

Position Paper

UEAPME¹'s reply to the Consultation on the Rules of Court fees and recoverable costs.

The Unified Patent Court (UPC) launched a public consultation on the Rules of Court fees and recoverable costs. In addition to proposing fee levels, the consultation also addresses other points such as support for SMEs, a threshold at which a value-based fee will be payable and a scale of ceilings for recoverable costs.

In general, UEAPME considers the proposed court fees very expensive, especially for SMEs. For small businesses too expensive court fees may cause problems. Patent litigation is expensive in every way and especially small businesses must carefully think whether it is possible for them to litigate at all. Expensive court fees do not make the situation of SMEs any easier in this respect.

Nevertheless, the UPC should be self-financed, which naturally cause pressure to have relatively high court fees. In the consultation document issued in May 2015, the Preparatory Committee for the UPC sets out two alternatives for amending Rule 370 of the Rules of Procedure. Both alternatives contain rules that are similar. The difference between the alternatives is how the implementation of the art. 36(3) of the UPC agreement should be made.

According to art. 36(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."

In the alternative 1 the support is targeted to all. According to it, the court fees may be partly (20-60 %) reimbursed to reward particular behaviors. This kind of reimbursement feels reasonable, since it can be assumed that in cases where the court proceedings ends at earlier stages the court has to work less. Therefore it is proportional that the court fees may be reimbursed. The situations where the reimbursement is possible are a) the action is heard by a single judge; b) the action is withdrawn; and c) the parties have concluded their action by way of settlement.

It must be noted that the position of SMEs are not taken into account specifically in the alternative 1. The alternative 2, instead, targets its support measures directly to SMEs and micros. According to it, a legal person listed in art. 36(3) may apply for an exemption of value based fees. The definition of SME is the definition given in Commission's Recommendation 2003/361/EC. Alternative 2 thus means that a SME shall pay only a fixed fee, regardless the value of the case.

¹UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](https://ec.europa.eu/transparency/regexp1/index.cfm?do=entity.entityDetail&entityId=55820581197-35).

Both alternatives are reasonable. The fee reimbursement structure (alternative 1) is beneficial for all and it encourages parties' settlement. Also SMEs would benefit a fee reimbursement, which may be up to 60 % of fixed and value based fee. The value based fee exemption for SMEs (alternative 2) means, instead, that a SME must pay the fixed fee in any case without possibility to save costs by way of fee reimbursement.

If we have to choose between these two alternatives, we would prefer alternative 2, since the exemption of value-based fee could be considered as a better support for SMEs. However, a mixture of the alternatives would be the best approach. Taking into account the question on UPC's financing, it could be useful to limit the support measures to the smallest businesses.

The mixture of support measures could consist of a fee reimbursement for all (according to alternative 1) and a value-based fee exemption for small enterprises according to the Commission's Recommendation 2003/361/EC or only for micros (less than 10 employees, or annual turnover less than or equal to 2 million euro). Since the vast majority of patent holders are big companies and most of litigations are conducted between big companies, the financing of the UPC would not be jeopardized if the effective support would be targeted for a small group of small businesses and the fee reimbursement could be served to all.

In addition to the above mentioned concerning the differences, some rules are similar in both alternatives. UEAPME is of the opinion that the rule 370(7) is a very important safeguard especially for SMEs (precisely start-ups which may rely wholly on a patented innovation). According to the rule, the court may reimburse the fixed fee and reduce the value-based fee to pay, if the amount of payable fees threatens the economic existence of a party. From the viewpoint of fair trial and access to justice this provision is crucial. However, this rule cannot be regarded as a de facto support measure for SMEs, because it applies only to legal persons facing severe economic difficulties.

When it comes to concrete fee levels, UEAPME considers the fees too expensive. The fees in the cases with relatively low value (for example less than 1-1,5 million) should be remarkably lower. However, the structure of the fees seems to be reasonable, since the value of the action determines the fee precisely. In addition, the fee structure for revocation action and counterclaim for revocations can be supported. The counter claim for revocation is a way of defense for the defendant of revocation action. It should not, therefore, be bound to the value of the case in a same manner than straight revocation action, which can be considered as an attack in patent litigation.

Finally, the question on the determination of the value of the case is of great importance. We consider it as a major weakness that the mechanism and/or guidelines for value determination are not addressed in the consultation document. While it is clearly the court who determines the value of the case, the grounds for determination is essential information for the parties. It is also important for the sake of legal certainty that the central division and the local divisions of the UPC interpretation questions on value determination in the same way. If a party is about to file a case before the UPC, or a defendant is preparing to defend its right, they must be able to have some information, which are the grounds for the value determination. Of course parties have their own subjective perception of the value, but the rules (or at least guidelines) regarding value determination must be clear.

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