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IP & Life Science News

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The Danish Consumer Ombudsman's annual report shows increased focus on "greenwashing"

The Consumer Ombudsman has published its annual report on the year 2022 highlighting some of the most recent practice regarding supervision of, i.a., the Danish Marketing Practices Act. Notably, the increasing misuse by companies of sustainability and environmental claims (referred to as "greenwashing") is among the topics that have attracted more attention from the Ombudsman in 2022.

The Ombudsman's focus on greenwashing in 2022 is not surprising as greenwashing and sustainability have been hot topics in both Danish and EU marketing law last year. The Ombudsman reports an increase in reports and complaints of greenwashing from both companies, consumers and the press from 52 in 2021 to 95 in 2022. Given the importance of the subject, the Ombudsman was granted additional funding on the most recent Danish Budget allowing the Ombudsman to dedicate additional resources to the area.

Greenwashing according to the Consumer Ombudsman

Companies should be aware that the Ombudsman's practice regarding greenwashing follows the general prohibition on misleading marketing in articles 5 and 6 of the Danish Marketing Practices Act. Further, it is important to notice that when used in marketing, general green claims such as "green" and "sustainable" must be documented, e.g., via a life cycle analysis documenting that the product throughout the product's entire life cycle (i.e., from cradle to grave) is significantly less damaging to the environment than similar products. A review of the annual report's highlighted practice shows that companies often struggle to document their marketed claims, resulting in the claims being misleading.

One of the cases mentioned in the annual report concerns a car dealer's use of general terms to describe the sustainability of a plug-in hybrid car. According to the Ombudsman, the statements led consumers to believe that the cars were less damaging to the environment than what the car dealer could document since the positive environmental qualities of the car were significantly reduced by other environmentally damaging aspects.

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In the annual report, the Ombudsman therefore recommends that companies market specific initiatives instead of using general terms as "sustainable" or "green" in their marketing. Using specific and documented characteristics ensures that the claims are not misleading to the consumers and are consequently in accordance with the Marketing Practices Act.

Green Claims Directive

Companies struggling with documentation requirements in green marketing is naturally not only a Danish phenomenon. A study referenced in the EU Commission's proposal for a Green Claims Directive revealed that 53.3 % of analysed environmental claims were vague, misleading, or based on unfounded information. The Directive proposes minimum requirements for companies' duty to document green claims, including claims of sustainability. Given the strict requirements for proper documentation already applicable in Denmark, the proposal is not expected to largely influence the Danish rules. Once implemented, Danish companies can expect that they will have to consider the strict documentation requirements when using green marketing outside Denmark – requirements which Danish companies are already getting used to. Perhaps, the implementation of the Directive could prove to offer Danish companies a slight competitive advantage? Accura will continue to monitor the implementation of the Green Claims Directive.

Accura's comments

The worldwide effort to transition into the use of green energy and more sustainable choices has led to an emphasis on the importance of preventing misleading marketing around sustainability. Consumers lose their ability to make choices based on a demand of sustainability if companies market their products as being more sustainable than they can document. Furthermore, the many examples of misleading marketing of sustainability can lead to consumers losing trust in companies' sustainable initiatives and as a result thereof ignoring the alleged sustainability of a product in their decision-making. The result is an unfortunate protraction of the green transition.

The increased focus on greenwashing solidifies the importance for companies to consider compliance with the law when promoting products in terms that suggest sustainability. If you have any questions regarding your company's green marketing, please do not hesitate to contact Accura's team of marketing experts.

The Consumer Ombudsman's report is available in Danish here.

Trends in design registration in Denmark and Europe

A new report from the Danish Patent and Trademark Office (DKPTO) on Danish companies' use of design rights examines to which extent Danish companies seek design protection compared to other countries within the European Union. The overall conclusion of the report is that Danish companies in the period from 2016 to 2022 have been more active in securing their design rights than their European counterparts.

