Report

Workshops on the unitary patent and the Unified Patent Court

initiated by the EPO Economic and Scientific Advisory Board
Munich, 3 - 4 December 2013
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EPO Economic and Scientific Advisory Board

While the EPO’s main focus is on its core business of delivering services under the European Patent Convention, it also has a strong interest in the broader economic and social ramifications of the patent system. This interest should be pursued in a collaborative way together with individuals and organisations that have shown a high level of expertise in the areas concerned. It is for this reason that the EPO set up an Economic and Scientific Advisory Board to address important economic and social issues relating to patents in a more dedicated and selective way than hitherto possible.

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Scope of work

The Advisory Board is independent within the scope of its mandate and is able to choose to address particular issues on its own initiative.

Detailed information on the Board’s previous work can be found at: http://www.epo.org/about-us/office/esab.html

At its second annual meeting in 2013, the Board decided to commission a study on the economic effects of the unitary patent and the Unified Patent Court and to devote a workshop to the topic. This workshop, at which the preliminary findings of the economic study were presented, was held in Munich on 3 and 4 December 2013. The present report summarises the discussions of the workshop participants.

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1 Introduction

This report covers two workshops held at the European Patent Office in Munich in December of 2013 to discuss the unitary patent package. These workshops focused on two elements of the unitary patent package ("UPP"): the Unitary Patent ("UP") and the Unified Patent Court ("UPC"). In December 2012 the European Parliament and the Council of the European Union adopted two regulations establishing the UP. Furthermore, in February of 2013 representatives of 25 EU member states signed an Agreement on a Unified Patent Court. This agreement will only enter into force once it is ratified by 13 member states including France, Germany and the UK.

These legislative steps come half a century after the signing of the Strasbourg Patent Convention (SPC) by the member countries of the Council of Europe in 1963. The SPC laid the foundations of the current patent system in Europe by committing signatories to unify their substantive patent law. Between 1963 and 2013 a number of attempts were made to establish unitary patent protection for all member states of the European Union (EU). Inter alia these efforts led to the establishment of the European Patent Organisation and the European Patent Office (EPO) under the European Patent Convention (EPC), signed 40 years ago in 1973. The EPO has been examining and granting European patents (EP) since 1977, but crucially these patents are not unitary. This means that effectively the owner of an EP holds a bundle of independent national patents once the patent is granted.

The aim of the unitary patent package is to unify the post-grant phase of patent protection in Europe by establishing the unitary patent and the Unified Patent Court. This should simplify access to the patent system, reduce post-grant costs and increase legal certainty for patent owners' in the greater part of the EU. Much work is currently being done to flesh out the details of the new patent system. In particular details of procedure and functioning of the UPC and the fee structures that will apply within this new system are still being worked out.

The two workshops revealed mixed feelings. On balance, participants were generally in favour of the UPP and of the majority of the draft rules set out for the UPC. But there were also significant concerns, mainly related to patenting fees and costs of litigation. Several participants pointed to the uncertainty with respect to some important aspects of the UPP that are still to be defined.

In this context, the workshops held at the EPO provided an important opportunity to gauge reactions to the current state of the project and the possible futures it has at this point. This report summarises the discussions at the workshop on the UP and UPC. Both workshops were held under the Chatham House Rule and this will be reflected in the current report. While individuals are not named, their background (firm representative, judge, academic) may be noted where this is helpful for the reader. The report focuses on what was said by participants at the workshop, while the endnotes contain facts or academic findings relevant to the statements made.

This introduction contains a short summary of the aims of the UPP and a box briefly reviewing the current state of the European patent system. The main body of the report consists of two sections, one each for the workshop on the UP and the workshop on the UPC. Finally, there is a brief conclusion.
Aims of the unitary patent package

The proximate aims of the UPP are to lower the costs and complexity of using the European patent system, while the ultimate aim is to foster innovation and competitiveness. While most workshop participants agreed that the proximate goals are achievable if fees are not too high, there was less agreement that the ultimate goals would be achieved: some were altogether sceptical, others saw this as a long run outcome and still others stated that implementation of the UPP would provide an immediate impetus to innovation. This last group pointed to similar reforms such as the creation in the United States in 1982 of the Court of Appeals for the Federal Circuit (CAFC), establishing a centralised appeals court to standardise patent law and reduce forum shopping.8

Participants agreed that the impact of the UPP will depend to a large extent on the costs of the UP and UPC for patentees, and in particular for SMEs. In the absence of concrete information on UP/UPC costs and fees there was much discussion on the level of costs and fees that might be expected and on the factors affecting these. Some participants were of the view that the impact of the UP and UPC on possible strategic litigation would affect the success of the package. Both discussions are reflected in this report.

An outline of patenting in Europe

The current patent system in Europe offers the applicant two alternatives: a national patent or centralised examination by the EPO, leading to a European Patent (EP). Where the applicants opt for the EP they choose in which countries to validate the patent, leading to a bundle of national patents. The bundle approach has the effect that once a patent has been granted by the EPO and the opposition period has expired, the common centralised procedure ends to a large extent. The jurisdiction concerning the infringement and validity of a patent lies exclusively with the member states of the European Patent Organisation and their national courts. Currently there is no common European patent court and there is no possibility to obtain one patent that is valid throughout the entire territory of the EU.

The UPP would change that, creating the possibility of a one-stop shop with the intention of lowering costs and reducing the complexity of obtaining patent protection in the greater part of the EU. Some participants at the workshop noted critically that the new UP would co-exist with the national and EP systems. This means that at least in the short term and quite possibly in the medium term the overall patent system in Europe is likely to become more complex. In particular, when examination and enforcement are considered jointly, applicants will be faced with four different ways to obtain patent protection:10

1. national patents, granted by national patent offices and enforced in national courts;
2. European patents (EP), granted by the EPO and enforced in the UPC system;
3. European patents (EP), granted by the EPO but opted out of the UPC system and enforced in national courts as a bundle of patents (during the transitional period);
4. unitary patents (UP), registered by the EPO and enforced in the UPC system.
In other words the applicant can maintain the status quo by choosing options 1 or 3, choose option 2, that is to stay with an EP instead of a UP but be covered by the UPC, or choose option 4, i.e. a UP. Moreover, it is possible to switch from option 3 to option 2, effectively opting back into the UPC as long as a patent has not become subject of litigation in a national court. The theoretical fifth option, where a UP that is opted out of the UPC, does not exist within the UPP. The four-tier patent system introduces more choices and as a consequence more complexity relating to interactions between the different tiers. The choices between various tiers of the new patent system were the object of much of the discussions at the two workshops.

