HOUSE OF LORDS

Unrevised transcript of evidence taken before

The Select Committee on European Union

Justice and Institutions Sub-Committee

Inquiry on

PROPOSAL TO CREATE A UNIFIED PATENT COURT

Evidence Session No.1. *Heard in Public* *Questions 1 - 49*

WEDNESDAY 15 FEBRUARY 2012

3.45 pm

Witnesses: Baroness Wilcox, Liz Coleman, Neil Feinson and Nicholas Fernandes

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.

3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.

Members present:

Lord Bowness (Chairman)
Lord Anderson of Swansea
Lord Blackwell
Lord Boyd of Duncansby
Lord Dykes
Lord Elystan-Morgan
Lord Renton of Mount Harry
Lord Rowlands
Earl of Sandwich
Lord Temple-Morris

_____

Examination of Witnesses

Witnesses: **Baroness Wilcox**, Parliamentary Under-Secretary of State for Business, Innovation and Skills; **Liz Coleman,** Divisional Director, Intellectual Property Office; **Neil Feinson,** Director of International Policy, Intellectual Property Office; and **Nicholas Fernandes,** Legal Adviser, Department for Business, Innovation and Skills.

Q1 The Chairman: Good afternoon to you and your colleagues, and thank you very much for coming to help us on this question that we are pursuing about the Unified Patent Court. For the record—and I know that you will be familiar with this—I should just say that Members' interests are recorded in the *Register of Lords' Interests.* Members of the Committee with relevant interests will declare these; I am not sure that it is relevant, but I do so as a practising solicitor. The session is on the record; it is being webcast and will subsequently be accessible via the parliamentary website. It will be posted on the website immediately after this hearing. You and your officials will, of course, receive a transcript of the session to check and correct it, although it will be on the website before you receive it. I should just say—you may want to say something in opening, or we can move directly to the questions—that I hope that you and your colleagues understand that this Committee has always been supportive of the proposal for a pan-European patent, the simplification of the

language regime and all the benefits that flow from that. I hope that you will accept that as a given. We understand the difficulties that have arisen over the Spanish and Italian decision to challenge the proposal, but we want to concentrate on the structure of the proposed court. I am sorry in a sense that it has been necessary to ask you to come, but as I have said to you previously we found the Explanatory Memorandum and correspondence incredibly difficult to follow. It is probably an incredibly complicated proposal, so we hope that it will be much clearer if we hear the answers to our questions from you and your officials. Is there anything that you want to say in opening before we proceed?

Baroness Wilcox: I thank you, Lord Chairman, for that kind and instructive introduction. I feel that we are among friends here and that we can bring some expertise to bear and clarify the complicated and lengthy negotiation that we have had. As you know, we are looking for a well designed unitary patent and court system, because we think that it could bring savings to business and growth to the economy. Therefore, you have very kindly allowed me to bring the officials with me. I would like to introduce them. Neil Feinson is the director of international policy at the Intellectual Property Office. Liz Coleman is the divisional director at the Intellectual Property Office and Nicholas Fernandes is the senior legal adviser for the Department for Business, Innovation and Skills. I am the chairman, and I will I hope give you the headline answers to the questions that you ask. But if I may, to speed up the proceedings for you, I will pass the question to an official if I think that they can give you more. Just stop me if you think that I should not.

Q2 The Chairman: We are very happy for you to answer or to ask your officials to answer. We have no problem with that at all. We go on to the first question, which for many of us on the Committee is the nub of the thing. Why, when you have EU regulations establishing a unitary patent, is it necessary to pursue the judicial supervision arrangements by creating a new court outside the EU? Our confusion about this arises from the fact that

we understood—and maybe somebody can explain to us if our understanding is incorrect—that the Court of Justice was not happy to deal with the original proposal that would have dealt with the EU member states and the European Patent Office states, as the court thought that it was not within its remit. That far we understood. However, it seems that we are now going to create a separate court that will deal only with the 25 participants who are all members of the EU. Why it cannot be within the framework or under the umbrella of the Court of Justice certainly escapes me—and maybe, without putting words in their mouths, escapes a number of my colleagues as well. A number of questions flow from that. What happens if the Court of Justice subsequently finds for Spain and Italy, or Spain and Italy subsequently decide to join? We have created something entirely separate. While there may not be expertise currently with the Court of Justice and while we may be on record as not liking specialist tribunals, it seems much more efficient and cost-effective for any kind of specialist tribunal to be within the umbrella of the court. I might ask my colleagues whether that is a reasonable assessment of our puzzlement in the matter—and they are nodding.

Baroness Wilcox: All shall be revealed—I hope there will be some helpful answers, anyway. But I shall start. Of course, we tried creating a court within the Court of Justice structure in 2003. That was the whole idea, but it was not successful; it would have covered only the unitary patent, and the current proposals offer a Unified Patent Court, which covers the unitary patent and existing European patents. The unified court will ensure consistent treatment for both unitary and bundle patent systems when the same legal issues arise. The Court of Justice does not deal with disputes between private parties; it does not have the specialist patent expertise, and the procedures that it has are not suited to this type of litigation. United Kingdom users considered that a court system within the Court of Justice would involve delays and uncertainty, which would be costly to business and defeat the

whole idea. If it is all right with you, I will now pass to Liz Coleman, who is the expert on this subject. Maybe she can reveal a little more and then take the questions that follow.

Liz Coleman: As the Minister has said, and Members of the Committee may recall, the first attempt in 2003 was to use a specialist tribunal under the treaty, and that whole package of negotiations failed, in part because of the language arrangements—but there were also underlying concerns about the court. The idea now is to cover the bundle patent, with normal European patents under the existing system. By bringing the two together, we hope that the unified arrangement will offer businesses more certainty and a smoother process. I do not know whether there is anything more that you would like in this answer.

Q3 The Chairman: Can we just be clear—I may have been wrong about this? Is the court going to deal not just with patents involved in the 25 but the EPO patents as well?