Danish companies' leading design position

A registered design right protects the appearance of a product, such as clothing, furniture or utility items, and may extend to protection of the whole or part of a product, e.g., the product's specific components. The design must, among other factors, be novel and possess individual character to enjoy protection, meaning that the overall impression must differ from that of previously published designs.

A design right offers the proprietor an exclusive right to use the design and to prevent other companies from using the design without the proprietor's consent. Such exclusive rights may offer substantial financial upsides for the proprietor, as companies with registered design rights on average have a 32.2 % higher revenue per employee than companies without any protected or registered IP rights in general. The decision to register a design obviously helps companies protect their products from imitation but may also increase revenues and provide investors with confidence that the companies' designs are unique and can be enforced against third parties' unauthorised use. For many companies, design protection can therefore be a strategically vital tool in their business plans. A registered design right is valid for up to 25 years if the proprietor ensures renewal at least every 5 years.

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Based on data from the EUIPO, the report reveals that with approximately 85 design applications per million citizens, Danish companies submit more design applications per million citizens than other European companies, resulting in around 500 design applications per year for the registered period. Compared to other European countries' design activity and highlighting the difference in the number of submitted designs, Danish companies remain the most active, continuing to submit more designs per million citizens. However, with respect to the total number of design applications, Germany is leading as the most design-active country in Europe with close to 4,000 applications per year.

The report further concludes that Danish companies are particularly active within the categories 'furniture and other household articles' and 'decorative articles'. Registrations within these categories are accounting for approximately one-third of all design applications by Danish companies in total.

Overall, the findings of the report highlight Danish companies' remarkable presence and proactive approach in design protection, contributing to the protection of innovative creations and strengthening Danish companies' competitiveness from a European perspective.

Accura comments

In Accura's IP & Life Science team we are content with the results of the report. We recognise the importance of design protection for companies and recommend that companies register their designs to the widest extent possible. Our team is committed to helping businesses navigate the intricacies of design protection to enhance competitiveness and safeguard innovations in a dynamic market and we are always happy to help within this specialised field with registrations or advice concerning design law in general.

The report is available in Danish at the DKPTO's website.

Proposal for a new SPC system in the EU

The European Commission has proposed a revision of the current SPC* system, proposing significant changes to the current regime. Various stakeholders have already expressed support for a centralised SPC system and the enhanced harmonisation and simplification, which the new SPC system is expected to bring. However, concerns have been raised about the possible strategic misuse of the pre-grant opposition procedure and the EUIPO being the central examination authority. In this article, we will focus on the key aspects of the proposed SPC reform.

Centralised examination procedure

Today, to obtain SPC protection in more than one Member State for a given product, applicants must file separate national SPC applications in the national languages of the respective Member States. This has led to inconsistencies between Member States on SPC matters, in particular differing interpretations of the SPC regulation, which, in turn, has led to numerous preliminary references to the Court of Justice of the European Union (CJEU). The proposed new centralised examination procedure is intended to solve this particular issue, among others, by improving consistency and transparency.

Under the proposed SPC reform, applicants would be able to file a single, or combined, application. This application will be subject to a single examination by the EU Intellectual Property Office (EUIPO), which, if positive, will result in the grant of a unitary SPC (for the 17 Member States currently participating in the unitary patent system) and/or of national SPCs in the Member States currently not participating in the unitary patent system.

Not surprisingly, the centralised route will be mandatory for unitary SPC applications. However, it is important to highlight that the centralised examination procedure will also become mandatory for SPC applications that rely on a traditional non-unitary European patent as the basic patent if the product in question has been authorised via the centralised marketing authorisation procedure. For such centralised (non-unitary) SPC applications, the national patent offices will still formally grant the SPC. However, in contrast to the currently applicable procedure, the national patent offices' grant of the SPC will be based on a binding examination opinion produced and published by the EUIPO.

The centralised route will not be available for SPC applications that rely on national patents or for products with marketing authorisations obtained via the decentralised or national routes. Such SPC applications would still need to be filed with the relevant national patent offices.