In case of a national patent the application and renewal fees are currently paid to the national office. In case of an EP application renewal fees are currently paid to the EPO during the examination phase, while they are paid to the national patent offices after the patent is granted by the EPO and validated in specific countries. Post-grant the national patent offices remit half of the proceeds from renewal to the EPO to help finance the costly process of patent examination. It is worth noting that renewal fees differ widely throughout the member states of the EU and across the non-EU members of the EPO. This alone makes the task of computing the costs of an EP patent complex - each bundle of national rights has its own costs, depending on the composition of countries and the duration for which the patent is held. As the next sections show, some participants at the workshops had strong views about the range in which renewal fees should lie for the UP relative to the EP and national rights. The level of renewal fees and their further use is undoubtedly one of the biggest remaining challenges for the implementation of the UP.

Currently litigation of European patents before national courts may lead to contradictory outcomes in different countries. This leads to legal uncertainty and to lengthy and costly proceedings. This demonstrates that the current European patent system forces firms that rely on the courts to enforce their patents to spend more money than comparable patent systems and may create much uncertainty for firms in industries that use the patent system.

There is evidence that in some industries firms that are in dispute deal with this state of affairs by contracting to use only one national court to clear disputes and agreeing to extend the decision of this court to the entirety of the jurisdictions in which the firms are in dispute. The number of such cases is currently unknown. It was stated during the workshop that such private contractual solutions are not observed in pharmaceuticals due to the enormous investments made by patent owners and the typically low cost of copying the product, once it is on the market. Litigation of pharmaceutical patents is often initiated by producers of generic pharmaceutical products with the aim of removing the patent in as many jurisdictions as is possible. Research-active pharmaceuticals manufacturers have strong incentives to enforce all their national patents. Where firms are unable to contractually limit litigation, the UPC should offer firms that use the patent system in Europe many advantages.
2 The unitary patent

Participants at the first-day workshop on the unitary patent were requested to identify benefits and costs of the UP for users of the European patent system as well as other stakeholders. This second category was interpreted to include firms affected by the UP, national patent offices and those working in the European patent system, such as judges or attorneys. Participants were also asked to rank their observations in order of importance. Accordingly this section sets out the benefits and the costs of the UP, as well as general concerns voiced about the UP.

2.1 Benefits of the unitary patent

This section is divided into two subsections. The first covers the direct benefits of the UP for users, and the second summarises indirect benefits of the UP for society and stakeholders.

Direct benefits for users

The most significant benefit of the UP noted by participants is the simplification of patenting in Europe. With the UP, the patent system will be simplified in a number of respects: the need for translation of the patent is largely removed, the need for validation is removed, the post-grant administration of the patent is much simplified with a single renewal fee and a single point of contact for all administrative matters. There is one centralised court for revocations and a harmonised court process for all infringement actions – although these are predominantly UPC aspects, they have an impact on the use and benefits of the UP. All participants, regardless of their professional background, regarded these benefits as potentially very significant.

Given that the UP will co-exist with the EP and national patents, introduction of the UP increases the range of options for users of the European patent system. Some participants pointed out that the additional option in the form of the UP would be positive as it would increase choices for inventors. Inventors could seek the patent protection that best serves their needs.

A significant benefit according to many participants is the reduction in the cost of administering the UP. Costs will fall because of the removal of translation costs and related costs (i.e. publication fees to be paid to national patent offices for the publication of the translation into their national language). The magnitude of these cost savings depends on the number of countries/validations, and is limited by the London Agreement, which has already provided a significant reduction in translation costs. Furthermore, firms holding a bundle of EP patents spread across different member states typically rely on patent attorneys in each of these states. This will no longer be necessary with respect to the post-grant administration of patents under the UP. To the extent that patent attorneys also provide firms with services relating to protection of their patents against infringement, these relationships may nonetheless be upheld. In principle, costs related to patent attorney fees should drop on account of this aspect of the UP. Despite cost savings that have already materialised due to the occurrence of firms specialised in the administration of renewal fees, these costs were noted by workshop participants to constitute a large proportion of the overall patenting costs, especially for SMEs.

Furthermore, participants noted that the geographic extension of the UP to the territory of almost all EU countries would make this patent more valuable than the average EP, with positive implications for licensing and comparable commercial transactions. Several reasons were noted for this difference in value. First, greater geographical coverage of the UP could enable customs authorities to help enforce patents at all borders of the states participating in the enhanced cooperation. Currently this is not always possible, as EP patents are frequently only validated in a subset of member states. Secondly, any firm seeking to market a product in only certain member states when applying for the patent would have the flexibility to extend its marketing effort to further countries without the need to apply for additional patents. This would lower the marginal patenting cost of market entry to zero, which may matter if this cost is currently significant relative to other costs of market entry. This point was made by academic participants. Firm representatives pointed to the fact that venture capital firms or licensing partners would value this patent more highly, because of the option it provides of entering further markets at a later stage.

It was also noted that centralised revocation would be possible over the lifetime of a UP as opposed to being restricted to the period of opposition for the EP. However, this benefit for third parties and that of the harmonised court process would be unlikely to affect many users as only a small minority litigate or become involved in opposition proceedings. In this context the point was made that cheaper centralised revocation is likely to increase the incidence of such proceedings and may also lower the frequency of opposition at the EPO. Clearly all of these considerations would have an indirect effect on all patentees as they must...
make allowance for the possibility of litigation and opposition. Nonetheless it is unlikely that these indirect effects would be more significant than the reduced costs of administration noted above for the average user of the patent system.

**Indirect benefits**

While the UP is being created to serve the needs of those industries relying on patent protection, introduction of the UP affects all those working within the patent system, e.g. examiners, attorneys and judges, as well as society more generally.