Liz Coleman: Yes, that is the main aim. We have been working in parallel for many years on a court that would deal with those patents that are granted by the European Patent Office for the individual member states. So yes, that is the idea of the Unified Patent Court arrangement.

Q4 Lord Blackwell: For non-lawyers here, I wonder if it would be possible to have a brief definition of the difference between unitary patent, a unified patent and a bundled patent?

Baroness Wilcox: Liz again.

Liz Coleman: Thank you very much. Let us say that I have in my hand a patent from the European Patent Office. When the office grants one patent, it does so on the basis of a single patent application. What happens after that is that you take the patent and divide it up so that it turns into lots of little national patents, each one effective only in a single national territory. The unitary patent will come out of the European Patent Office and cover all the countries that the unitary patent will cover—so there will be 25 countries all with the single patent.

Q5 The Chairman: Forgive me for interrupting, but is it 25 or 25-plus?

Liz Coleman: The unitary patent will cover only the 25 at the moment.

Q6 The Chairman: What generic term would you give to something that is an EPO and EU patent?

Liz Coleman: That is a very good question. I do not think that we have thought about that yet. If you wanted to cover both, you could just say "a patent granted by the European Patent Office", because that would cover both.

Q7 Lord Renton of Mount Harry: I sit on the Constitution Committee, and we were talking this morning about judges. It came about that we learnt that there is an anxiety now to appoint a judge who is an expert on patent. I mentioned that I would see you this afternoon. What are the judicial supervision arrangements? What will they be when this is all set up?

Liz Coleman: By judicial supervision arrangements, what I understand is the litigation arrangements that the court provides. It may be that the term is used differently in the constitutional discussions from how we might think of it in patent discussions. The court agreement would set up a patent court which deals with disputes about the infringement and validity of the patents granted by the European Patent Office. So there will be two private parties that either say, "You have infringed my patent", or, "Your patent is invalid—you need to prove it in court". So it would be those disputes that the court deals with. The other aspect that the Unified Patent Court can deal with will be appeals about procedural decisions that the European Patent Office makes. So those are two different sorts of cases that the patent court will deal with. I do not know whether that goes quite to the question about judicial supervision.

Baroness Wilcox: I should have let Nicholas Fernandes answer it for you, but we just happened to be there. Can you add to that for clarification, Nicholas?

Nicholas Fernandes: All that I would say is that the overarching principle is that the Unified Patent Court is considered as a common court to the participating EU member states, so it must respect Union law and may refer questions of European law to the European Union in accordance with Article 267 of the treaty. In relation to actual patent cases, the general rule is that the infringement cases start in the local or regional divisions where the infringement occurs or the defendant resides. If you would like me to expand more, I could do so.

Q8 Lord Renton of Mount Harry: I would, because I find it very hard to see how everything fits together. Is there going to be a great deal of duplication?

Nicholas Fernandes: I would not say that there will be duplication, if you mean duplication between the Unified Patent Court and the European Court of Justice—or are you talking about duplication between the divisions?

Q9 Lord Renton of Mount Harry: Between the divisions or between a national court of justice as compared to the EU Court of Justice.

Nicholas Fernandes: Well, the divisions are organised according to local, regional or central division.

Q10 Lord Renton of Mount Harry: What is the inter-relationship?

Baroness Wilcox: In the first instance, there are two different kinds of division. There is the central division, whose main role is to hear cases about the validity of the patent, and there are the local divisions, which take infringement cases. So the states can choose whether to host a local division or, if they do not feel that they can do that, they can join a regional division, which is like a joint local division between several states—or all their infringement cases can go to the central division. Does that make it clearer? The importance for us in having a single patent is that the central court shall be clear to everyone and drawn in such a way that, wherever the other courts are held, they are all singing from the same hymn sheet. That is the whole idea—so that this is what we should be able to expect. If the smaller states

feel that they cannot cope with doing it, they can come into a group of states together or, if necessary, go straight to the central court. Am I making that clear? That is what we are looking for.

Q11 Lord Renton of Mount Harry: Are you fairly confident that it is going to work?

Baroness Wilcox: Well, we are in the middle of negotiations to make sure that it will—because we will not be doing it if it does not. There is no point in having a single patent if it is going to continue to be as complicated, expensive and difficult as this. In the United States of America, you have one patent for the whole of the country and one set of rules; everybody knows what they are, and it is fast and efficient. It is inexpensive. If you go to China, you have the same thing; but if you come to the European Union, you have all these different states and all these different things to do, all these different expenses. The whole idea is to get one straight-through line there. So at the minute, we are in negotiations to make sure that the court, wherever it is placed, will be put together in such a way that the rules that it makes will then devolve down, so that in each of the states—whatever it is they have there—it will be the same. So it is very important to us, and it was a caveat that we made when signed up, that the court shall be safe.

Q12 Lord Renton of Mount Harry: Thank you very much indeed. I have a rather nasty supplementary question to ask you.

Baroness Wilcox: Well there are some nice people here to answer it.

Lord Renton of Mount Harry: In the situation where a patentee holds both a unitary patent and a traditional EPO patent in, for example, Switzerland, will the unitary court or the Swiss national courts enjoy jurisdiction?

Baroness Wilcox: The answer is both. The Unified Patent Court has jurisdiction only for the states that it covers, so not for Switzerland. The Swiss patent courts will rule for the European patent in so far as it covers Switzerland. Under a previous draft of the agreement,

Switzerland would have been able to join the Unified Patent Court, but the Court of Justice considered that that would not be compatible with EU law. So the answer to your question is both, but the Unified Patent Court has jurisdiction only for the states that it covers—so not Switzerland, which will cover its bit. Is that clear? No.

Q13 The Chairman: Forgive me, but are you saying that the court and its judges will come only from the 25? Is that right?

Baroness Wilcox: Yes.

