

Preliminary Findings of DG Internal Market and Services Study on the Caseload and financing of the Unified Patent Court

Introductory remarks, provisos, caveats

The present study has been requested by the delegations of the Member States engaged in the discussions on the creation of a Unified Patent Court (hereafter "the UPC" or "the Court"). It attempts to estimate the caseload and financing of a new court that will, at best, hear its first cases in 2015.

It goes without saying that this is a perilous endeavour. Of necessity, the study must be based on several estimations and assumptions regarding, for example, the number of patents in force (European patents and European patents with unitary effect), the likelihood that these patents become the subject-matter of litigation, patent proprietors' use of the opt-out scheme (including subsequent withdrawal of opt-out), choices to be made by plaintiffs (in particular choice of forum during the transitional period – either national courts or UPC – and choice of division of the UPC's Court of First Instance), the reaction of defendants (lodging of counterclaims for revocation), decisions of Contracting Member States (to create a local division, join a regional division or confer jurisdiction on the central division). In addition, it is inescapable to address several sensitive issues relating to the work of the judges (use of the options under Article 15a(2) draft Agreement, number of cases dealt with per year), remuneration, level of court fees and initial and special contributions by Contracting Member States to the budget of the UPC.

The only possible starting point for all this is data, practices and trends known today. From there, developments 5 to 10 years ahead must be predicted as far as possible. But nothing can be ascertained so far into the future, and much circumspection is required when relying on data available today and current practices for the purpose of making estimations and building scenarios for the future. Management of patent portfolios and enforcement strategies change over time, especially in times of economic and financial upheaval. And practices may evolve significantly, especially under a new statutory framework. The findings of present study are therefore, of necessity, preliminary and will need to be confirmed by further research – based on more recent data – to be provided when the date of entry into force of the Agreement on the UPC comes closer.

Despite all difficulties and uncertainties, a study of the future caseload and financing of the UPC does have merits. The focus on costs implies an analysis of how essential features of the UPC (for example setup, composition of panels, pool of judges, relationship between the central division and the local and regional divisions) could be implemented in practice and how the UPC could function on a daily basis. Such an attempt to gain insights into the actual

functioning of the UPC leads to many relevant considerations on how best to reach the overall objective of creating an efficient court system operating at reasonable costs.

The starting point for any study on the caseload and financing of the UPC is

- ⊖ the draft Agreement on a Unified Patent Court and draft Statute (hereafter "the draft Agreement" and "the draft Statute") under preparation since 2007 by successive Presidencies of the Council¹ and
- ⊖ the Conclusions on an enhanced patent system in Europe adopted by the Competitiveness Council on 4.12.2009² (hereafter "the Council Conclusions").

The intention is not to question any aspect of this framework – but to analyse it carefully in order to identify all cost factors involved in the creation and operation of the UPC. Scenarios can then be developed to illustrate a plausible range within which it is likely that the UPC will operate.

It should be emphasised that the present study does not include any estimations concerning parties' costs of representation (lawyers and patent attorneys with appropriate qualifications) and costs of experts. In comparison with court fees, such costs often constitute very significant cost items.

Work on the present study was undertaken by the Commission DG Internal Market in late 2009, following the publication of the "Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System" carried out by Professor Dietmar Harhoff on behalf of DG Internal Market.³ In the first half of 2010, intensive consultations took place with users of the patent system in Europe (expert groups of patent judges, industry representatives, lawyers and patent attorneys). Preliminary results were presented to the Council's Working Party on patents on 17.2.2010. Following the CJEU's Opinion of 8.3.2011 in case 1/09 and the publication of revised drafts by the Hungarian and Polish Presidencies, the methodology and assumptions of the study were again extensively discussed with Member States at a dedicated meeting in Warsaw on 12.10.2011 before the study was finalised in [November] 2011, with a view to provide Member States with a sound basis for further work on the UPC.⁴

General assumptions

1. The Agreement on the UPC will enter into force on 1.1.2015.⁵

1 The latest version taken into consideration was published by the Polish Presidency on 26.10.2011, see Council Document 16023/11.

2 Council Document 17229/09 of 7.12.2009.

3 "Economic Cost-Benefit Analysis of a Unified and Integrated European patent Litigation System", dated 26.2.2009 (hereafter "Harhoff (2009)").

4 During consultations with users and Member States, DG Internal Market and Services has received important feed-back on several counts, including criticisms that some of its estimations were too high. In this draft version of the study, DG Internal Market Services has not departed significantly from its earlier findings – even though a few adjustments have been made to reflect these criticisms (in particular as regards duplication rate, remuneration of judges and costs for facilities).

5 The question whether the UPC can start operations on the date of entry into force – or whether a period of 3 to 6 months must be provided for between entry into force and actual start of operations – is not addressed here. As far as the EPC is concerned, it is recalled that the EPC entered into force on 7.10.1977 (that is, three months after the 6th State had deposited its instrument of ratification, see Article 169(1) EPC); patent applications could be filed at the EPO as of 1.5.1978, date fixed by the Administrative Council on the recommendation of the President of the EPO (see Article 162(1) EPC 1973).

2. The Regulations implementing enhanced cooperation in the area of the creation of unitary patent protection will apply as from that same date.⁶
3. During the next decade, patenting activity and litigation rate in Europe will remain at its current level.

PART I – SCENARIOS FOR THE CASELOAD

In order to develop plausible scenarios for the future caseload of the UPC, it is necessary to estimate

- the number of patents that will fall under the jurisdiction of the UPC (Section 1) and
- the likelihood that these patents will actually become involved in litigation (Section 2).