At the workshop it was noted that national patent offices expect the UP to provide income. This point is further pursued in the section on debates below.

It was also pointed out that the business of patent attorneys would be affected by the UP. As noted above the aspect of a single point of contact for the administration of the patent might reduce attorney incomes in the long run. In the short run, however, the UP represents an additional option for patentees, which is likely to result in more business as firms begin to test the new system. Furthermore, it was noted that patent attorneys will be able to represent parties before the UPC, which is not the case today with regard to most national courts. Also, the point was made that the procedures of the UPC, which are intended to speed up proceedings in the court, will increase the workload of attorneys who will need to work in larger teams for each case. These considerations indicate that the overall workload for patent attorneys in Europe might well increase. Once more these points will depend crucially on the cost of the UP and its popularity.

The most important societal impact could result from additional innovation. Discussions on costs and the debates that follow below provided some mixed views amongst workshop participants on the likelihood of any effect on innovation and growth.

To summarise, the workshop participants noted a number of benefits that are in line with the aims of the UPP as noted in the underlying regulations. Participants also predicted that the UP would be used by many firms if the costs do not exceed those of an average EP, and if the UPC proved to be predictable and efficient. The important role of the UPC for the UP was evident, as many contributions to the UP workshop pointed to the importance of the UPC.

### 2.2 Disadvantages of the unitary patent

The main disadvantage of adopting the UP that was noted by firm representatives would be the reduction in flexibility of use with respect to the EP. Users of the UP would not be able to drop protection, by not renewing national patents, in certain member states in order to reduce the overall amount of renewal fees. This practice is widespread for the EP. The possibility of dropping certain states during the lifetime of a patent is particularly important for patents that are used for defensive purposes, i.e. filed to protect core inventions by blocking alternative technological solutions for a specific problem.

Workshop participants also indicated that the risk of central revocation of highly valuable patents could be another disadvantage of the UP. These disadvantages are the flip side of the UP’s main advantages that derive from its unitary effect.

### 2.3 Comments on the unitary patent regulations

The complexity of a European patent system consisting of national, EP (with or without competence of the UPC) and UP patents was pointed to as an important concern by some participants. This situation will exist for many years after the UPP enters into force. At the end of the transitional period the patent system in Europe will still consist of three tiers: national patents that will be adjudicated in national courts, EP patents and UP patents both in the competence of the UPC. Concerns regarding the system arise from several sources.

Firstly, several participants were concerned that the coexistence of the UP, the EP and national rights would create a patent system with opportunities for strategic gaming. It was pointed out that all other major jurisdictions (e.g. USA, Japan, China) operate with a single tier of patenting. Patents in those jurisdictions are national patents that have effects corresponding to the UP, i.e. there is a single point of contact for administrative purposes, a single renewal fee schedule and a unified court of appeal ensuring that patent law is enforced in a relatively uniform manner throughout the jurisdictions. Another concern
that was raised by some participants in this context was that non-practicing entities (NPEs) might find the presence of multiple tiers conducive to their business model. It was indicated that such firms might be able to exploit specific local divisions of the UPC to raise the litigation costs of their targets. The significance of this concern depends on the UPC’s rules of procedure and therefore NPEs are discussed in more detail in Section 3 on the UPC.

Secondly, a concern was raised regarding the impact on a UP of prior user rights registered in national territories, if these prior rights are discovered after the registration of a UP. It is currently not completely clear how such prior rights will affect a UP that is valid throughout the member states.

Thirdly, the prospects of SMEs within the UP system were also raised as an important concern by a number of participants. It was argued that the UP was unlikely to be as cheap as individual national rights and at the least would possibly cost in the order of an EP validated in four to five member states. This cost, it was noted, would be too high for SMEs, but their exclusion from the UP would run counter to the aims of the UPP, namely the aim of making the new patent system more accessible and less costly in order to foster innovation and competitiveness of businesses in Europe. Therefore it was suggested by some participants that there should be fee reductions for SMEs. They pointed out that such a fee reduction scheme is operated by the United States Patent and Trademark Office (USPTO). They also pointed out that the EU Regulation on unitary patent protection provides for the possibility of introducing reduced renewal fees for SMEs.

Other participants suggested that the new patent system would disadvantage non-patenting SMEs in those member states in which the EP is less frequently validated as the UP would now be valid in all member states. One may doubt whether patenting firms that would not previously have validated a patent in more than a few member states are likely to seek to enforce such a patent in all member states ratifying the UPC, just because enforcement becomes an option. Enforcement presupposes that firms spend money to identify those infringing their patents in all member states and this might still prove too costly. Nonetheless, it was discussed whether the UPP would prove costly for non-patenting SMEs. Aspects of the discussion are reported below in the debates section.

### 2.4 Expected participation

Given the wide range of benefits to be expected from the UP, it is important to understand whether firms are likely to use this new instrument or not. Firm participants at the workshop represented a range of industries (including pharmaceuticals, chemicals, information and communications technology (ICT), mechanical engineering) and different firm sizes, with users hailing from both inside and outside the EU.

All firm participants noted the primary importance of the renewal fee level in determining use of the system. Drawing on the costs of the EP patent as validated in the largest EU member states some firm representatives indicated that, in order for the take-up to be substantial, costs for a UP should not exceed those for an EP validated in between four and six countries. No firm representative stated that the UP would not be used. Some indicated careful testing of the system with a variety of patents ranging from important and strategically valuable to marginal, whilst others indicated that patents which protect important revenue streams, referred to as crown jewels, would initially be kept out of the UPC system, which has exclusive jurisdiction to litigate UPs.

The performance of the UPC was indicated by participants to be the second most important factor (after the level of renewal fees) in determining how extensively the UP will be adopted. In this context some firm representatives and a judge pointed out that if the UPC’s procedures are efficient and reliable, a firm seeking to patent a very valuable and highly innovative technology should find the UP highly attractive as the costs of enforcement are likely to be lower for a UP than for an EP validated in several states or a bundle of national rights.
2.5 Debates on adjusting the unitary patent package

A number of the comments listed above were further debated within the workshop working groups. These debates yielded some suggestions as to how the UPP might be adjusted to improve outcomes for the users of the new patent system.

