



The position of the European Patent Litigators Association (EPLIT)

in response to

the consultation document

by the

Preparatory Committee for the Unified Patent Court

on the

Rules on Court fees and recoverable costs

31 July 2015

A. Presentation of EPLIT

EPLIT, the European Patent LITigators association, is an association gathering European Patent Attorneys having appropriate qualification in patent litigation, especially before the future UPC. Any other patent practitioners qualified according to Article 48(1) or (4) of the Unified Patent Court Agreement (UPCA) are welcome to join as associate members.

EPLIT was formed at the end of 2013 as a non-profit organisation, with a seat in Paris. The objectives of the Association are:

1. To promote user-friendly, fair, efficient and cost-effective patent litigation in Europe, in particular litigation before the Unified Patent Court (UPC)
2. To promote any measures for improving patent litigation, in particular before the Unified Patent Court
3. To increase and strengthen the relationships between practitioners entitled to represent Parties in patent disputes in Europe, and
4. To encourage information exchange between its members.

More information can be found at www.eplit.eu.

B. Preliminary comment as to the scope of the consultation

Article 36 of the UPC Agreement re. the « Budget of the Court » stipulates that :

- (1) The budget of the Court shall be financed by the Court's own financial revenues (...). The budget shall be balanced.
- (2) The Court's own financial revenues shall comprise court fees and other revenues.
- (3) Court fees shall be fixed by the Administrative Committee. They shall consist of a fixed fee, combined with a value-based fee above a pre-defined ceiling. The Court fees shall be fixed at such a level as to ensure a right balance between the principle of fair access to justice, in particular for small and medium-sized enterprises, micro-entities, natural persons, non-profit organisations, universities and public research organisations and an adequate contribution of the parties for the costs incurred by the Court, recognising the economic benefits to the parties involved, and the objective of a self-financing Court with balanced finances. The level of the Court fees shall be reviewed periodically by the Administrative Committee. Targeted support measures for small and medium-sized enterprises and micro entities may be considered.

It has been **assumed that the levels of fees** proposed by the Preparatory Committee with the draft *Rules on Court fees and recoverable costs* are **globally complying with Art. 36** UPC Agreement.

The consultation paper **lacks however basic information** about the **background and hypothesis supporting the proposals**, in particular in terms of expected number of cases brought before the UPC, expected breakdown in terms of types of actions, expected distribution of Parties by "size" (respective involvement of small and large entities into the procedures), **and the expected revenues for the Court**.

Absent such information, our comments can only provide qualitative opinions, without any quantitative discussion about the budget itself and the compliance to article 36 UPC Agreement.

EPLIT's comments however retain a **consistent approach** where **suggestions to decrease certain fees** and revenues for the Court **are counterbalanced** by other suggestions proposing to **increase other costs and fees**.

C) SUMMARY OF EPLIT OPINIONS AS TO THE OVERALL BALANCE OF LEVELS FOR THE FEES

Taking into account the various parameters of the current proposal for the draft *Rules on Court fees and recoverable costs*, EPLIT has ended up with three main *pieces of opinion as follows*:

Opinion 1 : while the current levels proposed for the Court fees appear acceptable in general, some of the main Court fees seem not suitable enough for SMEs (including micro-entities)

-> Such insufficient taking into account of SMEs needs and expectations expose the UPC to a bad reputation, and to corresponding losses of revenues in the mid-term,

Opinion 2 : the current levels of some of the main Court fees do not offer sufficient discouraging signals against patent trolls, and other unfairly litigating Parties

Opinion 3 : certain levels of fees seem on the other hand to be too low in view of the corresponding economic advantages for some of the Parties involved, especially for cases with high litigation values

D) DETAILED COMMENTS AND SUGGESTIONS:

1) EPLIT supports specific measures for small and medium sized enterprises (SMEs) and other small entities

Main recommendation : electing Alternative 2

1.1- EPLIT clearly favours Alternative 2

The costs to access the UPC shall have to be high enough to allow self sustainability of the system within a reasonable term.

However, it would seem to EPLIT a deep mistake not to take substantial measures specifically dedicated at facilitating access to the UPC for SMEs and the like, including for counterclaims.

Only Alternative 2 of the current draft *Rules on Court fees and recoverable costs*, provide specific measures directed at facilitating the access to the UPC by SMEs and the like.

EPLIT is of the opinion that the implementation of a discount dedicated to SME and the like should indeed be systematically applied to certain fees, and hence that **Alternative 2 should be retained in any case.**

The Preparatory Committee should even consider to **further increase** the advantages provided for SMEs and the like within Alternative 2. One possibility would be to offer further discounted fees for counterclaims for revocation.

1.2- specific case of micro-entities

EPLIT believes that micro-entities (e.g. start-ups), — a category of small enterprises particularly important for the development of entrepreneurship and job creation — (as underlined by the ***Recommendation of the European Commission n° 2003/361 of 6 May 2003***) deserve a special treatment, with has not **been provided in the current draft Rules on Court fees and recoverable costs.**

Alternative 2 should be further amplified for micro-entities, with still further discounts, up to full exemption of counterclaim fees.