In addition, it is necessary to estimate plaintiffs' choice of forum during the transitional period (national courts or UPC) (Section 3) and to reckon with the migration of some opposition cases from the EPO to the UPC (Section 4).

On the basis of the above estimations, the number of cases initiated before the UPC can be calculated (Section 5). An attempt to estimate the incidence of the various types of actions (in particular infringement action, counterclaim for revocation and direct revocation action) is also made (Section 6).

Section 1. Estimation of the number of patents at risk

"Patents at risk" means patents which will fall under the jurisdiction of the UPC. Will be included (i) classical European patents in force in at least one Contracting Member State on or after 1.1.2015 (provided the patent proprietor has not notified an opt-out) and (ii) all European patents with unitary effect.

In order to estimate the number of patents at risk, it is necessary to first estimate

- A. the stock of classical European patents in force on 1.1.2015,
- B. the use of the opt-out scheme,
- C. the number of classical European patents granted after 1.1.2015 and of European patents with unitary effect.

A. STOCK OF CLASSICAL EUROPEAN PATENTS ON 1.1.2015

Some national patent offices publish information on the number of European patents in force on their territory, for example

- Germany: 313 819 (2005), 339 730 (2006), 369 837 (2007), 387 640 (2008).⁷
- France: 253 176 (2005).⁸
- The Netherlands: 128 138 (2008).⁹

⁶ See Article 22(2) of the Proposal for a Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection (hereafter "draft UPP-Regulation") and Article 7(2) of the Proposal for a Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (Council Document 11328/11 of 23.6.2011).

⁷ See http://presse.dpma.de/docs/pdf/jahresberichte/jb2007_dt.pdf, page 110 and email DPMA, 13.1.2010 and 19.1.2010. For 2009, the figure is expected to be around 400 000.

⁸ See http://www.inpi.fr/fileadmin/mediatheque/pdf/Le_maintien_des_brevets.pdf, page 8.

⁹ Octrooicentrum NL, Annual report 2008, page 19.

However, the number of European patents in force **in at least one Contracting State** to the EPC is not known. An estimation can only be made by collating data provided by national patent offices and data extracted from databases maintained by the EPO (EPASYS and PATSTAT). Harhoff (2009) thus estimates that 445 796 European patents were in force in March 2008 in at least one Contracting State.¹⁰

Estimation for 2015

The starting point for any attempt to estimate the number of European patents in force in future must be the EPO's long-term planning: for the period until 2015, a steady increase is expected both in the number of filings and grants.¹¹ Annex 1 sets out the details of the EPO's long-term planning and other relevant considerations which lead to the reasonably supported estimation that **600 000 European patents** will be in force in at least one Contracting Member State on 1.1.2015.

B. USE OF THE OPT-OUT SCHEME

During a transitional period of 5 years, a possibility to opt out from the exclusive jurisdiction of the UPC has been provided for in Article 58(3) draft Agreement.

Noticeable is that the opt-out scheme is available **only** for

- **European patents** granted **before** the entry into force of the Agreement on 1.1.2015 and
- European patent **applications** filed **before** the entry into force of the Agreement; where an opt-out is notified for a European patent **application**, the opt-out will apply also to the **European patent** granted on that application (if unitary effect is not requested).

As far as **European patents with unitary effect** are concerned, there is no possibility to opt out from the exclusive jurisdiction of the UPC.

An opt-out must be notified to the Registry of the UPC by the patent proprietor (or the applicant) no later than 1 month before the end of the 5-year transitional period (that is, at the latest on 30.11.2019). It may be withdrawn at any time by the patent proprietor (or the applicant) unless proceedings have been initiated before a national court.¹² The Registrar shall be responsible for keeping and publishing a list of notifications of opt-out – including any withdrawal – so that third parties can ascertain in advance whether a particular patent (or application) will fall under the jurisdiction of the UPC.

Where an opt-out has **not** been notified for a European patent (or application) and proceedings in respect of that patent are initiated before the UPC, an opt-out for that patent can no longer be notified. This applies whether proceedings are initiated by the patent proprietor or by a third party.

Where a patent proprietor has notified an opt-out for a particular European patent, litigation relating to that patent must be initiated before the national courts or other competent authorities of the Contracting Member States. Should litigation be initiated before the UPC, the action must be rejected as inadmissible.

Time line: Opt-out scheme

Adoption of Agreement on the UPC

¹⁰ Harhoff (2009), page 38.

¹¹ See CA/35/09, CA/35/09 Add. 1 and CA/40/09, Business Plan 2010-2014, page 14.

¹² Article 58(4) draft Agreement.

Entry into force 1.1.2015

Where opt-out is notified (for European patent applications and European patents):

NATIONAL COURTS RETAIN EXCLUSIVE JURISDICTION

Where opt-out is not notified:

EXCLUSIVE JURISDICTION OF THE UPC

Reasons for the opt-out scheme

For users of the patent system in Europe, the establishment of the UPC will represent a major change. The new Court will offer new opportunities as well as new risks. In future, patent proprietors may, in one action,

- ⊗ obtain Europe-wide injunctions and damages for infringements occurring in several or all Contracting Member States,
- ⊗ see their patents revoked "with one stroke" for several or all Contracting Member States.

Before entry into force of the Agreement – and during the first years of operation of the UPC – users will carefully weight the pros and cons of the new court system:

- ⊗ for some users, the advantages of effective patent enforcement through-out Europe will by far outweigh any associated risks;
- ⊗ for others – in particular users relying heavily on income generated by particularly valuable patents to recoup investments in R&D – the risk that the UPC could revoke one of these patents for many or all Contracting Member States will be perceived as so threatening to their business model that the current **national** patent litigation system – which only allows revocation country-by-country – will appear preferable (despite the high costs, delays and risks of divergent outcome where parallel litigation is taking place before various national courts).