Complexity and strategic behaviour

The first debate took place on the topic of strategic behaviour during the phase where EPs can be litigated before national courts or before the UPC. Participants suggested two mechanisms that might reduce excessive strategic patenting: either shortening the length of the transition phase (which is practically impossible) or using pricing mechanisms to make the EP relatively less attractive than the UP. When it was mooted that national patents should also be removed from the system, some participants indicated that these were important for SMEs and that any attempt to abolish national patents would damage the prospects of SMEs in Europe. In general, applicants usually first file at national level before filing an EP application. At a later stage, the national application is typically dropped as double protection in the form of a national patent and an EP is not possible in most member states. Whether or not an SME is going to need a pan-European right will depend very much on its business model. Also, national patents would be much less important to SMEs in the context of a fee reduction for SMEs using the UP and a small claims track at the UPC.

Business models of national patent offices

The second debate focused on the business models of national patent offices within the new patent system, given the greater role that the EPO would take relative to the national offices in the post-grant administration of patents in Europe. Several participants noted that one reason the European patent system has become complex is that the national patent offices have a strong interest in maintaining their current sources of income. In order to simplify the European patent system it was suggested that national patent offices would need to find new roles or business models within the overall system. This could consist of the provision of additional support for SMEs, seeking to obtain either an EP or a UP. These suggestions are all based on the assumption that national patents would over time no longer be part of the European patent system within the member states. As indicated above, however, it was also emphasised during the workshop that national patents are particularly important to SMEs and any attempt to abolish national patents could damage the prospects of SMEs in Europe.

Impact on firms at the national level

Workshop participants pointed out that a large proportion of EPs is currently granted to firms from outside the EU, and that the UP would be likely to attract even more applicants from beyond the borders of the EU. Some concerns were expressed that in countries where EP validation is currently low, local industry’s freedom to operate might become more limited under the UP-regime. The question was raised how this would affect firms within the member states which have not previously used the patent system and which might find themselves facing additional foreign (EU and non-EU) competitors holding one or more UPs. The views among participants on whether or not this would affect competition in favour of foreign competitors were mixed.
3 The Unified Patent Court

Participants at the second workshop were requested to identify benefits and costs of the UPC for users of the European patent system as well as other stakeholders. This second category was interpreted to include firms affected by the UPC and judges or attorneys. Participants were also asked to rank their observations in order of importance. Accordingly this section sets out the benefits and the costs of the UPC. These are supplemented by two sections reviewing general concerns voiced about UPC and debates that emerged in the working groups as well as in the joint sessions. The latter sections are added as the issues discussed under these headings cut across the benefit-cost dichotomy.

It is worthwhile repeating the observation in the box on patenting in Europe regarding the different paths through which firms may come into contact with the UPC: this may either be by choosing an EP and not opting out of the UPC or by choosing a UP. In either case the rulings of the UPC will apply to the patent right as a whole. For the EP (without opting out of the UPC) this implies that the entire bundle of national rights can be nullified or upheld, and that possible injunctions granted by the UPC apply to all member states in which the EP has been validated, providing these states have ratified the UPC Agreement.

3.1 Benefits of the Unified Patent Court

Main benefits

At the beginning of the workshop the advantages of the UPC over the current state of patent litigation in Europe were summarised. An immediate benefit of the UPC lies in avoiding multiple litigation in different jurisdictions in Europe with the risk of contradictory judgements. There is also hope for the potential for further harmonisation of the court procedures that would apply throughout Europe. As noted in the introduction, the EP becomes a bundle of national patents upon grant. This implies that currently both the infringement and revocation of the patent must be pursued in the national courts. Also, there are substantive differences in court procedures in the EU member states, leading to differences in the speed with which cases are decided, differences in the costs of reaching such decisions and quite frequently differences in the outcomes of cases.

In contrast, the aim of the UPC Agreement is to create one single specialised patent court, operating under one set of rules of proceedings and developing harmonised and consistent jurisprudence throughout the territory of the member states. At the workshop it was noted in particular that, alongside its decisions, the UPC could possibly publish dissenting opinions of individual judges sitting on the court, leading to more “intelligible and harmonised jurisprudence”.

Workshop participants noted with approval that the current draft rules of procedure for the UPC indicate that cases will be dealt with quickly and effectively. The aim is that the court will be composed of highly qualified judges. The court will not usually need to involve technical experts as technical judges will be present, and it will ensure active case management, i.e. arguments will be presented in written form early on and the parties will be held to strict deadlines to ensure that initial judgements can be made quickly. All of this should limit possible delaying tactics of parties and ensure that the court is an attractive alternative to the existing national courts.

A significant reduction in the high cost of enforcement for firms that validate in many or all member states was also frequently cited by workshop participants as a significant benefit of the UPC. This is typically the case in the pharmaceuticals industry but also affects firms in other industries. Workshop participants from the pharmaceuticals industry confirmed that currently pharmaceutical patents are frequently litigated in parallel in several national courts.

Workshop participants agreed that harmonisation brought about by the UPP could benefit firms in Europe. The cost of litigation at the UPC was frequently raised as an issue with the potential to question or qualify these benefits. This aspect is discussed further below in the sections on disadvantages and debates. Participants noted in particular that frequently cited “torpedo” actions would be eliminated by the UPC system, contributing to speedier resolution of patent disputes in Europe. Also, it was noted that the sheer complexity of having to deal with procedural differences in Europe is large and therefore the introduction of a common European patent court is beneficial.
Further benefits anticipated

Workshop participants expressed the view that the UPC is likely to be particularly attractive to parties seeking to obtain injunctions or revocations that apply throughout the territory of the member states. This makes rulings by the UPC economically very significant for the parties involved. Whether the UPC is chosen, will partly depend on how users view the strength of their patent in any particular case. Some users participating at the workshop indicated that their firms have developed complex evaluation procedures that will allow them to gauge when to rely on the UPC and when not to. This shows that users will exploit the full range of enforcement options available to them during the transition phase, which will reintroduce a degree of complexity into the European patent system but at the same time provides choices. This point is further pursued in the section on debates below.

