

Kluwer Patent Blog

Kluwer Patent Blog Poll: The Results

Rik Lambers (Brinkhof) · Tuesday, September 24th, 2013

This Summer we asked for your participation in a poll on the option to bifurcate under the Unified Patent Court ('UPC') and the implications this may have for litigation by Non Practicing Entities ('NPEs', or for the Lord of the Rings aficionados amongst you: 'patent trolls'). Studying clinical trials more than often as part of our patent litigation adventures, we wanted to conduct a small scale experiment on the broadest patent litigation experiment yet to come. But enough of our motivation. What were your, very much appreciated, votes?

First, one of you was lost to follow-up: seventy-three of you started out to answer our questions, but one of you did not reach it to the fourth. The litigators/prosecutors we are, we could argue away any bias this may have on the results. We will spare you our pleadings, and conclude that this one vote (out of 292), would not alter our conclusion: the UPC, specifically the subject of (absence of) a synergistic effect of bifurcation and NPEs, left you divided. Judge for yourselves. In one lump sum, here are the results (click the picture to enlarge it):

Will the UPC system end up being bifurcated?

Answer	Votes	Vote Count/Percentage
1 (not likely at all)		23 Votes(31%)
2		9 Votes(12%)
3		10 Votes(13%)
4		15 Votes(20%)
5 (very likely)		16 Votes(21%)
Total Votes: 73		

Will a bifurcated system lead to forum shopping?

Answer	Votes	Vote Count/Percentage
1 (not likely at all)		21 Votes(28%)
2		14 Votes(19%)
3		3 Votes(4%)
4		13 Votes(17%)
5 (very likely)		22 Votes(30%)
Total Votes: 73		

Will a bifurcated system increase patent litigation by NPEs?

Answer	Votes	Vote Count/Percentage
1 (not likely at all)		21 Votes(28%)
2		10 Votes(13%)
3		12 Votes(16%)
4		9 Votes(12%)
5 (very likely)		21 Votes(28%)
Total Votes: 73		

Will a bifurcated system be bad for European based companies?

Answer	Votes	Vote Count/Percentage
1 (not likely at all)		21 Votes(29%)
2		10 Votes(13%)
3		13 Votes(18%)
4		12 Votes(16%)
5 (very likely)		16 Votes(22%)
Total Votes: 72		

If we set all statistical significance aside – if there was any to start with – and leave the safeness of middle ground (i.e. the answers to the second and third question, and the second to fourth answer to every question), we may note the following.

The first question (“*Will the UPC system end up being bifurcated*”) and the fourth (“*Will a bifurcated system be bad for European businesses*”) received the most distinctive responses on the very extremes of your choices: 31% of you found it ‘not likely’ at all the UPC system will end up being bifurcated, compared to 21% it ‘very likely’ will be. And 29% of you found it not likely at all that a bifurcated system will be bad for European business, while 22% of you think it very likely will be.

This allows for numerous interpretations. One is that you do not share the expressed proposition that bifurcation will become the UPC standard, and *therefore* the UPC will not be bad for European business. Another one is that you see no correlation between bifurcation and the merits of the UPC system, good or bad, for European based companies. A further possibility– again, we left any statistical significance miles behind here – is that there is no correlation between the 31% ‘not likely at all’ voters on the first question, and the 29% ‘very likely’ on the fourth. And this is not to speak of the *Why* (did the currently consulted Rules of Procedure set you in any direction?), or *Where* (did you English/German participants make up the 31% vote?).

In short, your response raises more questions than we posed. Polls are trolls in the search of clear answers. As such, it reflects the current reading of tea leaves when it comes to the UPC, even if those leaves are the Rules of Procedure. Opinion guided by draft rules has to prove itself in practice. Or, the proof of the UPC is in the eating. In any event, we thank you for joining us in this quick bite as an appetizer of the feast that is to come (or not).

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