For these latter users, a possibility to opt out from the exclusive jurisdiction of the UPC has been provided, in order to protect their legitimate expectations. Indeed, as far as patent rights acquired **before** the entry into force of the Agreement [1.1.2015] are concerned, these users may have relied on Article 64 EPC which provides that any infringement of a European patent shall be dealt with by **national** courts. It would violate their legitimate expectations (that they had at the time of filing the application) to exclude the jurisdiction of national courts and confer exclusive jurisdiction on the UPC.

Scenarios: use of the opt-out scheme

Applicants and patent proprietors will have to decide whether to make use of the opt-out scheme for almost 1,2 million European patents and European patents applications in force or pending in 2015.¹³

It is not easy to predict at this stage how and to what extent applicants and patent proprietors will make use of the opt-out scheme:

- ⊗ some users may **systematically** notify opt-out for **all applications and patents** in their portfolio;
- ⊗ others may **select** applications and patents on a **case-by-case basis** and notify opt-out for these applications and patents **only**;
- ⊗ others again may wish to initiate actions before the UPC from the very beginning.

Extreme scenarios

The most extreme scenarios can be imagined:

- ⊗ if users notify opt-out for **all** pending European patent applications and **all** granted European patents, the UPC will be deprived of work relating to "classical" European patents – and only deal with litigation relating to future European patents with unitary effect
- ⊗ if users do **not** notify any opt-out, the UPC will be flooded with more than 2000 cases already in its first year – a caseload which could be difficult to master in an initial phase.

For the purposes of the present study, it is submitted that any such extreme scenario – be it massive opt-out or immediate overwhelming use of the UPC – is not very likely:

- ⊗ on the one side, it is unreasonable to assume that a unified patent litigation system – called for since very long by all users and carefully designed by judges, lawyers, experts from industry and officials from Member States and Union institutions – will not be welcomed by at least some users;
- ⊗ on the other side, some users will in any event continue to bring some cases to the tried and tested national courts.

Trust and confidence in the new court system

While some users may already have (or believe to have) made up their mind regarding the use of the opt-out scheme, it is submitted that most users' eventual choice will be strongly influenced by their overall perception of the new court system. When the Agreement enters into force and during the first years of operations, all aspects of the new court – including the UPC's setup, judges, procedures, language regime, practices, fees, efficiency, speed – will be scrutinised and assessed, and each user will form a subjective appreciation which will determine his choice. To summarize an immensely complex overall assessment,

- ⊗ if the new court inspires trust and confidence – experienced patent judges being appointed, efficient procedures being in place – most users will **not** notify opt-out;
- ⊗ if judges seen as inexperienced or unqualified are appointed, if procedures are perceived as slow or unworkable, most users will prefer to notify opt-out.

Steps to foster users' trust and confidence

Over the next years, as work on the UPC progresses, steps will be taken to [*donner corps au projet*] and gradually foster users' trust and confidence in the new court system. First and foremost, the ongoing work on the preparation of the Rules of Procedure of the UPC will be intensified with close involvement of all interested stakeholders. As the operational phase comes closer, further steps will influence users' appreciation:

¹³ Computed as 600 000 (see Section 1.A above) + 579 547 (see CA/40/09, page 14).

- ⊘ appointment of experienced patent judges,
- ⊘ early start of training programmes for the less experienced judges,
- ⊘ adoption of the Rules of Procedure and other secondary legislation (for instance, Practice Directions and Instructions to the Registry) in good time before the entry into force of the Agreement,
- ⊘ training programmes for in-house counsel, representatives and experts,¹⁴
- ⊘ as far as the actual procedures are concerned, transparency and availability of relevant material such as forms, model pleadings, toolbox for parties, tools for electronic proceedings.

Doubts of users in the 1970s when the EPO was set up

At this point, a parallel can be drawn to industry's fear of putting "all eggs in one basket" back in the 1970s when the EPO was created: while the advantages of obtaining a European patent for several States by means of a single application were fully acknowledged by many sectors of industry, some preferred to emphasise that filing at the EPO would carry the risk of losing any possibility to obtain patent protection, should the EPO reject the application.¹⁵ Also much feared at the time was the central opposition procedure at the EPO enabling any person to knock out a European patent for all EPC Contracting States.

Odd as this may sound today, it must be recalled that not much was known at the time about the EPO's granting practice and the patentability standards which it would apply. Similarly, today, only the basic institutional framework of the UPC and a preliminary set of provisions for the Rules of Procedure are available.

Conclusions

- ⊘ Doubts and suspicion are natural reactions of users when confronted with a new (international) route which may initially be perceived as implying new and significant risks in comparison to well-established (national) systems.
- ⊘ An opt-out scheme seems justified, if only to protect the legitimate expectations of users who have acquired patent rights before the entry into force of the Agreement.
- ⊘ Extreme scenarios illustrate the opt-out scheme's potential to critically undermine the very functioning of the UPC – but they seem unlikely.
- ⊘ The merits of the opt-out scheme are to compel all those involved in designing the new court system to strive for an efficient and workable patent litigation system and to carefully prepare the start of the operational phase.
- ⊘ Little can be said with any certainty about users' eventual choices. It therefore appears appropriate to design differentiated scenarios – while avoiding any extreme.