Users noted that the number of oppositions brought in the nine-month period after the grant of a patent at EPO would likely decrease as a result of the possibility of centralised revocation proceedings, which could reduce the case load to be dealt with by the EPO. This benefit will only be material if a large proportion of patents granted by the EPO comes under the jurisdiction of the UPC. Here the relative costs of the two systems will be of central importance in determining the intensity with which applicants make use of the UP and the EP.

Users also noted that it was likely that the EPO would have to consider the UPC’s interpretation of patent law in applying such law. To what extent this will have practical relevance for users is very difficult to predict. The EPO boards of appeal are not part of the EU judicial framework.

Finally, users voiced the expectation that the UPC would help to spread expertise in dealing with patent litigation to member states in which such litigation is currently rare and in which the courts are currently not very familiar with such cases. This would benefit potential patentees in such countries and increase access to the patent system for such firms.

3.2 Disadvantages of the Unified Patent Court

Several participants at the workshop indicated that patents protecting “pioneer” inventions (“crown jewel” patents) with the potential for strong revenues will likely be kept outside the UPC scheme to avoid the possibility of central revocation for all states participating in the UPC Agreement. Furthermore, users indicated that patents protecting incremental inventions with the possibility of amending the invention during the patent’s lifetime period and receiving new protection for the amended invention are just as important to secure revenues. According to many workshop participants, such patents would thus also be kept out of the UPC jurisdiction.

3.3 Comments on the Unified Patent Court Agreement

Some workshop participants with legal backgrounds felt that the status of the UPC within the EU judicial system was not clear and that this may yet have repercussions for the entire UP/UPC system. Specifically the relationship between the UPC and the CJEU is not entirely clear. This point was countered by others stating that the UPC would be a court common to the EU member states with the obligation to submit questions of EU law to the CJEU as any national court would have to. They also stated that it is not important that the UPC is created by an international agreement between the EU member states. Comments on the UPC Agreement at the workshop ranged from constitutional questions to far more practical matters. All of these comments touched on how well the court is likely to fulfil its role as intended.

Starting with the constitutional aspects, a few participants expressed their impression that there was a political desire to remove as much as possible the workings of the UPC from oversight by the CJEU. They pointed at what they saw as the CJEU’s not-so-strong record in dealing with trademark cases and the need for unanimity that characterises procedures at the CJEU. Nonetheless, these participants wondered whether the CJEU would accept its role in patent litigation in Europe in the compromise that was adopted.24
At a more practical level the UPC Agreement contains provisions in Article 83 that allow the owner of a patent, patent application or supplementary protection certificate (SPC) to opt out of the scope of the UPC Agreement and thus of the jurisdiction of the UPC, leaving the national courts with the jurisdiction. These provisions also allow the patent owner to opt back into the UPC scheme. The wording of the provisions in Article 83(3) and 83(4) of the UPC Agreement has left some commentators confused regarding the duration and the extent of an opt-out, and this was reflected at the workshop.

Further, it was pointed out by legal experts that Article 83(1) of the UPC Agreement opens the possibility that during a transition period of seven years any party could approach a national court with the request to revoke the national part of an EP. This provision applies only to the EP, not the UP. It was also pointed out that this provision would open up the possibility of simultaneous actions before a national court and the UPC regarding the very same patent. Legal experts present at the workshop indicated that the Brussels I Regulation did not entirely avoid this but they were of the opinion that parallel litigation before a national court and the UPC should be avoided on principle.

It was noted by some participants that there seems to be political consensus and a general legal view that during the transitional period the national courts would not have to apply the substantive provisions of the UPC Agreement to a case brought regarding an EP. As an example these participants mentioned the substantive provisions governing research exemptions for pharmaceutical patents (Bolar provisions), which differ across member states and between the member states and the UPC. In this context the possibility for a plaintiff to select a national court under Article 83(1) is problematic.

A number of users noted that the possibility of bifurcation within the UPC system could be problematic, in the sense that it could provide opportunities for strategic behaviour. Those involved in drawing up the rules of procedure for the UPC noted that bifurcation is by no means automatic and that due to procedural considerations and the composition of judicial panels of the UPC, it was unlikely to arise very frequently.

As another practical matter, participants in two groups discussed whether cases relating to the same patent might be joined together by the UPC to make enforcement less costly. Here there seems to be the need for further clarification of the rules. Also it is currently not clear how efforts to improve the uptake of arbitration will affect the costs of cases brought before the UPC.

At the most practical level one working group discussed in detail the transitional arrangements for judges and other personnel working for the UPC. Views were expressed that a wholesale switching of judges from their current work within national court systems to the UPC is not envisaged. Rather the UPC should be able to slowly ramp up its operations by drawing on judges who are able to work there part-time. This in turn requires cooperation with national court systems. It was also noted that in order to maintain the independence of the court the UPC would not accept employees of the EPO as part-time technical judges.

All users present at the workshops were unanimous in their view that the UPP would succeed if the UPC was seen to be a reliable and efficacious court and that the UPC would succeed if it was staffed by the most experienced and reputable patent judges in Europe. In sum, if there is any competition between the UPC and national courts it is likely to be decided primarily on the basis of which court system is able to attract those judges whom users wish to rely on.

One non-negligible facet of this is the level of remuneration to be offered to the judges of the UPC. It was noted that the level of pay that is offered to judges in Europe varies tremendously and that the highest levels of remuneration are found in the UK where judges are drawn from the ranks of specialised barristers who typically earn very significant fees. While the levels of remuneration have not been fixed as yet, there is clearly an expectation that judges currently drawing salaries at the top end of the scale in Europe will not find the UPC entirely unattractive to ensure that the expertise of the judges making up the court is as broad as possible. As a result the level of interest in positions at the UPC from judges in countries with significantly lower salaries for judges is very high. There was an indication that this level of interest is not always commensurate with the level of experience that judges could bring to the court. An advisory panel is currently determining the criteria on which to base the selection of judges to the UPC.

Finally, it was pointed out that the UPC would most likely not start to operate before 2015 due to the set-up of its IT system and the UPC Agreement’s ratification process in the member states.
3.4 Debates on procedure and functioning of the Unified Patent Court

There were two significant debates during the workshop on the UPC. The first related to costs, participation and NPEs. The second related to complexity, forum shopping, the role of regional and local divisions and again NPEs. Both debates are presented below.