> * **Supplementary protection certificates (SPCs)** are *sui generis* intellectual property rights which in practice extend the 20-year term of patents for medicinal or plant protection products (PPPs) by up to five years. SPCs aim to offset the loss of effective patent protection due to the compulsory and lengthy trials required in the EU for the regulatory marketing authorisation of these products.

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Examination of centralised SPC applications

A panel of three examiners, a member from the EUIPO and two qualified examiners from relevant national offices, will carry out the substantive examination of a centralised SPC application. The substantive examination will result in the publication of an examination opinion.

During the examination period, third parties may provide written observations on the validity of a unitary SPC application within three months of publication of the SPC application. The examination panel is under no obligation to take these written observations into account.

If the EUIPO concludes that the conditions for obtaining an SPC have been met, a positive examination opinion will be issued, whereas a negative examination opinion will be issued if the EUIPO concludes that the conditions have not been met. The examination opinion will be translated into the official languages of all designated Member States.

Any third party (opponent) may initiate an opposition procedure during a period of two months following the publication of a positive examination opinion in respect of a centralised application. Oppositions may only be filed by third parties on the grounds that one or more of the conditions for obtaining an SPC have not been met. An opposition panel will examine the oppositions. Examiners from national patent offices may be involved in these opposition procedures. However, the opposition panel must not include any examiner previously involved in the examination panel that examined the centralised application. Decisions on opposition applications will be made within six months unless the case is deemed complex.

Any decision by the EUIPO in the opposition procedure may be appealed to the EUIPO Boards of Appeal. The decision made by the Boards of Appeal may, in turn, be appealed to the European General Court, and a final appeal may be filed with the European Court of Justice. These appeal procedures will also be available to the applicant if the EUIPO's examination opinion is negative, i.e., when it proposes to refuse the grant of a unitary SPC.

It is important to note that the opposition procedure takes place prior to the grant of an SPC. Neither a unitary SPC nor a centralised (non-unitary) SPC will be granted until the time limits or the procedures for opposition and appeal have expired/have been finalised. This is in contrast to the current "EPO model" for examining and granting European patents, which does not include pre-grant opposition proceedings.

In light of the proposed pre-grant opposition procedure, the publication of a positive examination opinion will therefore be a relevant procedural step for third parties to monitor going forward, particularly as third parties may use pre-grant opposition procedures against positive examination opinions tactically to delay the grant of unitary SPCs and/or centralised (non-unitary) SPCs with the effect that they cannot be enforced against potential infringers until the end of the opposition and appeal proceedings.

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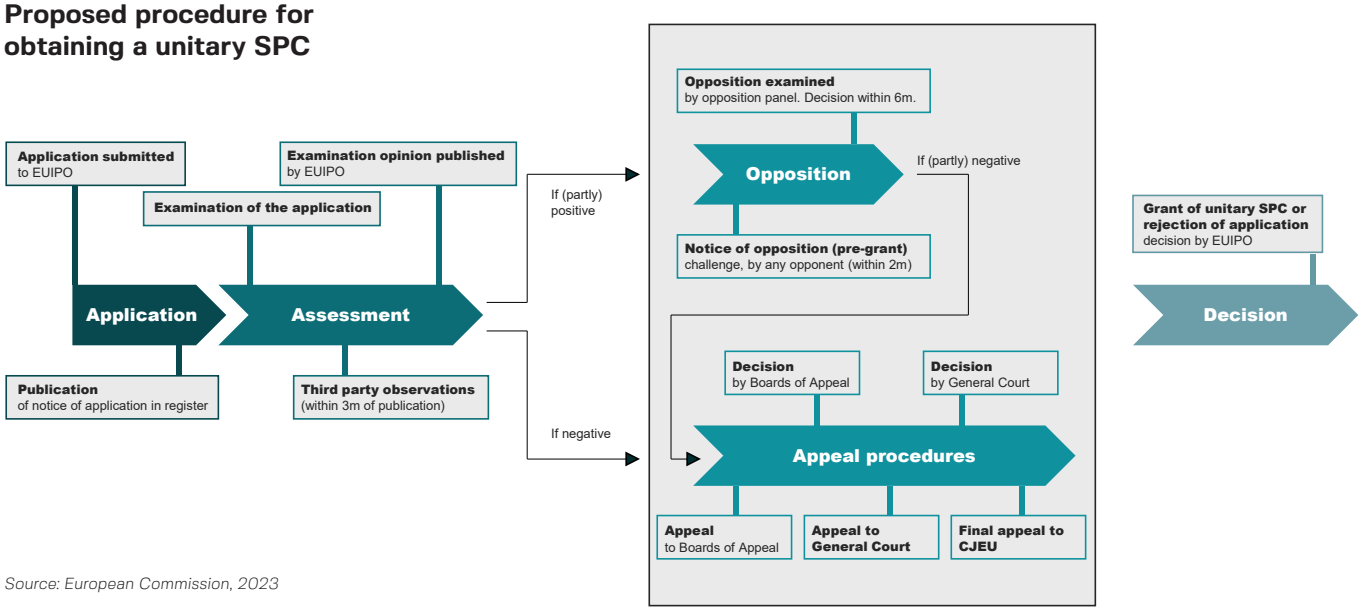
Proposed procedure for obtaining a unitary SPC