Two scenarios delimiting a plausible intermediate range

- **In Scenario 1**, users make **limited use** of the opt-out scheme: opt-out is notified for **25%** of the stock of European patents in force on 31.12.2014 and for 25% of European patent applications pending on 31.12.2014.
- **In Scenario 2**, users make **significant use** of the opt-out scheme: opt-out is notified for **75%** of the stock of European patents in force on 31.12.2014 and for 75% of European patent applications pending on 31.12.2014.

¹⁴ Representatives will have a crucial role to play when advising applicants and patent proprietors on the use of the new court in general and the opt-out scheme in particular.

¹⁵ It was argued that, should the applicant instead choose to file national patent applications at the national patent offices of the EPC Contracting States, he could hope to obtain patent protection in at least some States.

Assumptions regarding (i) the time when the decision to use the opt-out scheme is taken and (ii) withdrawal of opt-out

Two further features of the statutory framework in Article 58 draft Agreement add additional layers of complexity to the opt-out scheme:

- ⊘ applicants and patent proprietors may notify opt-out to the Registry **any time** until 30.11.2019 (ie, 4 years and 11 months after the entry into force of the Agreement);¹⁶
- ⊘ if they have notified opt-out, they may **withdraw** their opt-out **at any moment**, provided proceedings have not been initiated before a national court.¹⁷

It is impossible to predict when users will opt out: they may as well decide to notify opt-out

- ⊘ before the entry into force of the Agreement, in order to prevent any action against their patents being initiated at the UPC,
- ⊘ any time during the first years of operation of the UPC, once the first decisions and procedural practices become known,
- ⊘ after a particular decision perceived as unfavourable or wrong or
- ⊘ on the last days of the period of 4 years and 11 months.

Likewise, if users have notified opt-out, it is impossible to predict if and when they would withdraw their opt-out. So many considerations – not only relevant but also in part irrational – will influence users' behaviour that it makes little sense at this stage to build these aspects into the scenarios. A simplified model is therefore proposed:

- ⊘ The bulk of applicants and patent proprietors will decide whether to make use of the opt-out scheme **before** the Agreement on the UPC enters into force (ie, before 1.1.2015)
- ⊘ After entry into force, the number of notifications of opt-out will correspond to the number of withdrawals of opt-out.

These simplifications have limited impact on the overall stock of European patents at risk, since the moment in time when users notify opt-out or withdraw opt-out does not matter much, as long as the assumptions (regarding total number of notifications of opt-out) underlying Scenarios 1 and 2 are accepted.¹⁸ Annex 2 sets out the detailed calculations underlying the 2 scenarios proposed for the use of the opt-out scheme.

Scenario 1: Users make limited use of the opt-out scheme

Opt-out is notified for 25% of the stock of European patents in force on 1.1.2015: opt-out will be notified for **150 000** classical European patents.

Scenario 2: Users make significant use of the opt-out scheme

Opt-out is notified for 75% of the stock of European patents in force on 1.1.2015: opt-out will be notified for **450 000** classical European patents.

C. NUMBER OF CLASSICAL EUROPEAN PATENTS GRANTED AFTER 1.1.2015 AND OF EUROPEAN PATENTS WITH UNITARY EFFECT

After 1.1.2015, following the adoption of the Regulations implementing enhanced cooperation in the area of the creation of unitary patent protection and entry into force of the Agreement on the UPC, patent proprietors will be able to request that unitary effect be given

¹⁶ Article 58(3) draft Agreement.

¹⁷ Article 58(4) draft Agreement

¹⁸ Again, extreme scenarios – massive opt-out following plainly wrong decisions by the UPC or sudden withdrawal of opt-out by very many applicants and patent proprietors – are not reckoned with.

to European patents. All European patents with unitary effect will fall under the jurisdiction of the UPC.

Even after 1.1.2015, patent proprietors may instead wish to continue to obtain classical European patents taking effect in one or more of the Contracting Member States. Also these classical European patents will fall under the jurisdiction of the UPC (provided an opt-out has not been notified, see Section 1.B above).

Finally, patent proprietors may wish to obtain classical European patents in EPC Contracting States which are not Contracting Member States – whether these are Union Member States (as ES and IT) or not (AL, CH/LI, HR, IS, MC, MK, NO, RS, SR, TR). These classical European patents will not fall under the jurisdiction of the UPC.

[in any event, the 3 patenting routes in Europe – national, EPC and UPP – will coexist for a long time, whatever users' preferred route turns out to be in the first years.]

Assumptions

For the purposes of the present study, it is assumed that

- o 98% of all patents granted by the EPO as of 1.1.2015 – whether these patents remain classical European patents taking effect in one or more of the Contracting Member States or whether they become European patents with unitary effect – will fall under the jurisdiction of the UPC; only 2% will remain classical European patents taking effect only in EPC Contracting States which do not participate in enhanced cooperation or which are not Union Member States;
- o the EPO will continue to grant around 70 000 European patents per year in the years after 2015;¹⁹
- o 68 600 new patents will fall under the UPC's jurisdiction each year after 2015.²⁰

D. NUMBER OF PATENTS AT RISK

On the basis of the above assumptions and estimations, the number of patents at risk can be computed. For the year 2015, the stock includes all European patents in force in at least one Contracting Member State on 1.1.2015 (600 000)²¹ and for which an opt-out has **not** been notified (in Scenario 1: 450 000; in Scenario 2: 150 000).²²

For the following years (2016-2028), computations are more complex: not only must new grants²³ be added to the stock but the gradual lapse of the patents at risk must be reckoned with.²⁴ Annex 2 includes the detailed calculations underlying Tables I.1 and I.2 below which set out the stock of patents at risk for the years 2015 to 2028.

