

# **Consultation on European Patent Litigation Certificate**

## **Response by Intellectual Property Lawyers' Association**

This submission is presented by the UK Intellectual Property Lawyers' Association ("IPLA"). IPLA acts as a representative body for law firms in the UK with intellectual property practices who wish to lobby for improvements to IP law. Over 65 firms are members of IPLA, and the vast majority of patent and other litigation relating to intellectual property rights in the UK is conducted by these member firms. This gives IPLA a significant insight into the knowledge and skills required in order to conduct intellectual property, and particularly patent, litigation. In addition, lawyers in a number of member firms have also qualified as national and European patent attorneys, and so have experience of the knowledge and skills taught to trainee patent attorneys as well as to trainee lawyers, which makes them well-placed to comment on the differences between these qualifications.

### **Preliminary Remarks**

The Unified Patent Court will be a new court with a new set of procedures and with representatives and judicial staff coming from a range of jurisdictions each with different legal traditions. In its early years, the court will be called upon to make difficult decisions which reconcile different national approaches to substantive and procedural issues. It is particularly important that the court is assisted by legal representatives of the highest quality. High quality training of representatives who are not already qualified lawyers will be essential for the efficient functioning of the Court.

Article 48(1) provides that lawyers of the contracting member states have a right to conduct litigation in the Unified Patent Court. Article 48(2) extends the right to conduct litigation beyond individuals who are qualified as lawyers, to permit European Patent Attorneys ("EPA"), who have appropriate qualifications such as the European Patent Litigation Certificate, to conduct cases independently of lawyers.

As a preliminary matter, it should be noted that qualification as a European Patent Attorney does not involve any training in the conduct of litigation or give an individual any rights to conduct litigation in any member state<sup>1</sup>. Qualification as an EPA is solely dependent upon:

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<sup>1</sup> In some countries such as the Netherlands individuals qualified as EPAs occasionally appear in court as expert witnesses. Article 48(4) of the Agreement and Rule 292 of the Draft Rules of Procedure provide for patent attorneys, including individuals qualified as EPAs, to assist the representatives of parties and to address the Unified Patent Court subject to a representative's responsibility to co-ordinate the presentation of a party's case. This is a right similar to the rights of

- (1) The possession of a science degree;
- (2) A three year period of supervised practice under the supervision of another EPA, this work will normally be focussed on the development of the skills for preparing and prosecuting patent applications; and
- (3) Passing the European Qualifying Examination which tests the skills of preparing patent applications; responding to official letters during the examination procedure; preparing grounds of opposition for use in the EPO opposition procedure; and knowledge and application of the procedural rules for prosecuting patents before the EPO.

Article 48(2) makes it clear that possession of the skills and knowledge acquired by becoming an EPA alone is considered insufficient for acquiring a right to represent parties independent of the supervision of other qualified representatives such as lawyers.

Indeed the experience of a member of the IPLA working party who qualified as an EPA before qualifying as a solicitor has been that the EPA qualification alone would not be sufficient to handle substantial litigation. This is a view endorsed by a further colleague in a similar situation who qualified as an EPA before qualifying as an advocaat in the Netherlands.

The content of any European Patent Litigation Certificate (“EPLC”) or any other appropriate qualifications must supplement the skills that qualification as an EPA demonstrates, and also evidence possession of the skills required for independent representation of parties before the Court at a similar level to those of lawyers with rights under Article 48(1).

In short, the content of any European Patent Litigation Certificate or any other appropriate qualifications must be sufficient to enable EPAs to be effective litigators before the Court.

## **European Patent Litigation Certificate**

### **Course providers and quality control (Rule 2)**

Quality control and quality assurance will be an important part of any European Patent Litigation Course. The IPLA welcomes the committee’s recognition of the public law nature of granting certificates and the importance of ensuring a satisfactory and harmonized quality level. Universities and other regulated non-profit higher educational bodies have well established educational quality assurance mechanisms which are regularly assessed to

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national patent attorneys in Germany and the Netherlands to appear in national infringement proceedings.

ensure that education standards are maintained<sup>2</sup>. For that reason, the IPLA endorses the committee's recommendation that course providers should be limited to universities and similar institutions.

### ***Role of the Training Centre***

At present the draft rules set forth the possibility that the Unified Patent Court's Training Centre might also run a European Patent Litigation Course. The IPLA believes that having the Unified Patent's Court's Training Centre run a European Patent Litigation Course would not be advisable and is potentially *ultra vires*.