Source: European Commission, 2023

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Unitary SPCs

The introduction of the unitary SPC is motivated by the introduction of the unitary patent. To obtain a unitary SPC, the proposal requires that the basic patent is a unitary patent, and the marketing authorisation invoked for the SPC application must be one granted via the centralised marketing authorisation procedure.

In addition to these two specific requirements, the conditions that must be met for the grant of a unitary SPC are the same under this proposal as under the current regulation, meaning that the product cannot already have been the subject of a certificate, nor of a unitary certificate, and that the authorisation on which the certificate is granted is the first authorisation to place the product on the market as a medicinal product.

As with the unitary patent, a unitary SPC would be valid in all Member States that participate in the Agreement on a Unified Patent Court (UPCA) (currently 17 Member States).

Applicants must apply to the EUIPO for a unitary SPC within six months of receiving marketing authorisation for the product in question, or, if the authorisation is granted before unitary effect is attributed to the basic patent, within six months after unitary effect has been attributed to the basic patent.

Post-grant invalidity actions against a unitary SPC may either be brought before the EUIPO by filing for a declaration of invalidity or before a competent court of a Member State (including the Unified Patent Court) by filing a counterclaim for invalidity. However, the competent court of a Member State must reject a counterclaim for a declaration of invalidity if a decision made by the EUIPO relating to the same subject matter and cause of action and involving the same parties has already become final.