Costs, participation and NPEs

The cost of litigation at the UPC was raised as a matter for concern, just as the administrative and renewal fees applicable to a UP were raised during the workshop on the previous day. The cost of litigation at the UPC comprises both court fees and the fees payable to attorneys. The concerns were raised by all users, but a particular emphasis was put on SMEs. It was pointed out by legal experts that under the UPC Agreement the level of court fees has to be fixed to ensure a proper balance between the principle of fair access to justice, in particular for SMEs, micro-entities, natural persons, non-profit organisations, universities and public research organisations on the one hand, and an adequate contribution by the parties for the costs incurred by the court on the other. Furthermore, it was indicated that the UPC Agreement also provides for the introduction of a cap on recoverable costs.

However, as noted by others a ceiling on recoverable costs is not straightforward as it would mean that some non-practicing entities (NPEs; trolls) may also fall under this cap. This could remove a barrier to NPE-related litigation in Europe namely, the risk of having to pay all legal costs in the event of an unfavourable ruling, a prospect no workshop participant was in favour of.

One possible solution that was suggested by participants was to emulate the UK’s IP and Enterprise Court (IPEC) by imposing limits on both the recoverable damages and costs, effectively creating a small claims track for the UPC. Currently it seems that such a small claims track is not envisaged for the UPC as it is believed that the procedural innovations that the UPC already offers will help to lower the cost of using the court enough to help SMEs.

Complexity, regional and local divisions and NPEs

Some participants voiced the concern that there would be opportunities for strategic behaviour by patent applicants, observing that it would be important to prevent parallel protection of the same invention in separate tiers of the system. An opportunity to game the new patent system could arise if parties were able to select local or regional divisions in which the judicial panels were staffed by less experienced judges. It has even been suggested that some local or regional divisions could be created with a specific bias in order to attract users with weak patents to the division. It was pointed out that a number of provisions would stand in the way of such weak divisions with a specific bias. First, panels would never be staffed entirely by local judges and second there would be strong central oversight from the Court of Appeal. Also, legal experts pointed out that the three-judge panel of a division with less than 50 cases per year would include two highly experienced judges from the pool of judges. This would be the majority of local panels. In addition, participants noted the provision in Article 33 of the UPC Agreement that states that if a patent is infringed in more than two regional divisions at the same time, the defendant can ask to have the case referred to the central division of the UPC (the so-called “double Dutch” provision). This would make the system less attractive for NPEs as specific regional divisions cannot be targeted easily.

Finally, there was a debate surrounding opportunities for some NPEs to game the patent system. The question raised most forcefully in this regard was whether the possibility of bifurcation and the resulting delay in the validity decision would not create opportunities for NPEs to hold up other firms. In addition participants pointed to the much greater threat that a pan-European injunction might pose for firms facing an infringement suit in a UPC division that decides in the case of a counterclaim for revocation to bifurcate and transfer the question of validity to the central division of the UPC. In this context legal experts pointed out that the UPC’s judges would have to take the interests of both parties into account before an injunction is granted. Furthermore, the injunction decision is open to immediate appeal before the Court of Appeal of the UPC. At the request, the appeal has a suspensive effect, with the result that the decision cannot be enforced unless the Court of Appeal decides negatively on the appeal. At the end of this debate it was urged by some that more detail could be added to the rules of procedure on this matter, but
the suggestion was resisted by others. It was argued that matters of legal substance should not be solved via the procedural rules for the UPC. There was some disagreement on this point with certain lawyers arguing against this stance.

More generally it was pointed out that the UPC is not likely to be an attractive venue for NPEs due to the losers’ liability for legal costs, the absence of jury trials and the absence of a strong presumption of validity and court discretion on injunctions. While users agreed that liability for costs matters and is a strong feature of the current UPC proposals, they were less convinced about the absence of a presumption of validity.

In this respect, however, one participant expressed the general view, based on experience with the CAFC in the US, that new patent courts tend to be pro-plaintiff and pro-patent, and that this could have implications for those seeking to defend themselves against infringement claims based on weak patents. Others noted that while the possibility of clearing the way through central revocation may be an option in fields such as chemistry or pharmaceuticals, it seems less viable in ICT technologies that are more likely to be affected by patent thickets. Some representatives of the ICT industry wanted more safeguards in the UPC’s rules of procedure.

4 Conclusion

Overall there was both optimism and concern about the unitary patent package on display at the two workshops covered by this report.

With respect to the UP, the most significant benefits noted by participants during the first-day workshop on the UP are the administrative simplification of patenting in Europe, the potential for saving costs, including validation, translation and post-grant administration costs, and the geographic extension of patent protection.

However, the discussion also brought to light a number of critical decisions that have yet to be taken and that will determine how users come to evaluate the UP on a day-to-day basis. First and foremost these relate to the level of the UP renewal fees and the costs related to litigation before the UPC. Users pointed to the precedent set by the IPEC in the UK where costs and damages are capped in a small claims track. It was also pointed out by some participants that the additional tier to the patent system created by the unitary patent is complicated, although other users welcomed the additional choice. Several users suggested that pricing incentives could be used to shape the new system into one in which specific tiers are significantly more attractive to users than others.

An immediate benefit of the UPC lies in avoiding multiple patent litigation in different jurisdictions in Europe. There is also hope for the potential for further harmonisation of the court procedures that would apply throughout Europe. It was noted that the UPC Agreement creates one single specialised patent court, operating under one set of rules of proceedings and developing harmonised and consistent jurisprudence throughout the territory of the member states. It was expected that the UPC would be composed of highly qualified judges, who would deal quickly and effectively with cases. Workshop participants also frequently cited significant reductions in the high cost of enforcement for firms that validate in many or all member states as a significant benefit.
Participants at the workshop also expressed concerns. The main concern is the uncertainty regarding the future functioning of the UPC. There is uncertainty whether the court will function more like the current national courts in Germany or more like the current national courts in the UK. Also, there was concern amongst some participants that the UPC should not become the means by which the NPE industry currently active in the US patent system extends its activities to Europe. Although there were mixed views on this, some participants also raised concerns with respect to the clarity of the language of the UPC Agreement, especially with respect to Article 83.