As Article 19(1) of the Court Agreement makes clear, the training centre which is established in Budapest is "a training framework for judges". There is nothing in Article 19 which suggests that the Training Centre is intended for training European patent attorneys to qualify as representatives before the Court.

Article 11(2) of the Court Statute does refer to the training framework set up under Article 19 (i.e. the training framework for judges) as providing a platform for the exchange of expertise and a forum for discussion which includes organising courses and co-operating with international organisations and educational institutes in the field. However, this is in the context of the training framework for judges and it is not clear that this provides any basis for the Training Centre to provide courses for the training of European patent attorneys independent of the training of judges.

It is suggested in the Explanatory Memorandum, at the end of section I on page 4, that since the Training Centre is under the direct control of the UPC, there is no need for any course accreditation (or, by implication, special measures to ensure quality control). The IPLA submits that the UPC does not have the knowledge or experience of higher education to ensure that a course operated by the Training Centre meets applicable higher education standards (discussed further below) and to exercise necessary quality control. Furthermore, if the UPC and/or the Training Centre provide the kind of quality assurance mechanisms which are present within universities to ensure any course is both educationally appropriate and maintained at the same level as any equivalent courses offered elsewhere, there would be significant cost implications.

In view of the above, the IPLA would recommend that the Rules should not permit the Training Centre to run litigators' courses but rather, its role should be limited to the

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<sup>2</sup> Thus for example in the UK, Universities and other institutions of higher education are regulated by the QAA and QAA (Scotland) to ensure that they adhere to defined standards.

facilitation role envisaged in draft rule 10(1). The sections appearing in square brackets in draft rules 2, 10(2) should be deleted. (Rule 10(1) needs to be amended to identify the full name of the Training Centre.)

In any event, since the UPC is intended to be self-financing, it is important that any costs incurred by the Training Centre in relation to the EPLC should be financed through payments by the educational bodies whose activities the Centre assists.

### **Content of the Course (Rule 3)**

The outline curriculum of the EPLC looks broadly appropriate; however there are two important omissions which we consider should be added to the current list.

#### **Litigation Ethics**

Professional ethics are at the heart of all lawyers' professional training. Given that qualification as an EPA does not demonstrate a background in conducting litigation, it is very important that any EPLC course should cover litigation ethics and the duties and obligations litigators and advocates have towards a court, clients and any other parties, since the conduct of litigation raises additional questions which do not occur when drafting and prosecuting patent applications before the EPO.

#### **Litigation Skills**

The outcome of any EPLC course should be that EPAs who have passed the course should have sufficient skills to be effective litigators before the Unified Patent Court. At present the outline curriculum does not make any explicit reference to the teaching and testing of litigation skills such as:

- the analysis of facts and evidence in a case including the formulation of case strategy and drafting and review of witness declarations;
- organisational skills in obtaining evidence, executing a *saisie* or order for inspection, and complying with orders for the production of documents, and (in appropriate cases) working with fact witnesses and experts in preparing declarations in a timely and efficient manner; and
- the ability to draft a coherent, clear and persuasive written pleading in a case before the Court.

Express reference to the teaching of litigation skills should be added to the required curriculum.

## Duration of the Course & Course Standards (Rule 4)

### *(i) Course duration*

The definition of the minimum course duration in Rule 4(1) is ambiguous. At present Rule 4(1) states that the minimum duration of the course shall be 120 hours. It is not identified whether this means that the course is required to consist of 120 hours of classroom teaching or whether this measurement is intended to relate to the total numbers of hours spent studying. If the intended meaning is that the course should consist of 120 classroom hours, it is not apparent how this measurement is consistent with the stated intent in Rule 5(2) that e-learning facilities are to be encouraged.

To avoid this ambiguity, it would be preferable for the duration of the course to be defined with reference to a required number of credit hours as defined under the European Credit Transfer System ("ECTS")<sup>3</sup>. This is a uniform system accepted and understood by academic institutions throughout Europe. Under the ECTS credit system a year of full-time academic study corresponds to 60 ECTS credits which is equivalent to 1500-1800 hours of study including both classroom study and independent study.

