard it is starting now – and the training. Training will be essential for the future judges, including as regards their language abilities, so that they can sit on as many panels as possible.
- 118 Basically, I am confident. I have been mentioning many times, that we should not forget what happened at the EPO. We were very nervous forty years ago of what will happen at the EPO. Would it be a German system? Would it be a British system? At the end of the day, I think for the Unified Court, the same thing that happened at the EPO will happen. When you talk to judges, you understand that the German judges do not want to do as they were doing in Germany. The British judges do not want to do as they were doing in the UK, the same for France and Dutch and others. They will build a fully new system with the whole freedom they will have in the system. This will be a unique system. I still, maybe I am too optimistic, but I am still believing that, in the end, it will work.
- 119 I would just like to remind you of a sentence of Anatole France: “To accomplish great things, we must not only act, we also dream; not only plan, but also believe.” I am believing and dreaming. Thank you.”
- 120 **Klaus-Heiner Lehne:**¹¹
- 121 “Thank you very much. Some of the experts have expressly praised us as the Legal Affairs Committee. I would like to reciprocate this praise and state that my impression is that the preparations for the implementation of what has been politically adopted are at least well on the best possible way. As a first reaction, I am very satisfied with what I have just heard here.

¹¹ Translation of the German original speech, from 16:44:33.

122 Nonetheless, I could imagine that the colleagues have questions, so that I would like to open the discussion. Who wants to ask a question or make a comment? Nobody? Everybody is happy? The rapporteurs as well? Everybody is happy. This is good, what more should we wish for. [upon a remark from the floor] No questions? Good. Politically, there are different positions on the patent which will not be able to resolve, indeed.

123 Good, then I think we close the hearing. We thank you very, very much. As you see, you have satisfied the Committee. We wish you a lot of success in your further work. I think when all of this has been finished, we will probably have a further session in which, in a suitable manner, it is reported to us how the implementation was finally conducted in detail. At the moment, this is still work in progress, but, from the political perspective at least, the majority is very pleased with this work in progress. Thank you for coming.”

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