The Chairman: So what is the big gain in this court, in so far as it is also involved with the non-EU countries?

Liz Coleman: Non-EU parties are not going to be part of the court, but the court will cover patents.

The Chairman: From the non-EU parties?

Liz Coleman: Yes. Anybody can apply for a patent, but what counts is what territory the patent covers. That is what defines the relationship with the court.

Q14 The Chairman: And the overall agreement will mean that the EPO countries will accept the jurisdiction and rulings of this EU court?

Liz Coleman: Well, at the moment, if you take out a patent that covers Germany, France, Switzerland and the United Kingdom, which is not an untypical combination, that patent is subject to the individual jurisdictions of Germany, France, Switzerland and the UK in so far as the territorial coverage is concerned. So if the patent is infringed in the UK, you go to the UK—there is a case in the UK court. So we are putting together the UK, France and Germany bits, and Switzerland will have to stay outside.

The Chairman: You wanted to come in, Lord Anderson.

Q15 Lord Anderson of Swansea: Could you relieve some confusion on my part? In 2003, the ideal solution was to have all the EU countries participating, but I understand that

Spain and Italy proved difficult. Is there any prospect of retrieving this ideal situation by inducements to Spain and Italy that would bring them back on board so that we could return to the 2003 ideal?

Baroness Wilcox: Liz Coleman may have been there at the time, but let me answer first. Spain and Italy had difficulty with the language choices—

Lord Anderson of Swansea: With respect, that is not the question. They had, and still have, that difficulty, but is there any chance of meeting that problem to their satisfaction so that the ideal situation, as envisaged in 2003, will be constructed?

Baroness Wilcox: Negotiations are ongoing as far as Spain and Italy are concerned. We are always there to talk it through, as everyone would wish. As to going back to the 2003 situation, Liz Coleman will answer on that.

Liz Coleman: Even if Spain and Italy decided to come back into the fold for the unitary patent, that would work only for the part of the court that deals with the unitary patent. There is a separate question about the court in so far as it deals with the bundle patent, because—Nicholas Fernandes may wish to come in on this—at the moment it is not clear how the EU Treaty would provide a power for the Court of Justice to deal with the bundle patent, whereas there are very clear powers to allow it to deal with the unitary patent.

Q16 Lord Rowlands: May I just, for my own satisfaction, go back to the Minister's original statement about the inapplicability or inappropriateness of using the Court of Justice? Did I hear you say that the basic fundamental problem is that that court does not hear cases between two private parties?

Baroness Wilcox: Yes.

Lord Rowlands: Is that a fundamental problem with using the Court of Justice?

Baroness Wilcox: Yes, it certainly is a problem. The Court of Justice does not deal with disputes between private parties, and it does not have a specialised patent expertise—

Lord Rowlands: I understand the second point, but the first point seems to me quite fundamental.

Baroness Wilcox: Yes, it is fundamental.

The Chairman: If Switzerland, for example, was to continue to deal with such matters on its own, what benefit are we getting of integrating the 25 with the EPO countries? Is it just that they would all be subject to the same, simplified language regime under the agreement? Since we have not been able to obtain utopia—either because of the Court of Justice's role or because of the position of Spain or Italy—what benefit will we get?

Baroness Wilcox: Let us hear from Nicholas Fernandes.

Nicholas Fernandes: The benefit is that there would be a unified patent court for the 25 dealing with not only the unitary patent but the European bundle patent. There would be a single court across the European Union that would be composed of a court of first instance, comprising local, regional and central divisions, and a court of appeal. We would have one unified jurisdiction, albeit in different locations, dealing with both the European bundle patent and the unitary patent.

The Chairman: So there would be an EU-plus benefit.

Nicholas Fernandes: Yes, one might describe it as that.

The Chairman: I think that the next question is from Lord Dykes. No, sorry, we seem to have hopped over Lord Temple-Morris's question.

Q17 Lord Temple-Morris: I have been patiently waiting, while my question was flooded with other questions by very distinguished people who have put most of the main points, so let me just generalise the matter in political terms. I am trying to refine what has already been said in detail, and a lot of that detail is coming up later. The Minister very charmingly, in her comments at the beginning, explained that she has her experts with her, but I want to ask her a governmental headline comment, which is: what are we about here? This has all

the political sniff of a mess. We do not quite know where we are. Why are we doing this? What is the demand for it? She has every sympathy from me, because the patent Bar is an inscrutable place where very few people tend to go, and those who go tend to be very iconoclastic in looking after their own affairs. However, the Minister is now in the uncomfortable position of having to justify it. What are we doing? First, why cannot we leave the European Patent Office and the European Patent Convention alone until there is sufficient demand from industry and commerce for it? Secondly, bearing in mind that we have failed in almost every effort that has been made, why do we not keep it within the European Union rather than venturing outside the Union, which could create a whole nest of problems, including the expense for judges and so on that we will come on to later? Please answer me: what are the demands of Government here? What are we trying to do?

Baroness Wilcox: First and foremost, everything comes down to growth: we need to grow, we need to be able to trade and we need to be able to move forward in a world that is ever more technological and that requires patents. In particular, we are concerned about small and medium-sized enterprises—we need to understand the thicket that they are trying to get through and the expense involved and so on.

The key point is that the Unified Patent Court would give a single judgment under a single court system that would apply across Europe, instead of the current arrangements where you can have different decisions in different national courts. This means that a patent could be enforced or challenged in a single action for all relevant states, just as—this is what we would like—companies can do in China or the US. On a thing like this, rather than sit here in the middle of the disunited states of Europe while the world outside is whacking out patents at unbelievable speed, we need to ensure that, wherever and however possible, we can make things clearer and more straightforward for our businesspeople, in particular those in the new small and medium-sized enterprises that are coming through. We need to

understand exactly what they are about. We need to start at the Intellectual Property Office, which is where people start, and begin to move forward. We need to start in our own local courts and see where we go from there.