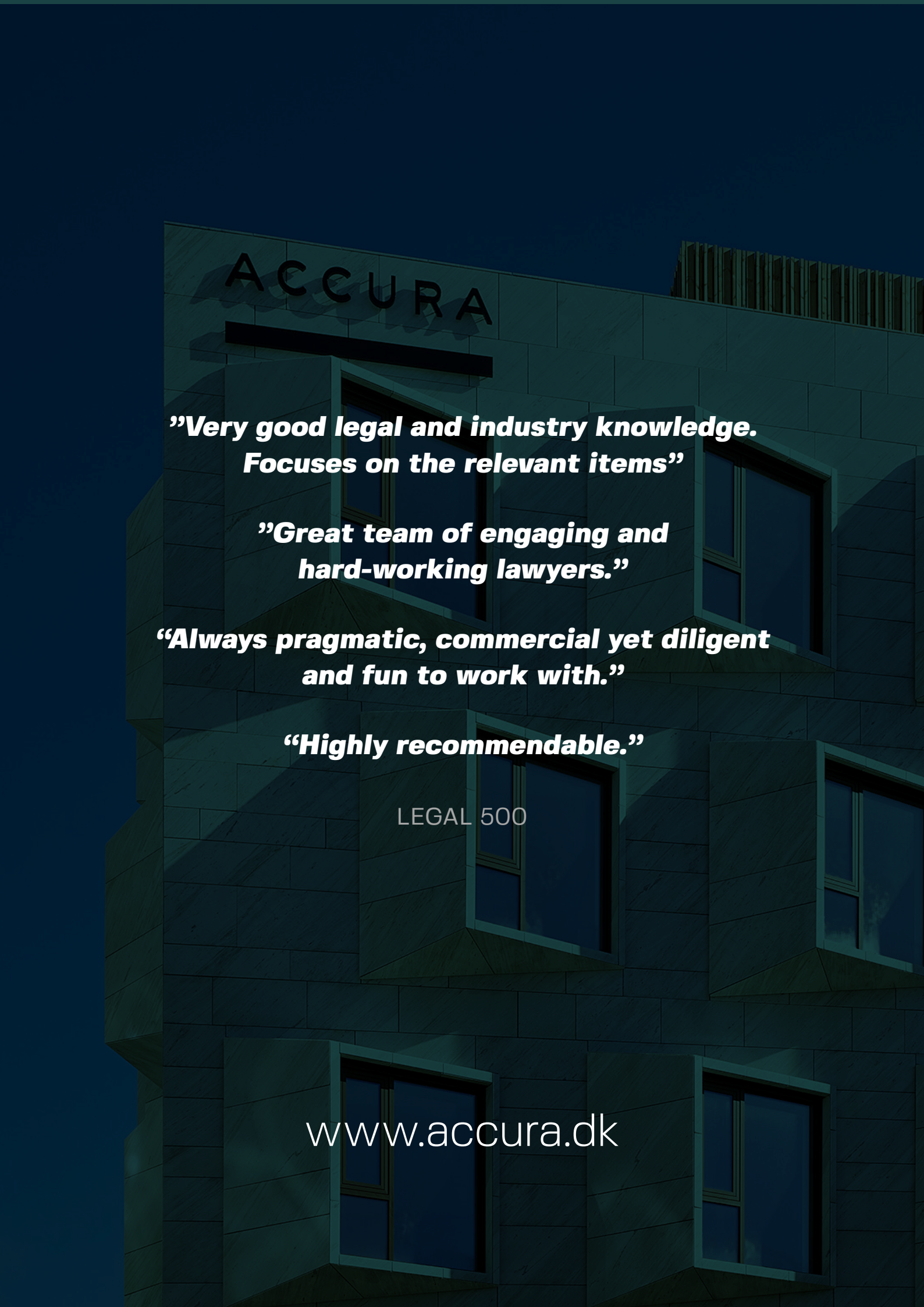
What is the status?

Most recently, the feedback period for stakeholders to comment on the proposed new SPC regulations[1] has closed. Overall, the position on a centralised SPC system is positive, with stakeholders generally welcoming the increased harmonisation and simplification which the new SPC system is expected to bring. However, several stakeholders have raised concerns, particularly regarding the pre-grant opposition procedure, which will, according to the EPI (the professional body representing professional representatives before the EPO), "*result in endless delays*" *and* "*the de facto non-useability of the centralised SPC system*". Similarly, the Chartered Institute of Patent Attorneys (professional and examining body for patent agents in the UK) has expressed concerns that the "*pre-grant oppositions would be vulnerable to misuse, for example as a tactic to enable (generic) product launch in the period between expiry of the basic patent and resolution of the (potentially meritless) pre-grant opposition*".

Moreover, some stakeholders have expressed doubts about the EUIPO serving as the examination authority, citing a perceived lack of expertise in SPC matters. The received feedback will now be discussed, and possible amendments may be made to the proposed SPC reform.

As for the timeline, no specific date has been set for the entry into force of the SPC proposals, and we are still in the early stages of the process. A plenary sitting is anticipated to take place during the first half of 2024. It is not expected that the SPC proposals will enter into force until 2025, and, even then, transitional provisions will most likely apply for pending SPC applications.

[1] *COM(2023)222 (for medicinal products) and COM(2023)221 (for plant protection products).*



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