By way of examples the duration and ECTS credits for a range of qualifications are as follows:

<b>Qualification</b>	<b>ETCS Credits</b>	<b>Course Duration</b>
1 <sup>st</sup> cycle: Bachelor's degree e.g. LLB	180-240 credits	3-4 years
2 <sup>nd</sup> cycle: Master's degree e.g. LLM	90-120 credits	1-2 years
Legal Practice Course (obligatory pre-qualification training course for solicitors in England: candidates already have a law degree or equivalent)	70 credits	1 year
Bar Professional Training Course (obligatory pre-qualification training course for barristers in England: candidates already have a law degree or equivalent)	60 credits	1 year
Foundation level training course for patent attorneys at Queen Mary, University of London	37.5 credits	3 months

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<sup>3</sup> [http://ec.europa.eu/education/tools/ects\\_en.htm](http://ec.europa.eu/education/tools/ects_en.htm)

The required duration of any EPLC course should be similar to the duration of courses accepted as “other appropriate qualifications” under Rule 12. It is believed that both the Centre d’Études Internationales de la Propriété Intellectuelle (‘CEIPI’) diploma course on Patent Litigation in Europe and the Nottingham Law School Intellectual Property Litigation and Advocacy Course referred to in current Rule 12 involve teaching of c. 30 ECTS credits on litigation matters and that level may be an appropriate benchmark.

The Nottingham Law School Intellectual Property Litigation and Advocacy Course in particular would appear to provide an appropriate benchmark for the required duration of an EPLC course as it is intended to be suitable for part-time attendance by UK registered patent attorneys undertaking full-time work and has been accredited by IPReg, the independent regulator of patent and trade mark attorneys in the UK, as providing sufficient teaching to bridge the gap between the UK patent attorney qualification and the knowledge and skills necessary to permit such attorneys an independent right to undertake intellectual property litigation in the English High Court.

For another comparison of how the number of hours teaching corresponds to ECTS credit hours, each module on the Queen Mary Intellectual Property Course referred to in Rule 12, which is a full time taught course, comprises c. 30 hours of lectures and comprises 7.5 ECTS credit hours. If the proposal for an EPLC course duration was intended to mean 120 hours of lectures, this would set the course duration at 30 ECTS credit hours.

The European Patent Office has addressed the question of what level of educational qualification is required of candidates for the European Qualifying Examination (for EPAs). In paragraph 7 of decision D12/04 of the Disciplinary Board of Appeal, the Board supports the use of ECTS in assessing the level of academic qualifications.

### ***(ii) Course standards***

In addition to clarifying the definition of study hours, the rules should also be amended to state the level of study required in accordance with the European Qualifications Framework (“EQF”)<sup>4</sup>. Again this is an accepted uniform academic standard used throughout the EU.

In the case of the EPLC course it would be expected that the required level of the course would be EQF level 7 which is the normal standard required of Masters degrees, Postgraduate Certificates and Postgraduate Diplomas, and is the standard required for the Bar Professional Training Course and the Legal Practice Course undertaken in England and Wales by barristers and solicitors respectively as part of their initial training. It is also the

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<sup>4</sup> [http://ec.europa.eu/eqf/home\\_en.htm](http://ec.europa.eu/eqf/home_en.htm)

level of the Nottingham Law School Intellectual Property Litigation and Advocacy Course referred to in Rule 12.

### **Request for accreditation (Rule 7)**

In addition to the matters listed in draft Rule 7, the IPLA would recommend that any request for accreditation should also require confirmation from the course provider that:

- i) The institution's quality assurance and enhancement processes meet / continue to meet the expectations of the regulator for higher education in the member state where it is situated;
- ii) The programme has been successfully (re)validated according to the institution's latest internal validation process, and attach a copy of the validation / revalidation report; and
- iii) Confirmation that the programme has been / will be subject to the institution's internal annual monitoring and enhancement requirements.

Such a requirement would ensure that the proposed course had passed appropriate internal quality control standards confirming that the content, level and duration of the course meet required educational standards and that the course would be subject to appropriate on-going quality control.

In England and Wales a similar provision for self-certification of quality control is required by the Solicitor's Regulation Authority in order for a university's law degree to be considered to be acceptable as a qualifying law degree for passing the academic stage for qualification as a solicitor. It would seem appropriate that similar provisions should also be applied to any EPLC course provider, particularly as the Administrative Committee will not itself have the expertise or the resources to monitor the educational aspects of the course.

### **Other appropriate qualifications**

#### **Law diplomas (Rule 11)**

The committee's explanatory memo states the rationale behind rule 11 is that the qualifications covered by this rule should provide EPAs with the necessary knowledge of private and procedural law required to conduct patent litigation. However, as presently drafted rule 11 encompasses many qualifications where this will not be the case.