Table I.1: Patents at risk – limited use of opt-out scheme (Scenario 1)

2015	2016	2017	2018	2019	2020	2021
450 000	478 500	505 000	530 000	553 000	574 500	611 000
2022	2023	2024	2025	2026	2027	2028
646 700	680 800	713 500	745 700	775 000	805 000	833 000

19 This assumption is based on the EPO's long-term forecasts relating to the number of grants (see Annex 1).

20 Computed as 98% of 70 000.

21 See above Section 1.A.

22 See above Section 1.B.

23 68 600, or 98% of patents granted by the EPO each year in the period, see above Section 1.C.

24 A 6% annual decrease is assumed (based on data relating to average maintenance rate, see B. van Pottelsberghe and J. Danguy "Economic Cost-Benefits Analysis of the Community patent", dated 7.4.2009 (hereafter "van Pottelsberghe/Danguy (2009)").

Table I.2: Patents at risk – significant use of opt-out scheme (Scenario 2)

2015	2016	2017	2018	2019	2020	2021
150 000	131 500	150 000	166 500	181 500	245 700	308 300
2022	2023	2024	2025	2026	2027	2028
269 500	429 500	488 000	545 500	602 000	657 000	711 215

Section 2. Likelihood of patent litigation (Litigation rate)

The likelihood of patent litigation can be expressed in two ways:²⁵

- (i) as the likelihood of a patent being subject to litigation during its term (from application date to date of lapse), or
- (ii) as the number of patents litigated in a given year divided by the total number of patents in force in that year.

For the purpose of the present study, model (ii) is chosen.

In order to estimate the likelihood of patent litigation, it is necessary to estimate

- A. the volume of patent litigation before national courts in Europe,
- B. the number of cases relating to European patents and
- C. the extent of duplication.

A. Volume of patent litigation before national courts in Europe

Great difficulties are associated with gathering comprehensive data on the volume of patent litigation in Europe. Only a few inquiries have been made during the last decade, not always yielding entirely consistent results. Of most relevance are surveys based on data provided directly by delegations of Member States, such as

- the survey carried out in the framework of the Working Party on Litigation in 2003,²⁶
- the survey carried out by the German Presidency in 2007²⁷ and
- the survey carried out by the Commission (DG Internal Market) in 2010.²⁸

Data from individual courts,²⁹ estimates by practitioners³⁰ and inquiries into particular sectors³¹ may help assessing the robustness of the official data but provide only a partial picture. Harhoff (2009), pages 24 to 34, reviews data from all surveys and studies carried out until 2007.³²

²⁵ See Harhoff (2009), page 14.

²⁶ See document WPL/4/03, dated 14.11.2003. Replies from delegations are included as annexes to document WPL/SUB 4/03, dated 13.5.2003.

²⁷ See Council document 11622/07 dated 12.7.2007. Replies from delegations are summarised in the annex pages 10-37.

²⁸ This survey was carried out in January-February 2010. Annex 3 contains the question put to delegations in the Council's Working Party on Patents.

²⁹ Harhoff (2009), pages 26 to 29 refers to recent data from German courts (2005-2007) and to studies by Cremers / Harhoff (2006).

³⁰ In particular Pierre Véron and Walter Holzer.

³¹ For instance DG Competition's Final Report on the Pharmaceutical Sector Inquiry, dated 8.7.2009 (hereafter "DG Competition (2009)").

³² A recent paper by N. van Zeebroek and S. Graham "Comparing patent litigation across Europe: A First Look", September 2011 (hereafter "van Zeebroek/Graham (2011)") should be added to this short list of relevant studies on the topic, in particular the data set (from 2005) summarised in Table 2.

Table I.3 below attempts to summarise the data provided by delegations. Due to the disparate data provided, this is in itself a perilous endeavour, and a meaningful comparison requires several provisos. First and foremost, the lack of a common definition of what a "patent case" is entails significant differences when counts are made:

- in countries where the same court deals with both infringement and validity issues, an infringement action with a counterclaim for revocation will be counted as one case; by contrast, in countries where different courts deal with infringement and validity issues, two cases (an infringement action and a revocation action) will be counted;
- where an action involves several patents, some courts deal with the action as one case while others divide the action in as many "cases" as there are patents involved;
- in a few countries, a distinction is not drawn between patent cases and other intellectual property cases (such as utility model, trademark or design cases or unfair competition cases);
- in some countries, a distinction is not always drawn between actions against decisions of the patent office (eg, appeals against decisions in opposition cases) and revocation actions.

The intention at this stage is only to provide orders of magnitude concerning the number of patent cases initiated before national courts of first instance in the Union Member States. *Table 1.3: Volume of patent litigation before national courts of first instance*