We need to remove the language barriers. We have those down to three—we thought that we had it at one, but we are fortunate that it is now three. As you know, Spain and Italy are very unhappy about that, and I wish you could have been there to hear the impassioned speech that the Spaniard made about how, wherever in the world people speak French or German, they also speak Spanish. However, for 41 years people have been fiddling about with this trying to get it right. If there is an opportunity here for Great Britain to get in there and lead—as we did—and if it is possible for us to put forward a good unified court that everyone can trust and work with, why should we not try to do it? This is what we are about. Now, it is not easy, as there are so many different agendas running and so many people want many different things, but if it is possible to do it, I think that we should really try. And that is what we are endeavouring to do.

Q18 Lord Temple-Morris: I have a little supplementary question. Would it not be better to try—and try and try again—to do this within the European Union structure rather than outside it? Would it not be better to start from there? In other words, enhanced co-operation, no; within the European Union, yes.

Baroness Wilcox: I am sorry, but I am not quite following you.

The Chairman: I think that, technically, the 25 are acting under enhanced co-operation.

Baroness Wilcox: We are using enhanced co-operation; that is the whole idea. Britain has never been that keen on using enhanced co-operation, but in this instance we think that this is an opportunity. However, we have a way to go yet.

Lord Temple-Morris: Sorry, what I meant was: would it not be better to do it in a unified way within the European Union rather than using enhanced co-operation? However, that has been ruled out now, by the sounds of it.

Q19 Lord Dykes: The issue is, I suppose, getting so complex now—

Baroness Wilcox: Sorry.

Lord Dykes: No, that is not because of you, Minister. You have been very clear in your explanations, as indeed have your officials, and we are very grateful for that. But the complexities are enormous, so one can understand in a way why it has taken so long, given all the details of language and so on that have to be considered.

Both Lord Temple-Morris, I think, and the Minister mentioned the needs of SMEs in particular. For everyone involved with commerce, business and trade in the national sovereign member states, Britain included, and in dealing with their representative organisations, it must be a very special task to be able to explain to SMEs—in particular, to medium-sized enterprises—just how this system will work. We will need to make it as simple as possible for people to understand, for example, the difference between a unitary bundle and a unified patent. Those definitional matters would be very helpful. Do you think that this can be done? Will the Government be taking a lead in exhorting people to do this properly and to make it clear?

Baroness Wilcox: We will be taking a lead in making it clear, if we can get this to the point where we think that it is really a goer and that we can really do it. The Prime Minister has called for 100,000 more SMEs to start exporting within the next four years, so it is absolutely essential that we get a system that is easy to access and that people can understand.

Q20 Lord Dykes: But remember that when you and your officials, along with others in other EU member states, presented these proposals—which had been worked out and

carefully considered over many years—to groups including the SMEs representatives in Britain, the representative group for small companies immediately proposed over 100 different new amendments to the suggestion that had been put on the table.

Baroness Wilcox: Yes, people proposed 100 different amendments for the United Kingdom to put forward, but we could not possibly put forward—and would not have got agreement to—all those amendments. Therefore, we focused on a small number of key issues, where there have been some improvements. In particular, there has been progress on the length and scope of the transition arrangements and so on. These are all ongoing negotiations, which we are involved in now.

Q21 Lord Dykes: Could you give another example of where you have agreed something that will be trade enhancing and trade promoting? Do you have another example in your list there?

Baroness Wilcox: I do not have an extensive list here, but perhaps Liz Coleman will come up with another one.

Liz Coleman: Let me give another example of progress that we have made in the recent negotiations. As the Minister was explaining earlier, there will be a central division and there will be local divisions. We think that it will be useful for states to be able to go more often to the central division rather than have to choose among local divisions. There are now more occasions on which a case will go to the central division rather than to a local division. That is a useful piece of progress.

Q22 Lord Anderson of Swansea: On the appeal procedure, you mentioned this layered organisation, comprising local, regional and central divisions. Does an appeal go from the local division to the regional and central division, or does each of them go to an appeal division?

Nicholas Fernandes: The appeal would be to the court of appeal from each of the local, regional or central divisions, because they are the court's first instance.

Q23 Lord Elystan-Morgan: This is a matter that has been mentioned already tangentially. In its opinion on the most recent failed attempt to create a pan-European patent, the Court of Justice decided that it was incompatible with the treaties to allow a court operating outside the usual treaty mechanisms to rule on the validity of EU law. In other words, there was the issue of what was or was not *ultra vires*. The latest agreement includes provisions addressing the primacy of EU law and covering requests for preliminary rulings. Are you confident that this latest attempt will satisfy the Court of Justice's concerns?

Baroness Wilcox: Yes. That is a nice straightforward answer. The Unified Patent Court would be a court common to the participating EU member states and so would be equivalent to a national court of a member state, with the same obligations under EU law. The model was chosen because it is similar to the existing Benelux court, which the Court of Justice mentioned as a possible model in its opinions. Because it mentioned it, it approves of it.

Lord Elystan-Morgan: It would be utterly compatible then—that is the whole point.

Baroness Wilcox: Yes, and they are happy with that. So at least we can say yes to this one.

Q24 The Chairman: We have had a further opinion from the court, have we?

Liz Coleman: No.

Baroness Wilcox: Technically, no. Right, who is going to continue?

Liz Coleman: I defer to Nicholas Fernandes's legal expertise.

Nicholas Fernandes: This agreement is a non-EU agreement. The Union is not party to the agreement, so there are no procedures in the Treaty set out for referring this to the Court of Justice. But in the opinion, the court gave some hints and the agreement has been improved to create functional links between the Unified Patent Court and the Union judicial

system, which was the main concern of the Court of Justice. Those links were not apparent in the agreement before. So now we have a court common to contracting member states, which have to apply Union law and give respect to the primacy of Union law. There is a mechanism for a preliminary ruling referral. Finally, member states would be accountable if the Unified Patent Court acts in breach of law and may be liable to damages in this regard. So there are guarantees within the EU system.

