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Exploring Perspectives of the Unified Patent Court and Unitary Patent within the Business and Legal Communities – A Report for the UK Intellectual Property Office

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Since the announcement of the establishment of the Unified Patent Court (UPC) and Unitary Patent (UP) for Europe there has been much speculation concerning the potential positives and negatives of the new system, but little empirical evidence has been provided on the subject. For this reason, in January 2014 the UK Intellectual Property Office (IPO) commissioned a qualitative, empirical study of the views of the UPC and UP within the business and legal communities. The study was launched at the Chartered Institute of Patent Attorneys in London on July 9th.

The three main objectives of the study were as follows:

- To identify the key issues of concern to the business and legal sectors with regards to the Unified Patent Court and the Unitary Patent.
- To assess and appraise which issues are of greater or lesser relative importance to stakeholders.
- To gauge the overall sentiment of the aforementioned stakeholders with respect to the introduction of the Unified Patent Court and the Unitary Patent, including the likelihood that they will engage with the new system.

The study's methodology involved the author first undertaking a review of existing literature on the current state of patent litigation in Europe as well as the UPC/UP reforms, such as the 2013 ZEW comparative study of patent litigation in Germany, the UK, the Netherlands and France headed up by Katrin Cremers. Following this review, the author designed the questions and representative sample, and undertook 26 interviews with key stakeholders within the business and legal sectors (15 from the business sector, 11 from the legal sector). Interviews took place with participants based in the UK, Germany and the US. Finally, the data from these interviews were analysed and a number of key issues were highlighted. The key findings of the report are as follows:

(a) The issues of judicial composition and quality will be crucial to the success of the UPC

Potential users of the UPC have real concerns regarding bifurcation and the granting of injunctions (especially in the ICT sector) and the central revocation risk (particularly evident in the Pharmaceutical sector). There is also anxiety amongst stakeholders concerning the potential for an

increase in patent troll litigation and forum shopping at the UPC. In this respect, companies in all sectors have concerns about the maintenance of common standards across the 25 MS of the UPC.

In this respect, it is imperative that a high-quality judiciary is established across the entire UPC system, as this will do much to alleviate these concerns. To achieve this, effective training must be provided for the judiciary and the final UPC Rules of Procedure must be defined and published as soon as possible.

(b) Cost is a real issue of concern for potential users of the UPC and UP

There is hope that the UPC will lead to lower overall costs for patent litigation in Europe; however, this is tempered by the fact that many potential users fear that the costs of patent litigation in Europe will in fact increase, particularly if German-style high court fees or UK-style high private legal costs come into play. On this point, there are some concerns over the value-based fee system, including its perceived unpredictability; nonetheless, some are positive about the value-based system, noting that it works well in Germany.

Regarding the UP, many businesses – particularly in the ICT and ENG sectors – report that the wide protection offered by the UP may not be worth paying for, although it will be seen positively if fees are set at a reasonable level. This is particularly important since companies in many sectors do not currently validate patents beyond 3-4 European Member States (typically the UK, Germany and France). For this reason, a UP renewal fee which is set far above the combined UK, French and German renewal fees is likely to reduce the attractiveness of the UP as an option for those who currently take out limited European protection (though for the Pharma sector, which patents much more widely, there is a clear benefit in this respect).

Importantly, by setting the UP renewal fee at the combined 3 MS level, the UP organisers can encourage uptake of the patent in the early days of the system. Nonetheless, there are likely to be benefits of the UP which are hard for businesses to quantify at this stage. Indeed, recent research by the EPO and the UK IPO indicates that the UP may be seen as a more valuable asset than the current bundle of EPs, which may help businesses to raise finance for research and development.

(c) Whether to opt-in or opt-out of the UPC jurisdiction is an important decision for patentees, and many are as yet undecided about what they intend to do

The responses strongly suggest that the opt-out fee will be a major factor in this decision and several interviewees argued that it should be set at an administrative level. Even so, some interviewees further noted that for companies with large portfolios even a low opt-out fee would mean the costs for opting out everything in the portfolio would be very high i.e. if the fee were set as a ‘per patent’ fee. While it is surely tempting for the UPC/UP organisers to try to use the opt-out fee to make it financially unviable for companies to opt their patents out of the new system, this is not recommended as it is unlikely to create goodwill amongst patentees – something that the new system will rely upon if it is to be a success. Instead, the priority ought to be on setting up a high quality judiciary, and making sure the costs of the new system make it widely accessible.

The data also suggest that currently many patentees are strongly considering opting-out their most valuable patents, while keeping their low and mid-range patents within the UPC system; alternatively, some patentees may choose to opt-in their ‘strongest’ patents to benefit from one-stop enforcement.

(d) The London-based Central Division is expected to be beneficial for both for the legal community in London and for the Pharmaceutical sector more generally

The legal profession faces a number of important challenges over the coming years as a result of the new system. The emerging view is that larger firms will benefit over smaller firms due to the amount of resources required to conduct speedy patent trials at the UPC. Patent attorneys expect there to be an increase in costs for their firms. The use of English at the UPC is seen as a benefit for UK firms – and the Pharma sector is happy that the Pharma/Chemicals Central Division will be located in London, a hub of expertise in the area.

(e) The key concerns for SMEs are the revocation risk, the injunction risk and the cost of using the new system

SMEs share many of the primary concerns of the larger companies regarding the UPC. However, the major difference for SMEs is the scale of the risk involved: a revocation ruling – or an injunction grant – issued against an SME with effect across 25 MS could prove fatal to the SME's prospects. Moreover, if the UPC is expensive to use, SMEs are likely to avoid it. The planners should explore ways of ensuring that the value-based fees system makes the UPC accessible to SMEs. This could include the incorporation of a small-claims track into the system. However, given the fact that SMEs tend to be 'risk averse', and they tend to avoid litigation where possible, as part of this exploration the organisers should also consider the normative possibility that efforts to encourage SME litigation at the UPC might actually create incentives to litigate that were not previously there.

Conclusion

In conclusion, for potential users of the UPC/UP concerns such as higher costs, greater complexity and more patent troll litigation are countered by the potential benefits of lower costs and one-stop enforcement.

It is important to note that potential users' hopes, expectations and fears are not set in stone; they are contingent on a number of yet to be decided issues, such as what the exact final rules of procedure will be and what the precise levels of the fees for the UPC and UP will amount to.

As such, the planners/organisers of the UPC and UP ought to take into account the views of the stakeholders canvassed in the IPO report in order to harness the real, yet fragile, goodwill that exists towards the UPC, while at the same time allaying the major fears about it in the minds of the system's potential users.

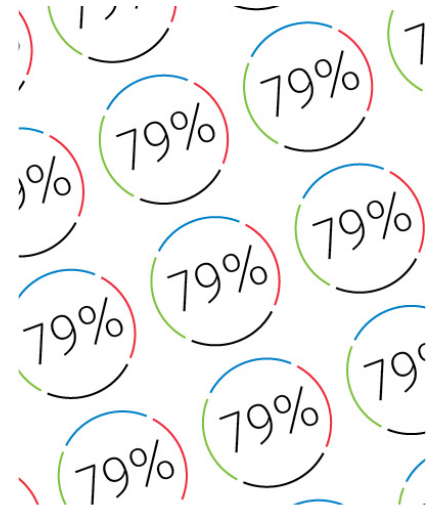
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