Member State	N° of cases at first instance		
	Survey by Working Party on Litigation (2003) Years 2000, 2001	Survey by German Presidency (2007) Years 2005, 2006	Survey by DG Markt (2010) Years 2007, 2008, 2009
Austria (AT)		(RA) 21, (I) 17, (PrInj) 9 (2005) (RA) 12, (I) 19, (PrInj) 9 (2006)	(RA) 16 (2007), 18 (2008), 18 (2009) (I) 30 (2008), 37 (2009), 18 (2010)*
Belgium (BE)		~ 30 per year	17 (2007), 23 (2008), 15 (2009)*
Bulgaria (BG)		< 5 per year	(I) 3 (2007), 4 (2008), 10 (2009)
Cyprus (CY)		n.a. (very few)	< 5/year
Czech Republic (CZ)		(R) 4, (I) 5 (2005)	(RA) 5 (2008), 2 (2009), (I) ~ 8-10/year
Denmark (DK)	15 (1999), 11 (2000)	10-15 per year	69 (2007), 33 (2008), 16 (2009)*
Estonia (EE)		1 per year	n.a.
Finland (FI)	~ 20 per year	~ 15-20 per year	9 (2007), 37 (2008), ~ 30/year (2009-2010)
France (FR)	300 (2000), 287 (2001)	459 (2005), 487 (2006)	228 (2007), 219 (2008)*
Germany (DE)	(RA) ~ 200 per year (I) 500 per year	(RA) 220 per year (I) 600-700 per year	(RA) 275 (2008), 227 (2009) (I) 1079 (2008), 1137 (2009)
Greece (GR)		n.a.	n.a.
Hungary (HU)		(RA) < 10, (I) 15-20	(I) 23 (2007), 23 (2008), 24 (2009)
Ireland (IE)		~ 1-3 per year	5 (2008), 2 (2009)
Italy (IT)		n.a.*	42 (2007), 38 (2008), 64 (2009)
Latvia (LV)		~ 1-2 per year	5 (2008-2009)
Lithuania (LT)		n.a. (very few)	4 (2007), 2 (2008), 4 (2009)
Luxembourg (LU)		n.a. (very few)	1 (2009)
Malta (MT)		n.a. (very few)	1 (2009)
Netherlands (NL)	70	30-35 per year*, (PrInj) ~ 20 per year*	104 (2009)
Poland (PL)		(I) ~ 20 per year	(RA) 37 (2007), 66 (2008), 38 (2009); (I) ~ 20-30/year
Portugal (PT)		~ 20 per year	(I) 15 (2007), 16 (2008), 17 (2009) (PrInj) 16 (2007), 7 (2008), 6 (2009)
Romania (RO)		20 (2005), 13(2006)	(RA) ~ 30 per year; (I) 32 (2007), 16 (2008), 23 (2009)*
Slovak Republic (SK)		(RA) 5, (I) 5 per year	(RA) 3 (2007), 9 (2008), 3 (2009); (I) 9 (2007-2008)
Slovenia (SI)		~ 3-6 per year	7 (2008), 4 (2009)
Spain (ES)*		n.a.	n.a.
Sweden (SE)	29 (2000), 38 (2001), 51 (2002)	~ 30-50 per year	38 (2007), 25 (2008), 17 (2009)
United Kingdom (UK)	86 (1999), 105 (2000), 61 (2001)*	138 (2004), 176 (2005), 85 (2006)*	63 (2007), 94 (2008), 165 (2009)*

Abbreviations: RA = revocation action, IA = infringement action, PrInj = preliminary injunction

Comments (*)

For AT, for the period 2008 to 2010, data on infringement actions was provided in 2011.

For BE, the data from 2007 to 2009 relate to the number of *decisions*, not to the number of cases *initiated*.

For DK, the data from 2007 to 2009 include 5 utility model cases.

For FR, the data for 2007 and 2008 include a very small number of cases relating to certificats d'obtentions végétales et topographies de produits semi-conducteurs.

For IT, the survey carried out by the German Presidency did not include any data. The high figures in Harhoff (2009) (270-300 cases) for the years 2005 and 2006 include trademark cases. The figures for 2007 to 2009 in DG Internal Market's survey include only patent cases.³³

In NL, the data from 2005 and 2006 relate to the number of *decisions*, not to the number of cases *initiated*.

In SK, 3 (2007), 9 (2008) and 3 (2009) patent cancellation actions were lodged at the Patent Office of the Slovak Republic.

ES did not provide any data to any of the above surveys. Evidence that some patent litigation does take place in ES can however be found in DG Competition (2009)³⁴ and in van Zeebroek/Graham (2011).³⁵

For the UK, the data from 2000 and 2001 do not include the Patents County Court. The data from 2004 to 2009 are the revised data provided in 2010 by the UK IPO; they include cases from the High Court, the Patents County Court, the Scottish and Northern Ireland Courts and the IPO Tribunal; only patent cases are included.

On the basis of the most recent data, it appears that the number of patent cases initiated annually before first instance courts in Member States is currently reaching the **2000** mark. This figure includes

- litigation relating to European patents **and** to national patents and
- revocation actions in Member States – such as AT, CZ, DE, HU, SK – where such actions are heard by courts other than the courts hearing infringement actions.

B. Number of cases relating to European patents

In the questionnaire to delegations in the Council's Working Party on Patents, DG Internal Market also inquired about the percentage of cases involving European patents and national patents. Not all courts make this distinction, and data are only available for the following Member States:

Table I.4: Estimation of the % of cases relating to European patents

A	B	D	F	F	D	H	I	L	N	P	R	S
E	K	I	R	E	U	E	T	L	T	O	K	

33 van Zeebroek/Graham (2011) estimate the number of Italian judgments in patent cases at 151 (in 2005).

34 DG Competition (2009) page 215: Respondent companies (originators and generic companies) reported 70 patent litigation cases (in the pharmaceutical field) initiated in Spain in the period 2000-2007 (Figure 71).

35 For 2005, the number of judgments by Spanish courts in patent cases is estimated at 198, see van Zeebroek/Graham (2011), Table 2.

4	7	3	2	5	6	3	5	4	9	2	1	1
0	8	0	0	6	0	5	0	5	5	0	0	0
%	%	%	%	%	%	%	%	%	%	%	%	%
			*									
SI	SE											
20	60%											
%												

Comments (*)

For FR: P. Véron: 40% (survey 2000-2008), French delegation: 50-60% (DG Internal Market inquiry 2010).