Baroness Wilcox: So Liz was not being skittish when she laughed and said no—she really meant it. There is no immediate read-across. Is that correct? You might clarify that for people who may not understand that, because we had the same problem at the Select Committee in the Commons.

Liz Coleman: As Nicholas said in his first point, there is not a mechanism to go back to the Court of Justice to ask for another opinion on the current arrangements.

Baroness Wilcox: That is what it is—there is no mechanism for it.

Q25 The Chairman: Just to pursue this, the framework will mean that there is a regulation establishing the unitary patent, and will there then be an agreement? The regulation established for the unitary patent is the one that has been agreed under enhanced co-operation. Is the agreement on the court going to come about as a result of an EU legislative act or a series of international agreements between the participating member states?

Nicholas Fernandes: The court agreement is an international agreement or intergovernmental agreement between the contracting or participating member states. It is not an EU legislative act, and it is outside enhanced co-operation.

The Chairman: Please do not anybody ask why we are scrutinising it then, in that case.

Q26 Lord Boyd of Duncansby: Can I just ask a supplementary on that issue? What then is the mechanism for the Court of Justice? Obviously, there is enhanced co-operation and so

on, with the unified patent court and the court of appeal and so on. Where exactly does the relationship come in with the Court of Justice, and how is that effected or made real?

Nicholas Fernandes: That is made real or effected by Article 267 of the Treaty on the Functioning of the European Union, which is the preliminary reference mechanism. That is expressly incorporated by reference in the agreement. So that provision will apply to enable any matter of interpretation of the treaties or an act of the institution to be referred to the court. The validity of an EU instrument may also be referred to the Court of Justice, if that is an issue. So that is the mechanism by which the Unified Patent Court common to the contracting member states is linked to the Court of Justice. It is the same as it would be with a national court.

Q27 Lord Boyd of Duncansby: And on the precedent that the Minister was citing on the Benelux court, it is linked in the same way through Article 267 into the Court of Justice. Is that correct?

Nicholas Fernandes: Yes, the Benelux Court of Justice was set up mainly to deal with trademarks between Benelux countries. That may refer questions to the European Court of Justice as a national court. That was decided in one of the cases before the court on *Parfums Christian Dior*.

Q28 Lord Boyd of Duncansby: I have one final question on this point. Because it is in the Treaty in Article 267, am I right in thinking that the European Union as such does not have to sign up to this? It is just because it is in the Treaty and that is the mechanism—there is no other agreement from the Commission or the Council of Ministers or anything like that.

Nicholas Fernandes: That is correct.

Q29 Lord Rowlands: You said that we could get these preliminary references to the Court of Justice, but earlier on the Minister said that one reason why the Court of Justice

was not appropriate was because it did not have any specialised knowledge. How would it respond to a reference if it has no expertise to deal with it?

Nicholas Fernandes: The court has experts in European Union law, and how that applies, and those are the questions that would be referred to them.

Q30 Lord Rowlands: So it would not be any reference to the patents themselves?

Nicholas Fernandes: No, those would be matters of fact for the Unified Patent Court to decide. The matters of European law arising would be matters—

Q31 Lord Rowlands: Can you give me an illustration or example of the kind of thing that could get referred?

Nicholas Fernandes: I could give you an example of something under the current system, which is probably analogous to what might happen under the unified patent regulation system. There was a case with BASF and the German patent office, where German law required a translation into German before the patent could be effective in Germany. That was challenged on the principle of free movement of goods—formerly Article 30 in the EU treaty and is now Article 34 in the Treaty on the Functioning of the European Union. So basically the argument was that the provision hindered free movement of goods within the Union. That was referred to the court, which rejected the arguments. But that is the type of thing.

Lord Rowlands: Thank you.

Q32 The Earl of Sandwich: I think that you have answered almost all of my question, but I am still unclear whether the Court of Justice remains involved post-treaty, when the new court is set up. How will the Court of Justice escape becoming embroiled for some time to come? I shall run past you a quotation from someone who has been a barrister and judge and is very familiar with the patent system—namely, Sir Robin Jacob. He said, "I know of no one in favour of involvement of the CJEU in patent litigation. On the contrary, all users,

lawyers and judges are unanimously against it". Technically, you could say that it is not going to be involved, but are his fears to be realised?

Baroness Wilcox: I will speak first, and then Nicholas Fernandes can dash in. I have had the privilege of discussing this issue with Sir Robin in person several times, which is a very exciting occasion because he is a very exciting man to exchange with and very well versed in all this. Of course, references to the Court of Justice are unavoidable when EU law is concerned, and this leads to additional costs and delay. But the main issue here is the potential for the new EU patent regulation to apply in the case of infringement disputes. We would like to minimise the number of references to the Court of Justice, particularly in areas of specialised patent law where the court does not have the relevant expertise. So we have continued to press the case for deletion of the infringement provisions from the patent regulation. I have a much longer answer here, which I am very happy to go further forward with.

The Chairman: Forgive me, Minister, but if you have got more perhaps you would like to let us have it in writing.

Baroness Wilcox: Certainly. We continue to talk with Sir Robin Jacob, because where the court is to be sited is important and who is going to write the rules for this new body is very important. It is very interesting for me to continue to have the conversations with him. The nice thing with Sir Robin Jacob is he is madly enthusiastic on discussion, which is a wonderful thing. He asks you the impossible questions and gives you the chance to fight them out before you get there.

The Earl of Sandwich: I know exactly what you mean. You have obviously reassured him since he wrote that.

Q33 Lord Temple-Morris: The lack of expertise and so on when you are setting up a new court is something that is very much there, whichever the jurisdiction may be.