By way of example in England and Wales, in addition to a 2 year period of supervised practice, qualification as a solicitor involves both the acquisition of a qualifying law degree or

an equivalent graduate diploma in law, and the legal practice course ('LPC'), a one year full time training course which covers *inter alia* civil and criminal procedure and evidence. It is only after completing both the initial law degree and the LPC that an individual is eligible to complete a 2 year training contract and qualify as a solicitor. Similarly, aspiring barristers must acquire a law degree or a graduate diploma in law and then pass the Bar Professional Training Course ('BPTC') before undertaking a period of pupillage. Training in procedural law is obligatory in order to qualify as a lawyer because it is included in the LPC and BPTC. However, because it is covered on the LPC and BPTC, procedural law is not a subject which is included in most UK law degrees.

Similarly, many specialist LLMs (e.g. Masters in Canon Law or Tax Law etc.) do not include any substantive or procedural law relevant to practice before the UPC.

In order to implement the committee's intent, Rule 11 should be limited to:

- a) qualifications or combinations of qualifications which evidence completion of the academic training required in order to practice as a lawyer in a member state<sup>5</sup>;
- b) qualifications which evidence study covering the subjects of the curriculum in private and procedural law required an EPLC at the level and for the duration of time required for completing an EPLC as defined in rules 3 & 4; and
- c) during the transitional period, any qualifications which encompass the content of any other acceptable qualifications as defined in rule 12<sup>6</sup>.

### **Other qualifications during a transitional period (Rule 12)**

The list of other appropriate qualifications listed in Rule 12 should be reconsidered.

### ***Litigation-focused qualifications for patent attorneys***

Two of the qualifications listed, namely:

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<sup>5</sup> Thus in the UK, an EPA would need to evidence possession of a law degree or a graduate diploma in law and completion of the LPC or BPTC. In Germany, an EPA would need to evidence having passed the first and second state exams for qualification as a lawyer and in the Netherlands an individual would need to evidence completion of an LLM which included the prescribed subjects in evidence and procedural law etc.

<sup>6</sup> Thus for example, prior to the establishment of the current Nottingham Law School course in Intellectual Property Litigation and Advocacy, Nottingham Law School used to run equivalent courses incorporating the content of the current course which led to an LLM in Intellectual Property Litigation or an LLM in Advanced Litigation. These predecessor courses required study for a period of 2 years rather than the current course which is a 1 year course and supplemented the content of the current Litigation and Advocacy course with the submission of an academic thesis on a litigation related subject. The courses in question comprised 90 ECTS credits on litigation matters all at EQF level 7.



- CEIPI Diploma on Patent Litigation in Europe; and
- Nottingham Law School, Intellectual Property Litigation and Advocacy Course

are litigation-focused courses attended by qualified patent attorneys. As noted above, the Nottingham Law School Intellectual Property Litigation and Advocacy Course was explicitly designed to bridge the gap between the skills of a UK registered patent attorney, and the skills required in order to conduct intellectual property litigation in the English High Court. As noted above, both courses are understood to comprise c. 30 ECTS credits on litigation matters at EQF level 7 (i.e. the duration and level at which an EPLC course might be set).

The committee acknowledged in the Explanatory Memorandum that recognition of other appropriate qualifications is necessary in order to allow the UPC to start with a sufficient number of qualified EPA representatives. Recognition of both of these qualifications would appear appropriate as both involve substantial study of litigation matters at a level and of a duration similar to that expected for the EPLC. The courses themselves are attended by EPAs and qualified national attorneys who have an interest in improving their litigation skills. This pool of attorneys would constitute those who most likely to want to conduct litigation in the UPC and those best qualified to do so. Both courses are well established with approximately 500-600 EPAs having attended them, which would provide the court with significant cohort of EPAs spread across the EU who could undertake litigation in the UPC.

***Introductory courses for students training to become national patent attorneys***

In contrast, the following qualifications listed in Rule 12:

- CEIPI Diploma of international studies in industrial property (specialized in patents);
- FernUniversität in Hagen, course “Law for Patent Attorneys”;
- Queen Mary College London, courses “Certificate in Intellectual Property Law” or “MSc in Management of Intellectual Property”;
- Brunel University London, course “Intellectual Property Law Postgraduate Certificate”
- Bournemouth University, course “Intellectual Property Postgraduate Certificate”

are all introductory courses taken by trainee patent attorneys as part of their qualification as national patent attorneys in France, Germany and the UK.