As the process of consultation on the UPC's rules of procedure and deliberations on the pricing of the UP and the UPC are ongoing, the views of users, attorneys, judges and academics summarised in this report will hopefully be helpful in further improving the UPP in the interests of all of its future users.
References


Cremers, Ernicke, Gaessler, Harhoff, Helmers, McDonagh, Schliessler, van Zeebroeck, 2013. Patent Litigation in Europe 1-70


Tilmann, W., 2013. The compromise on the uniform protection for EU patents. Journal of Intellectual Property Law & Practice 8, 78-81

Endnotes

1 Strictly speaking the term “unitary patent package” is not correct because the Unified Patent Court will also be dealing with classic European Patents. However, this report will use “unitary patent package” (UPP) to refer to the unitary patent and the Unified Patent Court.

2 An important part of the workshops consisted of a discussion of an ongoing study of patent user views on the UPP by Europe Economics. At the time of the workshop the study results were preliminary and are therefore not discussed in this report.

3 Also referred to as a “European patent with unitary effect”.

4 These are Regulations (EU) No. 1257/2012 and (EU) No. 1260/2012.

5 Currently Croatia, Italy and Spain are not participating in the enhanced cooperation on the unitary patent with the result that this patent will not cover their territories. Croatia, Poland and Spain have not signed the Agreement on a Unified Patent Court.

6 See Pila (2013) for a detailed history of the evolution of patent legislation in Europe.

7 Compare Regulation 1257, paragraph (4).

8 As Jaffe (2000) points out, economists have found it hard to identify the effects of this reform on innovation. Three recent papers are particularly pertinent in the context of the UPP: Nicholas (2011) analyses the reduction of patent filing fees by 84% in 1884 in Britain and finds that while this increased the level of patenting, i.e. the reach of the patent system to smaller firms, it did not raise the number of highly cited patents originating in the United Kingdom and filed in the United States. On this rather indirect measure of important innovations, the level of patent fees had no effect on important innovations originating in Britain. Using historical data from the world fairs in 1851 and 1876, Moser (2005) shows that stronger patent laws affect the kinds of innovation undertaken in an economy, and thus the types of industries that are established within it. Kyle and McGahan (2012) analyse how the adoption of the TRIPS agreement by countries around the world affected R&D efforts of pharmaceutical firms directed at both globally prevalent diseases and diseases affecting mainly those living in less developed countries. They find that there is a response in terms of R&D investments, but that this is strongest for those diseases prevalent in high-income countries. These papers show that the effects on innovation of reforms to patent systems are not the same across industries and that an impetus for growth can, but may not, result.

9 Note that not every national office offers examination services.

10 This point is elaborated by Hilty et al. (2012).

11 Rules for opting in and out of the UPC are set out in Article 83 of the UPC Agreement. There is some confusion on the precise implications of this article. This is discussed in more detail in the section on the disadvantages of the UPC.

12 Compare Smits and Bull (2012).

13 Much of the work took place in four working groups so it is not possible to offer a final ranking of problems that was accepted by all workshop participants. Every effort was nonetheless made to identify important and less important problems from the reports of the group rapporteurs and chairs.

14 Some participants noted that the London Agreement, formally the Agreement on the application of Article 65 of the Convention on the Grant of European Patents, had already lowered these cost substantially, so that the UPP provides only an incremental benefit in this respect. This agreement entered into force on 1 May 2008.

15 For example, it was mooted that applicants could file a patent in the UP system and a divisional thereof in the EP or national systems. The increased possibility of having various types of patents on the same invention could make it more costly for rivals to dislodge such patents if they were to be invalid.

16 One of the participants noted that Europe lags behind other developed economies such as the United States in its ability to foster fast growing SMEs. Whether this phenomenon can at least partly be attributed to the functioning of the IP systems in Europe is unknown. However, it seems reasonable in the light of what is known about SMEs, namely that the high cost of patenting discourages the use of this option by SMEs and that IP is increasingly important to secure funding in high technology sectors (Graham et al., 2009), that the high-cost patent system has an effect on SME’s prospects.

17 A report commissioned by the ESAB supports the notion that applicants’ adoption of the UPP will be highly dependent on the level of renewal fees. See Table 4.11 of “Economic Analysis of the unitary patent and the Unified Patent Court”, Europe Economics, April 2014.
Again much work took place in four working groups so it is not possible to offer a final ranking of problems that was accepted by all workshop participants. Every effort was nonetheless made to identify important and less important problems from the reports of the group rapporteurs and chairs.

In the first nine months after the grant of an EP it is possible to commence an opposition procedure with the aim of having the patent revoked. This procedure is centralised and being administrative has a relatively low cost. This is the only exception to the rule that bundle patents must be enforced or revoked before national courts.

It was noted that it appeared increasingly common for judges sitting on parallel patent cases in different member states, to take note of each others’ findings and rulings. This in itself may be contributing to greater uniformity of outcomes in parallel patent litigation.

Cremers et al. (2013) confirm the very wide range of procedures used by national courts, variations in the duration of cases from filing to first decision and in the types of outcomes that are typically observed. This indicates that there will be benefits from harmonisation of court procedures. Providing reliable estimates of the economic importance of these is likely to be very challenging due to the important element of self-selection at work in any litigation system. Evidence derived from the establishment of the CAFC in the United States suggests that harmonisation of patent law by the CAFC contributed significantly to a reduction in the duration of patent cases there (Galasso and Schankerman, 2010).

Cremers et al. (2013) also provide a first comparative review of the incidence of parallel litigation cases in Europe for the period 2000-2008. Their analysis does not suggest that the problem of parallel litigation arises very frequently: only 8.4% of EP patents that are litigated, are litigated in more than one jurisdiction. Taking into account that only a small proportion of patents are ever litigated, these findings suggest that reducing parallel litigation will be a significant benefit for large international pharmaceutical firms but not necessarily for very many other firms currently using the European patent system.