Therefore, it could easily be bestowed upon a European court in a division, rather like the patents court in our own High Court. On the other hand, you could set up an enormous court and structure outside of it, with relations to it. Therefore, the lack of expertise does not mean very much. You have just mentioned Sir Robin Jacob, who is a very distinguished figure, but what does he really want, at the end of the day? Does he want national jurisdiction or some form of international jurisdiction—and if so, what?

Baroness Wilcox: Who wants to answer on what Sir Robin Jacob would like? Perhaps Nicholas Fernandes would like to do so.

Nicholas Fernandes: The system that I assume he would like is one where we have the Unified Patent Court deciding all issues of patent law, and very little opportunity for issues of substantive patent law—issues arising from infringement—being referred to the Court of Justice.

Baroness Wilcox: Which is what he is endeavouring to do.

The Chairman: Lord Temple-Morris, would you like to go on to the next question?

Q34 Lord Temple-Morris: This is a more detailed question about the court's rules of procedure and how the negotiations on rules of procedure are progressing, bearing in mind that we as a Committee have very little information about that—and also bearing in mind, in fairness, that you are busy negotiating them anyway. So this is a little bit premature in some ways, but perhaps you could give us some guide to it. As far as we are concerned, the splitting of the jurisdiction to hear validity of a patent on one hand and the infringement of a patent on the other is something that they love having separately considered in Germany, but not here—and of course it increases cost. So with that as an example, are we making progress on that issue and generally?

Baroness Wilcox: It is a good question, because the right rules of procedure will make a significant contribution to solving the problems. I will ask Liz Coleman to expand on that. If

cases are split, we need to ensure that the two decisions are taken within similar timescales so that there can be a single result. The split proceedings will still incur extra costs for the parties, but that would address the most serious issue. The rules of procedure are being taken forward by an expert group, including judges from the main jurisdictions, but we have been clear that we need to be sure that the rules of procedure are well advanced before the United Kingdom could sign up to any agreement on a court. It is an essential point for us.

Q35 Lord Boyd of Duncansby: Can I ask about the current state of negotiations? The European Council summit statement said, "The participating Member States commit to reaching, at the latest in June 2012, a final agreement on the last outstanding issue in the patent package". What is the current state?

Baroness Wilcox: The summit communiqué was a high-level statement—if you know what is meant by that in the European Union—reflecting what is perhaps the most difficult outstanding issues in the negotiations. I would interpret it as meaning that, if agreement could be reached on the seat of the central division, the other more technical issues would fall into place. The package as a whole has not yet been agreed, and outstanding technical issues are still important, both for us and the other member states. We continue now to meet the Danish government and to impress on them the need to ensure negotiations are taken forward. What is most important is getting the right package, not when it is signed. We are not interested in when it is being signed; we are interested in what we are signing being right. If it means that we make life difficult not just for ourselves but for others by saying, "We are not happy yet", we will continue to do so. It has taken 41 years to get this far, so I do not see that there is any hurry. Each country would like to feel that it did it during its time in the presidency. But these are very important things.

Q36 Lord Boyd of Duncansby: There was a suggestion that there would be an initialling at the Polish summit in December, and we were asked to clear it rather quickly, which we

declined to do. But what happened there? It was suggested that that was initialling part of the process to have an agreement by June 2012 signed off, but does that really mean that it has slipped beyond June 2012?

Baroness Wilcox: I would have to say that that is my opinion. Yes, I think it is slipping—and I am not worried that it is. It is important; it is not just ourselves but other countries that want to be very clear about what we are actually agreeing to. As you know, some countries like to sign up-front to show a meaningfulness or coming together; it does not seem to have the same weight as in our Anglo-Saxon system.

Q37 Lord Rowlands: I think that your enthusiasm is infectious, because I started out as a sceptic but I am now beginning to think it is a good idea. However, then I see the figures. First, we are going to have all this multinational composition—in other words, there is the need to replicate everything because, presumably, all or most of the states will need to be represented in this new court. I see that the Commission's figures suggest that we will need 101 full-time and 45 part-time judges. So my enthusiasm is beginning to wane again, because I am worried about the cost and the capability to recruit for this huge new bureaucracy in front of us. Can you prove to me that I should remain enthusiastic?

Baroness Wilcox: Let me see whether I can reassure you on this. The caseload of the court will build up only gradually, so such a great number will not be required from the outset. There are already—we certainly have them in this country, and other countries also have them—expert patent judges in the major jurisdictions. The smaller states are keen that training of judges should start as soon as possible. In fact, Hungary has already bid to have a training establishment, and I understand from Liz Coleman that there is already a training establishment in Venice. So it will not all happen at the same time, and we have a lot of very well trained judges who know what they are doing across different jurisdictions. In the start-up phase, the funding of the court will come from member states' contributions, but we

expect that eventually the court will be self-financing from court fees and any other income. We will work strongly to ensure that that is exactly what happens.

Q38 Lord Rowlands: Can you give us an idea of how the costs will build up? What are we talking about?

Liz Coleman: We are talking about several billions, really, for a court that covers the whole of Europe for the states that are involved. For start-up costs, we have been looking at two different aspects: there is the hosting of a division, which would probably cost about £1 million a year in ball-park figures; and then there is a UK contribution towards the running of the court, which would be a bit more than that—perhaps between £1 million and £10 million.

Lord Rowlands: The Chancellor of the Exchequer will not be happy.

Baroness Wilcox: He does not think that we are that far forward yet, and I am not quite sure that we are down to the ball-park figures, really. If it is doable and good and enables us to get a single patent quickly, efficiently and effectively so that we can take on what is without doubt enormous competition from around the world, that is something that we need to look at. However, as I said at the beginning, we are negotiating all the way forward, and it will only be when we get to the final stand that we will actually have to start quantifying things and tying them down.

Lord Rowlands: You think that the costs will be manageable. Is that what you are telling us?

Baroness Wilcox: Yes, I hope so. We will negotiate to make sure that we can cope with it.