This raises serious doubts as to the suitability of these courses for providing adequate training for EPAs to conduct litigation independently in the Unified Patent Court. As previously noted, it is implicit in Article 48(2) of the Court Agreement that the EPA qualification, per se, is not sufficient.

If adopted in the present form, with reference to the above courses, Rule 12 will effectively ensure that any EPAs who are qualified as French or German patent attorneys<sup>7</sup> and 2/3rds of UK patent attorneys<sup>8</sup> will be given an independent right to conduct litigation in the Unified Patent Court. Understandably, almost all such EPAs will reside in the UK, Germany or France and very few will reside in any of the other member states.<sup>9</sup>

Accepting basic training courses leading to part qualification as a patent attorney in some but not all contracting member states as sufficient to confer a right to conduct litigation independently in the UPC would appear to be unfair.

More importantly, though, these introductory training courses do not appear to devote sufficient time to litigation matters that they could be considered to be equivalent to the training which might be acquired on an EPLC course. This is something implicitly acknowledged in the UK by the fact that IPReg, the independent regulator of patent and trade mark attorneys in the UK, refuses to permit patent attorneys to conduct litigation in the English High Court on the basis of having passed any of the UK courses listed above and instead requires registered attorneys to complete the Nottingham Law School Intellectual Property Litigation and Advocacy course before awarding such rights<sup>10</sup>.

***The number of patent attorneys who handle litigation independently is very small***

For the vast majority of European and national patent attorneys, the focus of their work will be the preparation and prosecution of patent applications through the EPO and national patent offices. Litigation matters typically form a far smaller part of a patent attorney's work

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<sup>7</sup> The EPI survey of the Patent Profession in the EPC Contracting States identifies completion of the FernUniversität in Hagen, course "Law for Patent Attorneys" in Germany and the Centre d'Études Internationales de la Propriété Intellectuelle, courses leading to the Diploma of international studies in industrial property (specialized in patents) in France as compulsory requirements for qualification as a patent attorney in Germany and France respectively.

<sup>8</sup> Trainee patent attorneys wanting to qualify in the UK can either attend and pass the Queen Mary, Brunel or Bournemouth courses or alternatively take and pass examinations set by the Patent Examination Board. Previously a similar course was run by the University of Manchester. At present roughly 80% of trainees take the university route although historically the numbers taking the examination only route were higher (it depends on the willingness of patent attorney firms to provide their own in-house training to their trainees). IPReg, the UK regulator for patent and trademark attorneys, recently consulted on making attendance at a university course compulsory. However, no such change has yet been implemented. So for the present, those trainee patent attorneys whose firms arrange for them to attend these courses as part of will be unfairly advantaged over those trainee patent attorneys whose firms enter them instead for the Patent Examination Board exams.

<sup>9</sup> By way of example according to the UK Register of Patent Attorneys, at the end of 2013, 138 out of 1860 UK RPAs were resident abroad of which 38 (c. 2%) were resident in other UPC contracting states other than UK, Germany and France. However, this probably overstates foreign residents as 22 of those 38 were Irish attorneys who had chosen to cross qualify in the UK which in the case of Irish attorneys involves passing a single extra examination.

<sup>10</sup> Limited rights in the IPEC and on appeal from the Patent Office may be acquired by registered patent attorneys if they attend and pass a 3-4 day basic litigation course.

load. In many cases, qualification as a national patent attorney gives no rights at all to conduct litigation before the courts.

More specifically, the national patent professions in Europe can broadly be broken down into three groups<sup>11</sup>:

- (1) In Belgium, Bulgaria, Denmark, France, Ireland, Italy, Lithuania, the Netherlands, Portugal, Slovenia, Slovakia and Spain, qualification as a national patent attorney does not give an attorney any rights to conduct litigation in the national courts.
- (2) In Finland, Latvia and Sweden, there are no restrictions on anyone representing parties before the courts. However, qualification as a national patent attorney does not give an attorney any additional rights to conduct litigation.
- (3) Finally in Austria, Germany, Czech Republic, Estonia, Hungary, Poland and the UK, qualification does give the attorney some limited right to represent other parties in court in certain patent matters. In the case of Austria and Germany these rights are restricted to representation in invalidity cases. In the UK, with the exception of 82 individuals who have an additional qualification as a patent attorney litigator, such rights are limited to appeals from the UK-IPO and matters before the IPEC (successor to the Patents County Court), a specialist list in the English High Court, Chancery Division, dealing with lower-value intellectual property disputes (damages are capped at £0.5m, and costs at £50k)<sup>12</sup>.

