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Will the Unitary Patent in Europe become a success ?

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Doubts about the Unitary Patent (UP) and the Unified Patent Court (UPC) are wide spread among users

They mainly relate to the level of renewal fees for the UP which are still unknown and which some users fear could be too high compared to what they currently spend for the classical European Patent (EP)

They also relate to the uncertainty concerning the future functioning of the UPC, its efficiency and the quality and fairness of its judgements

Conferences are more often dominated by discussions on how to avoid the new system than on how the benefits of the new system can be reaped

The renewal fees, which will be known at the end of the year at the earliest, are likely to be somewhat higher than users hope, but lower than they fear

The fees have to be fixed at a level which makes the UP attractive for business but also in a way which allows for sufficient fee income to ensure a balanced budget for the EPO

Currently EPs are validated on average in 4 out of the 25 countries participating in the UP. The fees for the UP are likely to be somewhat, but not dramatically, higher than the equivalent fees for an EP validated in 4 countries (usually DE, FR, UK and NL, which are the most validated countries)

One particular difficulty is the lack of maintenance flexibility for the UP compared with the EP which means that the fees cannot be reduced by dropping the maintenance in some countries towards the end of the lifetime of a patent

Any comparison of the costs for the UP and the EP will have to take account not only the renewal fees but also costs for translations and all other transactional costs for national validations and for the payment of national renewal fees

Patent holders will make their choice between a UP and an EP mainly but not exclusively on the basis of a comparison of costs
Contacts with users revealed that they are prepared to pay more, but not significantly more for a UP, than they pay today for a EP

It is not whether you pay a little bit more , but what value you get for your money which will ultimately drive the choice between the UP and the EP

The value for money the UP offers ranges from simplified administration of the patent portfolio, via the broad geographical coverage of protection and more seamless protection at the EUs external borders to increased (cross) licencing opportunities and improved possibilities to secure investment

In addition the exclusive jurisdiction of the UPC ultimately may become an incentive rather than a deterrent for choosing the UP

During the transitional period of 7 (more likely 14) years an EP may become the subject of litigation (invalidity actions or declaratory actions of non-infringement) without that the patent holder can prevent this in a number of national jurisdictions. By choosing the UP one can avoid multiple litigation

Concerns about the quality and efficiency of the UPC and the uncertainty resulting from the unfamiliarity with the new system are likely to be dispelled soon once the new system comes into operation

In Europe we made the same experience with the creation first of the EPO and then the OHIM

The preparatory work for the creation of the UPC is very thorough. The Preparatory Committee gives quality priority over speed and has just revised its roadmap for this reason. The UPC is now not likely to come into operation before the end of 2015

The 16th draft of the ROP for the UPC has been finalised by a group of expert judges and lawyers on the basis of contributions from users from all major jurisdictions. The draft is now being revised by the PC's Legal Framework group before a hearing is held in the fall

The PC's call for interest for candidate judges has resulted in 1300 applications for legally or technically qualified judges. Among the candidates for LQJ seem to be many of the most experienced judges from the major European patent countries

The reply to the call for interest for TQJ revealed that there are many candidates among the most experienced European patent attorneys

Given the expected qualification and experience of the future judges concerns among patent holders about central revocation do not seem to be founded. There is no need to be afraid of the UPC unless you have a bad patent

Concern of third parties about bifurcation and injunctions will be further looked at by the PC. However, there may not be a real problem. The mock trial at last year's judges forum in Venice revealed that judges from ALL countries decided NOT to bifurcate the case

There will also be no automatic injunctions. Judges in Europe are used to look at the circumstances of the case and the interests and situation of the parties. This is one of the reasons why in Europe there is no significant problem with patent trolls

To sum up

The UP and the UPC are likely to become a success but there is still a lot of work to be done

As one wise and very successful man said:

The only place where success comes before work is a dictionary!

Thank you for your attention