Q39 Lord Elystan-Morgan: Am I right in thinking that the enthusiasm here is immense but that it comes really from one quarter—that is, the commercial quarter. The Prime Minister is saying that we have a vast potential in this field that is clogged by archaic conditions of patent jurisdiction and so on. However, in so far as the professions are

concerned, there is a very different feeling, as we have seen from the words of Sir Robin Jacob. As a lawyer, or former lawyer, I have no experience at all in relation to patent, but it seems to me that there will be massive difficulties. I think that I am right in thinking that in the United Kingdom only two judges in the High Court are patent orientated, so we are drawing on a very narrow base. It may well be that in Germany and France there is a wider Bar, as it were, from which we can draw, but even then it seems to me that, although I appreciate that the court will grow gradually, it will be a massive task to achieve that target of 101 full-time and 45 part-time judges.

Baroness Wilcox: I see your enthusiasm for bidding for the court—

Lord Elystan-Morgan: I do not want to pour cold water on it at all, but it seems to me that there is massive commercial enthusiasm, whereas there is a more restrained attitude professionally.

Neil Feinson: I would point out that there is an existing infrastructure. For example, I think that I am right in saying that there are about 150 patent-trained judges in the German federal system alone. There is an existing expenditure and existing infrastructure, some of which will in effect transfer, so this is not all completely new cost and complexity and recruitment of judges.

Q40 Lord Dykes: Minister, can you briefly outline what kind of extraneous third-party guidance, advice, suggestions and information came out of the various different bodies, such as the trademarks office in Alicante[1] and the European Parliament, where a number of MEPs, including some quite well-known names, take an interest in these subjects? Was there much feed-in to national governments on these matters from the national parliaments of EU member states? That may sound a bit vague, but I just wonder whether ideas came in not just from patent experts but from other people as well.

[1] Office for Harmonisation in the Internal Market (Trademarks and Designs).

Baroness Wilcox: Do you mean to the member state ministers assembled?

Lord Dykes: And from parliamentarians and so on as well.

Baroness Wilcox: I can speak for the member state ministers who were assembled. Yes, there was enthusiasm and, as you will know, there were differences, too. But, gradually, together I think that people began to see the enemy without rather than the enemy within, and that is very important. If the European Union is to go forward confidently and well into the world that we face, these are areas where we really do have to sit there and just tease it out to see whether we can get something to work well.

Lord Dykes: And were there contributions from the trademark office in Alicante and the IP offices in the various member states?

Baroness Wilcox: I am afraid that I do not know.

Neil Feinson: They have all been very closely involved in forming the position of their capitals, who then come to Brussels. There has been extensive consultation in the UK, at European level and in other member states with, as you correctly identify, not just the practitioners but the users—the people in industry who will actually patent inventions and use the system.

Q41 Lord Anderson of Swansea: I want to come back to the human infrastructure. You say that there are 150 judges who are specialists in patents in the German system. However, 25 EU countries will be involved, some of which will have much less expertise than there is in Germany. I wonder how many patent lawyers and practitioners there are in Slovenia, Estonia or Cyprus—although there are perhaps more in Cyprus because of international business. The judges will need to be not only specialists in this rather arcane field but also, probably or ideally, linguists. If they are not linguists but specialists only in German patent law, we will need excellent interpreters. We will need not just a generalist interpreter but

an interpreter who is able to take on this highly specialised area. Do these interpreters exist? Do judges exist who are both learned in this area and good linguists?

Baroness Wilcox: They do. Does Nicholas want to answer this?

Nicholas Fernandes: Liz will.

Baroness Wilcox: We are passing this up and down the table. Quickly now please.

Liz Coleman: They do, in that if you are dealing with the field of patent law and patents specifically, you will normally be dealing with them in more than one language. If you are looking at a patent, you have to be able to look at what went before, and often that is not in the same language as the patent. Therefore, many patent judges have expertise in other languages.

Q42 The Chairman: Can we pursue this question of interpreters and translators? This is probably in the papers and I have just forgotten it, but I know that we have a three-language regime for registration. However, so far as the court is concerned, the point has been made this afternoon that it will be hearing actions between individual private parties, so presumably the basic European law will prevail and people will be able at least to lodge their pleadings in their own language. If not, what would someone from Croatia say, as might happen in a few months' time, if they are refused access to the court because they speak only Serbo-Croat—or Croatian, as they probably prefer it to be referred to?

Baroness Wilcox: I think that only three languages will be used for the single patent—

The Chairman: With respect, I am talking about the court proceedings. I understand that the restricted language regime means that people sign up to English, French or German—that is fine. However, if there is an action involving someone from an EU country who does not use French, German or English, or someone from one of the countries outside the EU, are we really going to say that they cannot argue the case in their own language?

Liz Coleman: There are language rules for the different divisions. One of the reasons for setting up the local divisions besides the central division is so that local defendants can use the local language. There are possibilities for the parties to change the language or to petition the president to use another language altogether, and we anticipate that the divisions would have interpretation and translation arrangements, as you would expect, for parties to be able to deal with their case appropriately.

Q43 The Chairman: So, further to Lord Anderson's point about these 101 full-time judges, some of us picture the yellow towers in Luxembourg as being full of translators rather than lawyers and judges. The proposed Unified Patent Court may not need so many people or have towers that are so tall, but are there not going to be all these associated people around in this separate structure?

Baroness Wilcox: Perhaps Nicholas Fernandes can talk about the draft agreement.

Nicholas Fernandes: There are provisions in the draft agreement on languages, because this was considered to be a fundamental issue. As Liz Coleman has indicated, the language of proceedings before any local or regional division will be the official European language of the member state hosting that division. The parties may agree on which language to use, but the mandatory rule is that the language of proceedings of the central division is the language in which the patent concerned was granted. There are other language arrangements that may be agreed upon, but this is one of the issues that has been set out.

The Chairman: Is this not inviting a preliminary ruling from the Court of Justice?