Even in those countries in the third group, the proportion of patent attorneys actively involved in conducting patent litigation is low. The following table identifies the numbers of EPAs and the number of patent cases in 2004 for all of the countries where patent attorneys acquire an independent right to conduct litigation.

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<sup>11</sup> The following information is taken from the Representation in National Proceedings for Patent Matters table appearing in the EPI information, Vol 3, 2008 pp 84-85. Greece and Cyprus have been omitted since representation in patent matters before the national patent offices in those countries is restricted to individuals who are qualified as lawyers and hence will have full rights of audience before the courts.

<sup>12</sup> Even in those cases, UK registered patent attorneys are required to attend and pass a basic litigation skills course before acquiring such rights. Qualification as a patent attorney alone is not sufficient.

<b>Country</b>	<b>European patent attorneys currently on EPO register</b>	<b>Patent cases in 2004<sup>13</sup></b>
Austria	130	25
Germany	3918	251
Czech Republic	95	5
Estonia	26	v few
Hungary	79	10
Poland	309	20
UK	2071	153

Given the limited amount of patent litigation which can be undertaken by patent attorneys (the above figures would indicate that on average an attorney is involved in a case about once every 10 years), it is unsurprising that the basic training of national patent attorneys has very little focus on litigation skills. The above also does not account for the fact that in many, if not most, cases it will be lawyers rather than patent attorneys who conduct the litigation. Thus for example in a survey of cases conducted in the Patents County Court between 2008 and 2012, even though UK patent attorneys had a right to conduct cases only 2% of cases involved representation by patent attorneys<sup>14</sup>.

Of course in practice rather than being evenly spread amongst the national patent professions, some individuals' practice will have a greater focus on litigation matters than others. Such individuals are much more likely to supplement their basic training as patent attorneys with specific litigation-focused training such as the CEIPI Diploma on Patent Litigation in Europe course or the Nottingham Law School, Intellectual Property Litigation and Advocacy course, and it is these individuals who are most likely to want to be active in the Unified Patent Court.

Thus for example, as noted above, 82 out of the 1,860 UK registered patent attorneys have qualified as patent attorney litigators through attending the Nottingham Law School, Intellectual Property Litigation and Advocacy course or having been able to demonstrate significant involvement in litigation matters prior to the patent attorney litigation scheme

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<sup>13</sup> Figures taken from Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System, Dietmar Harhoff, Ludwig-Maximilians-Universität (LMU) München, Institute for Innovation Research, Technology Management and Entrepreneurship (INNO-tec) Final Report 26 February 2009 Tender No. MARKT/2008/06/D page 25. Figures for Austria and Germany relate to invalidity actions only. The figures for the UK are actions in the Patent Court and Patents County Court (the forerunner of the IPEC).

<sup>14</sup> [www.cms-cmck.com/documents/pcc\\_emergingtrends.pdf](http://www.cms-cmck.com/documents/pcc_emergingtrends.pdf)

having been established. The proportion of litigation work undertaken by patent attorneys who have not acquired the litigator's qualification is negligible<sup>15</sup>.

### ***National patent attorney qualifications are insufficient***

The IPLA is keen to ensure that there is a level playing field for patent attorneys to gain the right to conduct litigation before the UPC. In particular, although, as appears above, there are variations in the extent to which national patent attorneys may conduct litigation before their domestic courts, it would not be appropriate to favour national patent attorneys in some jurisdictions over those in others, bearing in mind that in all jurisdictions, the core patent attorney training does not deal with the conduct of substantial court proceedings.

The content and value of the basic university courses for qualification as a national patent attorney should be assessed in the light of the previous section. It would be expected that the focus of any such basic training courses would be on matters which are handled by a typical national patent attorney. As indicated above, in many countries (e.g. France and the Netherlands) qualification as a patent attorney does not give an individual any rights to conduct litigation and therefore it would be surprising if the basic training of patent attorneys in such countries focused much time on the development of the skills necessary to undertake litigation independently of a lawyer. Even in countries such as Germany or the UK where qualification as a patent attorney does give an individual certain rights to act before certain specific courts in some patent matters, acting in litigation only forms a very small part of the work undertaken by patent attorneys and most do not act in litigation at all.