A “torpedo” action arises when a potential defendant in a patent litigation case abuses the *lis pendens* rule by bringing a prior action, for instance in response to a warning letter, against the plaintiff in a jurisdiction that is noted for the duration of court cases. *Lis pendens* implies that the case the plaintiff intended to bring would be stayed until the prior action was concluded. More detail can be found here: www.commonlawreview.cz/cross-border-qtorpedoq-litigation.

These participants are echoing a widespread unease that the CJEU may yet alter the way in which the UPP and in particular the UPC operates and that this may be done in such a way as to make the UP and UPC unattractive for users (Hilty et al., 2012; Tilmann, 2013; Wadlow, 2013)

This point is further discussed by Alan Johnson and Richard Pinckney here: www.bristows.com/articles/draft-brussels-regulation-amendments-add-confusion-to-upc-opt-out-regime-by-richard-pinckney-and-alan-johnson

This is discussed by various contributors on the web: http://ipkitten.blogspot.co.uk/2013/04/harmonisation-by-back-door-what-will.html and: http://www.reddie.co.uk/news-and-resources/ip-developments/clinical-trials-the-unitary-patent-and-bolar-exemptions.

The law and economics literature describes NPEs as firms that specialise in the acquisition and assertion of patent portfolios without any interest in exploitation of these portfolios in products of their own (Chien, 2008; Farrell and Shapiro, 2008; Reitzig et al., 2007). Some of these NPEs are sometimes referred to as “trolls”.

This argument can be found in the records of a CIPA seminar on the UPP which are published on the web: http://www.cipa.org.uk/pages/UPC-Free-Webinar-CIPA-2013. At the workshop it was also noted that the UPC would have discretion in allowing parties to ramp up the costs of a case by introducing expert witnesses. In effect this could mean that the court can limit costs of a case, if it perceives this to be commensurate with the damages at issue. The problem for SMEs in this case is the uncertainty about how the court will proceed in a particular case.
Annex 1

List of participants at the Economic and Scientific Advisory Board’s workshop on the economic effects of the unitary patent and the Unified Patent Court

Date: 3 and 4 December 2013

<table>
<thead>
<tr>
<th>First name</th>
<th>Surname</th>
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<tr>
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**EPO participants**

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| Nicolas    | Kopp          | Director Finance and Budget                                                 |
| George     | Lazaridis     | Chief Economist Unit; Financial Controlling and Statistics                 |
| Jean-François | Lebesnerais  | International Legal Affairs                                                |
| Stefan     | Luginbuehl    | International Legal Affairs                                                |
| Florence   | Muller        | Financial Policy and Planning                                               |
| Minna      | Nikolova-Kress| European Co-operation                                                       |
| Mariella   | Piana         | European Academy                                                            |
| Bettina    | Reichl        | Financial Controlling and Statistics                                         |
| Karin      | Terzić        | Chief Economist Unit                                                        |
| Theon      | van Dijk      | Chief Economist                                                             |
Annex 2

Programme of the ESAB workshop on the economic effects of the unitary patent and the Unified Patent Court

3 December 2013 | Unitary patent

09.00 Opening and welcome
Raimund Lutz, EPO Vice President
Dietmar Harhoff, Max Planck Institute for Innovation and Competition, ESAB Chairman

09.15 Plenary 1 | Chair: Sadao Nagaoka, Hitotsubashi University
Introduction into the unitary patent | Margot Fröhlinger, EPO (legal aspects) – 10 mins
Europe Economics | Preliminary findings of the study – 30 mins
Short Comments (5 mins each)
Bruno van Pottelsberghe, Solvay Brussels School
Ruud Peters, Koninklijke Philips N.V.
Jacques Combeau, Air Liquide
Hanns Ullrich, Max Planck Institute for Innovation and Competition
Gabriele Leißler-Gerstl, Hoefer & Partner
Initial Discussion (15 mins)

10.40 Coffee break

11.00 Group work
Questions: What are the expected benefits and disadvantages of the unitary patent for inventors? How important are these? Besides inventors, how are other stakeholders affected by the unitary patent?
Chair of Group 1: Udo Meyer, BASF SE
Chair of Group 2: Vincent Tilman, Eurochambres
Chair of Group 3: Geertrui van Overwalle, KU Leuven
Chair of Group 4: Pieter Callens, Eubelius

13.00 Lunch

14.10 Plenary 2 | Chair: Bronwyn Hall, UC Berkeley
Presentation and discussion of initial group work findings by group chairs

15.20 Coffee break

15.45 Continuation of group work
Open issues from the morning’s group work and conclusions

16.45 Coffee break

17.00 Plenary 3 | Chair: Dietmar Harhoff, MPI for Innovation and Competition
Presentation of group work findings by group chairs and discussion

18.00 Closing | Benoît Battistelli, EPO President

19.30 Dinner
09.00  **Opening and welcome** | *Dietmar Harhoff, Max Planck Institute for Innovation and Competition, ESAB Chairman*

09.15  **Plenary 1** | *Chair: Ayşe Odman Boztosun, Akdeniz University*

**Introduction into the Unified Patent Court** | *Kevin Mooney, Simmons & Simmons, legal aspects (10 mins)*

*Europe Economics: preliminary findings of the study (20 mins)*

**Short comments (5 mins each)**

*Eugen Popp, Meissner Bolte*

*Tony Tangena, epi*

*Giustino de Sanctis, Sisvel International*

*Sir Robin Jacob, University College London*

10.15  **Coffee break**

**10.45 Group work**

**Questions:** Compared to patent litigation before national courts, what are the expected benefits and potential disadvantages of the Unified Patent Court for patent owners and for third parties? How important are each of these? Do they differ between types of companies and across sectors?

*Chair of Group 1: Pierre Véron, Véron & associés*

*Chair of Group 2: Gabriele Leißler-Gerstl, Hoefer & Partner*

*Chair of Group 3: Samuel Granata, Commercial Court Antwerp*

*Chair of Group 4: Sir Robin Jacob, University College London*

12.45  **Lunch**

**13.45 Plenary 2** | *Chair: Ruud Peters, Koninklijke Philips N.V.*

**Presentation of group work findings by group chairs**

14.45  **Coffee break**

**15.30 Closing** | *Dietmar Harhoff, MPI for Innovation and Competition*
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