Nicholas Fernandes: It may do.

Q44 Lord Renton of Mount Harry: Minister, you have told us—and I totally understand this—that you do not actually think that the final agreement will be concluded by June 2012. When is your best guess that it will be concluded?

Baroness Wilcox: I am afraid that I do not think that I could answer that. We could be lucky and we might just find that everyone suddenly agrees with things that we think are acceptable and we move as quickly as everyone wishes.

Neil Feinson: If I may, let me just round that off by saying that we are in a little bit of a deadlock at the moment, particularly over the location of the seat. As the Minister said earlier, we are trying to ensure that, when at a political level that deadlock gets unlocked—if it gets unlocked—all the preparatory work has been done, so that we can then move quickly. If we achieve that, then who knows? It could happen very quickly, or the deadlock could go on for a long time. Everyone has in mind the target of completing the agreement during the Danish presidency, which means by the end of June, but, as the Minister said, there is absolutely no guarantee of that.

Q45 Lord Anderson of Swansea: I have a question on language. Let us say there is a situation in the central division where a monoglot Estonian inventor believes that a monoglot Slovenian has infringed his patent. How is that likely to be done, technically? Are there sufficient experts able to convey that?

Liz Coleman: This would probably go to a local division in which at least one of those languages is spoken and, normally speaking, for a patents case, I would expect both parties to have some form of adviser who would be conversant with other languages as well.

Lord Dykes: Lord Chairman, you only have to hear the skill of the European Parliament interpreters when they are dealing with Greek and Danish, and so on.

Lord Anderson of Swansea: But not especially Estonian.

Lord Dykes: No, but I mean they come out of the woodwork when the market demands it, in a sense. Can I pick up on what Neil Feinson was saying? If during its presidency Cyprus is too preoccupied with other things to deal with this—even with the European Union helping more, as it normally does with a very small territory—in the following years both

Ireland and Lithuania would be intellectually and practically equipped to reach an agreement, I would have thought.

Baroness Wilcox: We are hopeful, but the presidency is with Denmark at the moment.

Q46 Lord Dykes: Do you really think that June is possible?

Baroness Wilcox: We were there just recently—I was there 10 days ago—and they have been over and have seen the Secretary of State on a visit. In broad terms, our Prime Minister is aware of what is happening.

Lord Dykes: It could be an episode of "*Borgen*".

Baroness Wilcox: I think Neil Feinson's answer was good, in that the commissioner is talking about June. We would love to think that it was June, because that would mean that we had got what we wanted. So we would like to get as much as we can sorted now, negotiating hard now, so that if there is a sudden movement we are there and ready to go. We would love to come back with thrilling news.

The Chairman: I think that we cannot speculate any more. Lord Elystan-Morgan, did you have a different supplementary before Lord Anderson's last question?

Q47 Lord Elystan-Morgan: Only of a general nature. Am I right in thinking that, among the member states generally, from a commercial angle, there is a deep general committed enthusiasm here, even though there are professional difficulties and objections? Is the mood such that the commercial enthusiasm will enable this to go through fairly quickly? Is that sensible?

Baroness Wilcox: I think that the commercial enthusiasm is evident. We are very hopeful that countries such as Spain and Italy, which do not find it possible to join up at this stage, will join a little later when their own industries realise that there is a nice straight fast track for all the other Community countries. It is going to be very difficult for them. We are after all the Department for Business, Innovation and Skills. For industry, particularly the small and

medium-sized businesses that we have to help through the complexities of this, we want to get this faster and less expensive, simpler and with fewer languages. It would be wonderful if we could.

Q48 Lord Temple-Morris: I have a quick supplementary. We have not talked about the legal aspect of this yet. We talked about the number of judges and the complexity of the whole thing, but we have to bear in mind that there are 27 members with deeply varying procedures and laws in dealing with these things. It is all very well talking about 100 judges—and I know that it is not going to happen immediately—but are we not slightly concerned whether the punters, the stakeholders or participants, are going to be happy that a whole load of German or British judges or whatever will deal with things that they would prefer to be dealt with under their own law?

Baroness Wilcox: They will be dealing with their own courts anyway to begin with. The location of the central court is still to be decided. There are many bids in for this central court—from Paris, for example.

The Chairman: I suppose that part of the answer is that they have all signed up for enhanced co-operation anyway.

Baroness Wilcox: Yes, they have.

Nicholas Fernandes: The rules of procedure are something that we worked on in common, so those will be agreed between the member states. Those are the rules to which the judges will work.

Lord Temple-Morris: Building up their own precedent as they go along, obviously.

Baroness Wilcox: I like to think that they will have integrity among themselves, as do all good lawyers and QCs and judges. My son is a QC, and I tend to think that there is a particular code between them. I have great hopes for this. I would like to think that we can

come back and say that we have done it. If not, we will come back and explain why we have not.

Q49 Lord Anderson of Swansea: On the bidding for the seat of the central division, I thought I overheard Mr Feinson say, "if agreement is ever reached", or something similar. What is the current state of play? Is it true that we have actually very few international bodies in London? Is that a major argument in our favour? What are the current expectations? Where do we stand?

Baroness Wilcox: Well, all the bids are in, and it is now up to the Netherlands to decide the way forward on this. There is no decision yet on the location of the central division. We have four or five different names in, so we will just have to wait and see how the current stand-off will be resolved. We do not know how it is going to be resolved. We will continue to meet with the Danish government and impress on them the need to ensure that the negotiations are taken forward as quickly as possible.

Lord Anderson of Swansea: But the assumption is that it would be made during the Danish presidency.

Baroness Wilcox: I think that they would like to think that was so, and we will do everything to help them.

The Chairman: Thank you very much.

Baroness Wilcox: Thank you—you were very patient with us.

The Chairman: Thank you for answering all our questions. I am sorry if you think that we are confused about some elements. Hopefully, we are less confused now.