Reviewing the content of the basic training courses in greater detail confirms that this is indeed the case. Although the overall level and duration of the basic patent attorney training courses may be similar to the Nottingham law school litigation course and the CEIPI Diploma on Patent Litigation in Europe course (ie c. 30 ECTS credits at EQF level 7) relatively little time on any of the basic qualification courses is spent on litigation matters.

### ***Queen Mary Certificate in Intellectual Property Law***

Taking the Queen Mary course as an example<sup>16</sup>, this course is a 13 week full time course where students are required to study five modules: Copyright & Designs, Law of Trade Marks and Unfair Competition, Patent Law, Competition Law and Basic Principles of English

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<sup>15</sup> Virtually all of the cases brought by patent attorneys in the IPEC (previously the Patents County Court) have been litigated by attorneys who have acquired the Patent Attorney Litigator qualification.

<sup>16</sup> Taken from <http://www.ccls.qmul.ac.uk/courses/certificates/intellectualproperty/index.html>. The content of the other UK patent attorney training courses are similar, as similar content is required by IPReg, the patent attorney regulator, in order for a course to be accredited for the purposes as training as a UK registered patent attorney.

Law. Each module comprises 15 UK credit hours (2 UK credit hours are equivalent to 1 ECTS credit). Each module comprises approximately 30 hours of lectures<sup>17</sup> and is intended to equate with 150 hours of actual learning and studying<sup>18</sup>. Thus the course as a whole will comprise 37.5 ECTS credits of teaching/studying. Further the Queen Mary Programme Specification states that the award is taught at level 7 of FHEQ scale which is the same as level 7 under the EQF scheme.

However, the only module which contains any content relating to litigation is the Basic Principles of English Law module. This module is a non-credit bearing module and accounts for only 20% of the course. Study of litigation and evidence forms a very small part of that module. Indeed, in addition to litigation and evidence the 7.5 ECTS credit hours of teaching in the module must also cover<sup>19</sup> subjects such as:

- Differences between civil and criminal jurisdictions and remedies
- Court structure in England and Wales
- Doctrine of precedent and relevance of decided cases
- Manner in which decisions of courts and tribunals may be challenged
- Sources of law and effects on intellectual property
- Relevance of European law in the UK
- Legislative procedure in the UK
- Hierarchy and roles played by different actors in the legal system
- Personal property and trusts
- Taxation and IP
- Relevant law of companies
- Professional matters and ethics
- Law of contract
- Law of tort

Had the entire content of the Basic Principles of English Law module been dedicated to study of litigation matters, at most that would have accounted for 7.5 ECTS credits. However from the above it is apparent that the actual amount of time spent studying litigation-specific topics is actually far less than that.

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<sup>17</sup> See for example the competition law lecture format at

<http://www.law.qmul.ac.uk/postgraduate/certificates/intellectualproperty/modules/index.html>

<sup>18</sup> 1 UK credit hour is intended to represent 10 hours actual learning and is equivalent to ½ an ECTS credit.

<sup>19</sup> As listed at

<http://www.law.qmul.ac.uk/postgraduate/certificates/intellectualproperty/modules/index.html>

## **FernUniversität in Hagen, Law for Patent Attorneys Course**

The position with the content of the FernUniversität Hagen course is similar. The content of the course is listed as follows<sup>20</sup>:

<b>Course title</b>	<b>Course Hours<sup>21</sup></b>
Basics of civil law	140
Commercial law	20
Company law	20
Labour	20
Patent infringement	40
Legal history	40
Antitrust	40
Competition law	40
Introduction to public law	60
Introduction to European Community law	60
Procedure and enforcement law	80
Licensing law	60
Procedural law in patent matters	30
Patent attorney law	40

From the above it would appear that a single 80 hour module relates to procedure and enforcement law. No further information is available as to the content of what is taught. However, it is clear that this module accounts for less than 12% of the total course. Based on the assumption that each of the basic training courses for qualification as a patent attorney is of the same length in terms of ECTS credits as the equivalent UK courses, this would indicate that the FernUniversität Hagen course has around 4.5 ECTS credits of study devoted to litigation matters.

## **CEIPI Diploma of international studies in industrial property (specialized in patents)**

Similarly the content of the CEIPI Diploma course is as follows<sup>22</sup>:

<b>Subject</b>	<b>Course Hours<sup>23</sup></b>
General Law	46
International Patent Law	22
European Patent Convention	
1) Patentability	45
2) The European patent grant	21

<sup>20</sup> Taken from <http://www.fernuni-hagen.de/kurthaertel/patent/> and translated into English.