The following figures are available for EPC Contracting States joining the EPC only recently: 4 cases in LV (period 2008-2010) and "less than 5 cases per year" in RO.

The huge differences between Member States may be explained as follows:

- in countries where the European patent system has to some extent replaced the national patent system (in particular NL), litigation almost exclusively involves European patents;
- the longer a country has been a member of the European Patent Organisation, the more European patents will be in force in that country and the higher the percentage of patent disputes involving European patents rather than national patents: in countries which have been members since 1977 (for instance, BE and DE), many thousand European patents are in force and a majority of patent disputes involve European patents; by contrast, in countries which joined the European Patent Organisation after 2002, only few European patents are in force and patent disputes still mostly involve national patents.

The above data is supported by data from previous surveys in courts dealing with many patent cases:

(a) for DE: **Cremers (2004)**: 25% (revocation) and 26% (infringement) (relying on data collected in 1993-1995); **Harhoff (2009)**, pages 28-29: 60% (revocation actions in the Federal Patent Court, 2003), 50% (overall); **WPL/SUB 4/03**, page 5: 60% (overall) (based on data concerning the years 1998-2002 provided by the DE delegation in the working party on the EPLA); **Federal Patent Court 2010** (email 18.1.2010): In 2008: of the 275 nullity cases, 68% related to European patents, 32% to German patents. In 2009: of the 226 nullity actions, 74% related to European patents, 26% to German patents,

(b) for FR: **Véron (2009)**, slide 5: after a slow increase in the 1990s (from 20% to 35%), stable between 30-40% in the years 2000-2008;

(c) for NL and SE: **WPL/SUB 4/03, page 5**: NL: at least 80%; SE: 33% (based on data concerning the years 1998-2002).

On the basis of the above data, it appears safe to assume that 65% of patent cases involve European patents. The remaining 35% involve national patents. It follows that, of the 2000 patent cases initiated annually before first instance courts, **1300** cases involve European patents.

C. Extent of duplication³⁶

36 The definition of the term duplication in Harhoff (2009), page 25, footnote 19 is used here: "Duplication ... does not require that exactly the same legal matter is brought by identical parties into different national courts. ... we can speak of duplicated cases if the introduction of the unified Court would render one or several of the cases

The duplication rate is assumed to be 10%.³⁷ Out of 1300 cases involving European patents, 130 cases are thus duplicated. In a unified litigation system, duplication will not occur, and **1170** actions will suffice to settle the same number of disputes.

D. Conclusions

The analysis of the available data on the number of patent cases before courts of first instance in Europe leads to the conclusions that

- ⊗ the overall volume of patent litigation in Europe has increased steadily during the last decade, concurrently with the increase in the stock of patents;³⁸ currently the 2000 mark is being reached;
- ⊗ the percentage of disputes involving European patents has increased slowly in the same period, concurrently with the increase in the number of European patents in force.³⁹

Based on the available data for the year 2008 (stock of European patents⁴⁰ correlated to the volume of litigation), the likelihood of litigation relating to European patents (in a court system **not** allowing duplication) is **0,24%**.⁴¹

Section 3. Plaintiffs' choice of forum during the transitional period: national courts or UPC

The UPC will have exclusive jurisdiction to deal with actions relating to **European patents with unitary effect**, as of the entry into force of the Agreement on the UPC (1.1.2015).

unnecessary, i.e. if the different national cases are substitutes in a legal and economic sense".

37 Some uncertainty surrounds this figure:

- Harhoff (2009), page 40, Table 6.2 (medium scenario 1b) assesses duplication rate to be 21,4% (for 2008), computed as: 186 duplicated cases out of 872 cases = 21,3%;
- WPL/SUB 4/03, page 5 (with data from 7 countries), states that "parallel litigation may account for not more than 5-10%";
- according to the DG Internal Market's expert group of judges and lawyers, the duplication rate is not above 8%.

38 To illustrate this increase in the stock of patents at risk, reference is made to the Annual Report of the DPMA, page 110, available at http://presse.dpma.de/docs/pdf/jahresberichte/jb2007_dt.pdf: in the period from 2001 to 2007, the overall stock ("Patentbestand") has increased from 371 903 to 501 199.

39 According to the Annual Report of the DPMA, the stock of **German** patents is relatively stable in the period 2001 to 2007 (from 119 072 to 131 362), while the stock of **European** patents in force in Germany increases steadily in the same period (from 252 831 to 369 387).

40 Harhoff (2009), page 38, estimates that 445 796 European patents were in force in at least one Contracting State in March 2008. Further grants in 2008 (April to December 2008) will have resulted in a stock of 485 000 European patents at the end of 2008.

41 Computed as 1170/485 000 (that is, for 2008, the correlation between the number of cases relating to European patents (without duplication) (= 1170) with the stock of European patents in force in at least one Contracting State (= 485 000)).

As far as **classical European patents** are concerned, a period where plaintiffs may **choose** forum is provided for:⁴² during a 5 year period (from 1.1.2015 to 31.12.2019), plaintiffs – whether patent proprietors, holders of licences or third parties – may freely decide to initiate **infringement actions** and **revocation actions**

⊖ **either** before the UPC

⊖ **or** before the national courts or other competent authorities of the Contracting Member States.

Once a plaintiff has chosen a particular forum (having jurisdiction under either national law or the Agreement), that forum shall have exclusive jurisdiction to deal with the action. Where proceedings are pending before a national court at the end of the 5 year transitional period, the action shall be dealt with by the national court concerned, in order to ensure continuity and efficient disposal of pending cases by the court first seized.