In this respect, it should be noted that the UPC Agreement explicitly refers distinctively to the notions of “*small and medium-sized enterprises*” on one hand and of “*micro-entities*” on the other hand [see Art. 36 (3)]. However, while the notion of “*small and medium-sized enterprise*” is defined in Alternative 2, this is not yet the case for the notion of “*micro-entity*”.

Accordingly, it is proposed to insert a further definition into the Scope (Definitions) part of Alternative 2, Rule 370 (6)(a) as follows:

“(ii) ‘*micro-entity*’ to be understood as microenterprise as defined in Title I of Annex of the Recommendation of the European Commission n° 2003/361 of 6 May 2003.”

It is then proposed to apply specific discounts and exemptions of costs and fees for that specific category of micro-entities, as suggested above.

- 1.3- EPLIT considers that neither Alternative 1, nor Rule 370(7) as proposed would provide adequate protection for SMEs.

While Rule 370(7) should be maintained and applied in certain circumstances, we think that Rule 370(7) should not be retained as the main and only measure in favour of SMEs, as it does not specifically targets SMEs, and moreover raises serious issues as to interpretations which would increase the burden of the Court.

On the contrary, Alternative 2 together with the definitions of the different categories of SMEs that have already been harmonized at European level (see *Recommendation of the European Commission n° 2003/361 of 6 May 2003*) offer an adequate protection for SMEs without raising any serious issues as to interpretations.

- 1.4- EPLIT would be in favour of combining Alternative 2 with part or all of Alternative 1

While Alternative 2 should be retained as the main measure in favour of SMEs and the like, and possibly amplified, EPLIT believes that **Alternative 2 could moreover be combined with part or all of the measures of Alternative 1.**

While of lower importance in our eyes, Alternative 1 makes indeed sense in relation to another objective, (although distinct of a specific support for SMEs), in inciting and rewarding Parties, whatever their size, towards early solutions to their disputes in sparing UPC time and resources.

- 1.5- Consequences of electing Alternative 2 (possibly in combination with all or part of Alternative 1)

1.5.1- Financial consequences for the UPC budget : maximise attractiveness for SMEs

Applying Alternative 2 as a primary measure supporting SMEs and the like, in combination with all or part of Alternative 1, could apparently endanger the balance of costs and revenues for the UPC as has supposedly been weighted by the Preparatory Committee.

However, EPLIT suggests that the apparent loss per case will most probably be over-compensated by the attractiveness gained by the UPC as a Court being SMEs-friendly. It is known that SMEs constitute by far the most numerous contingent for patent litigations. Making the UPC visibly and concretely attractive for SMEs will be rewarded by inciting substantially more SMEs and the like to use the UPC, and more importantly to use the patent system as a whole.

1.5.2- Other consequences : positive image of the UPC

Retaining Alternative 2, and even reinforcing the measures specifically dedicated to SMEs and the like, is also an opportunity to promote **right from the beginning** the reputation of the UPC in the eyes of SMEs, economic actors in general and the public.

It would be devastating that the image of the UPC, and hence of the European patent system as a whole, be challenged, if not ruined, by a bad reputation of the UPC being here to primarily serve large entities.

Specific measures for micro-enterprises, such as full exemption of fees for counterclaims for revocation actions, would further help building a positive image for the UPC, without substantially challenging the budgetary balance objectives.

2) Discouraging patent trolls, and unfair litigation strategies

It should certainly be avoided that some plaintiffs would rely on a Defendant abstaining from counterclaiming for revocation before the UPC due to a too high fee for introducing such a counterclaim.

SMEs and the like are more prone to renounce such defence strategy for costs reasons. Such abstention would however be detrimental both to the SMEs, but also to the public interest.

Again, providing clear and straightforward measures to assist SMEs in lowering the costs to access the UPC, especially as Defendants, seems a necessity.

3) Scale of variable fees as a function of the value of the cases

The fixed fees proposed seem acceptable, especially considering that the UPC should be self-financing and that the ceilings of the recoverable costs could prove substantially higher. For the specific case of SMEs, see her-above and here-under.

However, the variable fees for high-value cases seem to be low.

EPLIT is of the opinion that high-value cases could reasonably be expected to bear a greater burden.

Expected consequence : maximise revenues for the UPC budget.

4. Recoverable costs

4.1- It should be considered that the ceilings for recoverable costs of representation be decreased for SMEs. It is suggested that NPEs (such as patent trolls) should be excluded from this advantage by specific legal tools

4.2- As it would seem unfair that the rules of calculation of recoverable costs would solely rely on prior National rules already existing in certain European countries, such as Germany, it is highly recommended that specific guidelines be discussed and adopted at European level to establish and clarify the rules that shall be implemented in the frame of the UPC, and offer sufficient clarity to minimize the likelihood of litigations focussing specifically at this issue.


Koen Bijvank

President