<sup>21</sup> It is unclear what relationship a university "course hour" in this context has with the ECTS scheme.

<sup>22</sup> Downloaded from <http://www.ceipi.edu/index.php?id=5475&L=2#c49239> translated into English

<sup>23</sup> Again it is unclear what relationship a university "course hour" in this table has with a ECTS credit.

The Patent Cooperation Treaty (PCT)	21
National patents (issue and effects of patents)	
1) French patent law	21
2) Other foreign patent rights	26
Exploitation of patents	39
Patent Litigation	33
Seminars	
1) Practical application of EU law	63
2) European Qualification Examination	49
Preparation	
Professional law	4

As can be seen from the above, patent litigation accounts for 33 out of 390 course hours (i.e. less than 10% of the course). The above is taken from the lecture outline for the accelerated patents course. The course can be supplemented by a course on trade marks and designs. The content of that course is as follows (it will be apparent that the trade mark and design course adds nothing more of any relevance to a candidate's knowledge and experience of patent litigation):

<b>Subject</b>	<b>Hours</b>
International and Foreign Laws	78
Trademarks Law	
1) French Trademarks Law	50
2) Practical seminars in the field of French Trademarks Law	23
3) Geographical Indications	4
4) Domain Names	4
5) Community Trademarks Law	21
Copyright	14
Designs	
1) French Designs Law	35
2) Community Designs Law	11
Implementation of Trademarks and Designs	40
Seminars	
Alternative mechanisms for resolving disputes	4

Thus again the number of ECTS credits devoted to litigation matters would appear to be very limited. Equating the CEIPI long course with UK qualification courses, the proportion of ECTS credits devoted to litigation would appear to be less than 2 ECTS credits.

#### **Request for recognition of other appropriate qualifications (Rule 14)**

At present Rule 14(2) requires a request for recognition under Rule 11 or 12(a) to contain a copy of the respective diploma. In the case of a qualification under Rule 11, we would recommend that a copy of the diploma should be supplemented by an academic transcript evidencing the subjects studied and the numbers of credits associated with the courses passed. This would enable the Registrar to confirm that the qualifications in question



covered both private and procedural law and that the study of these subjects was at a level and duration equivalent to that required for an EPLC.

### **Effect of entries (Rule 16)**

As an administrative matter, Rule 16 should permit the Registrar to remove the name of a representative from the List if an entry is made in error or if the representative ceases to be permitted to practice as an EPA. The exercise of such a power should only be permitted after having given any individuals affected the opportunity to be heard and should be subject to review under rule 17.

Consideration also needs to be given to the possibility of a representative (lawyer or patent attorney) being removed from the List if he (or she) commits a serious breach of the ethical code of conduct (see Rules 290.2 and 291 of the Rules of Procedure, which are currently rather limited in this respect). It is not appropriate for decisions about disbarring representatives to be left to national Bar Associations which may interpret the rules in differing ways.

### **Miscellaneous**

In the UK and, we believe, most European jurisdictions, qualified lawyers are under some obligation to undertake Continuing Professional Development. The IPLA proposes that some such continuing education should be required to maintain in force an European Patent Litigation Certificate.

### **Summary**

In summary, the IPLA would recommend that:

- 1) The EPLC course curriculum should be amended to include express reference to the need to study litigation ethics and to acquire litigation skills.
- 2) The duration and standard of the EPLC should be defined with reference to the European Credit Transfer System ("ECTS") and the European Qualifications Framework ("EQF"). It is believed that the appropriate standards would be c. 30 ECTS credits at EQF level 7.
- 3) Recognition of law diplomas as 'other appropriate qualifications' should be restricted to qualifications which evidence study of private and procedural law equivalent to that

required when qualifying as a lawyer in a contracting state or which encompass the curriculum required to obtain a EPLC.

- 4) The content of any “other appropriate qualifications” should be required to contain a similar amount and level of teaching on litigation as the EPLC (i.e. if the definitions at (2) are adopted c. 30 ECTS credits at EQF level 7) which would be fulfilled by the CEIPI Diploma on Patent Litigation in Europe course or the Nottingham Law School, Intellectual Property Litigation and Advocacy course.
- 5) The other courses listed in Rule 12 which relate to the initial training of trainee patent attorneys should be deleted as the proportion of the courses which relate to litigation subject matter is not equivalent to that which would be covered in an EPLC course.

Submitted by the Intellectual Property Lawyers’ Association, 25 July 2014

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