Time-line: Transitional period

Reasons for the transitional period

The transitional period aims at facilitating the transition to the new court system:

- from a public policy perspective, the transitional period contributes to avoid that too many cases be brought to the UPC during the first years of operations where the capacity of the new court must gradually be built up;

⁴² Article 58(1) draft Agreement.

- from the point of view of users, the transitional period enables plaintiffs to decide freely, during a limited initial period of 5 years, whether to initiate proceedings before competent national courts or authorities or before the UPC.

Contrary to the opt-out scheme, which enables patent proprietors to **entirely withhold** selected applications and patents from the jurisdiction of the UPC (with effects on the caseload of the UPC for up to 25 years), the transitional period is intended to enable plaintiffs to get acquainted with the UPC by gradually bringing selected cases to the new court. And contrary to the opt-out scheme – which will require an **abstract** strategic assessment ranging far into the future – a plaintiff's choice of forum during the transitional period will be a decision to be taken when **actually** facing the prospects of litigation. Users involved in many patent litigation cases may wish – if only due to internal work-flow management – to continue to have some cases heard by the tried and tested national courts under familiar procedures, while in parallel try the UPC for other cases. Other users may wish to wait and see how the UPC will handle its first cases and deal with particular aspects of the procedure (eg, provisional measures, preservation of evidence, injunctions, interlocutory appeals, bifurcation, award of damages), then start a test case and only gradually step up the use of the UPC.

While some users may want to cumulate the effects of the opt-out scheme and the transitional period in order to continue to have cases heard as long as possible by national courts, it should be kept in mind that, precisely due to its transitional nature, the transitional period will come to an end on 31.12.2019. Users who have [*mettre à profit*] the transitional period to make first experiences with the UPC – whether as plaintiffs or as defendants – will be at an advantage over users who have systematically refrained from being involved in proceedings before the UPC.

In the year following the end of the transitional period (2020), the caseload of the UPC will reach a steady state.

Assumptions regarding the choice of forum during the transitional period

Above, when making assumptions regarding applicants' and patent proprietors' use of the opt-out scheme, a list of factors believed to influence users' decision was set out. It is submitted that these factors will most likely also influence plaintiffs' decision to

- ⊗ either initiate proceedings before the UPC as soon as the new court starts operations
- ⊗ or continue to use national courts during the transitional period.

Crucial will again be whether the new court system can foster trust and confidence. The state of preparation and concrete steps taken in the run-up phase will be of paramount importance in this regard.

During the transitional period, every plaintiff will have to make a choice of forum for each action initiated (amounting to some 9000 to 10 000 instances in total).⁴³ Again setting aside extreme scenarios, it appears appropriate to work with 2 scenarios to cater for plausible situations:

⁴³ Rough estimation based on the current volume of patent litigation (around 2000 cases/year).

- in Scenario 1, users will **quickly choose to bring cases** before the UPC
- in Scenario 2, users will be **slow to bring cases** before the UPC

Scenario 1: Users quickly choose to bring cases before the UPC

Table I.5

	2015	2016	2017	2018	2019	2020	2021	2022	2023
% of cases relating to classical EPs brought before the UPC	10	20	35	50	75	Exclusive jurisdiction of the UPC, subject to - opt-out scheme - continuation of pending proceedings before national courts			
% of cases relating to classical EPs still brought before national courts	90	80	65	50	25				

Scenario 2: Users are slow to bring cases before the UPC

Table I.6

	2015	2016	2017	2018	2019	2020	2021	2022	2023
% of cases relating to classical EPs brought before the UPC	1	3	5	10	20	Exclusive jurisdiction of the UPC, subject to - opt-out scheme - continuation of pending proceedings before national courts			
% of cases relating to classical EPs still brought before national courts	99	97	95	90	80				

Section 4. Plaintiffs' choice of forum for validity issues: EPO or UPC

[or Migration of opposition cases from the EPO to the UPC]

In order to present as complete a picture as possible of the future activity of the UPC, it is necessary to address the issue whether some users will choose to initiate revocation actions at the UPC rather than – or in addition to – starting opposition proceedings at the EPO.

It is recalled that each year around 3000 European patents are opposed at the EPO.⁴⁴ For a low opposition fee (635€), any third party may, within 9 months of the publication of the mention of grant, file a notice of opposition which will be examined by 3 technically qualified examiners skilled in the relevant field of technology. The Opposition Division may be enlarged by a legally qualified examiner, if the nature of the case so requires, for instance where evidence must be taken (prior use cases).⁴⁵ Despite some adversarial features, the opposition procedure at the EPO remains an administrative procedure carried out by technically qualified examiners in the period immediately following grant. By contrast, the central division of the UPC will carry out a judicial revocation procedure which may be initiated any time during the life span of the patent.⁴⁶

In the framework of the UPC, the revocation procedure has to a large extent been disconnected from the opposition procedure at the EPO. A third party may initiate a revocation action at the UPC

- without having to start opposition proceedings at the EPO beforehand⁴⁷ or
- even though he has already started opposition proceedings at the EPO.⁴⁸

In the latter case – where parallel proceedings have been initiated – the UPC has a discretionary power to either stay its proceedings or proceed with the case. One statutory criterion for staying proceedings is laid down in the draft Agreement: the UPC may stay its proceedings "when a rapid decision may be expected from the EPO".⁴⁹

It is inevitable that central revocation proceedings at the UPC will be seen – during the 9 months following grant of a European patent – as both an **alternative** to opposition proceedings before the EPO and as an **additional route** to challenge the patent's validity. As long as the patent proprietor has not notified opt-out for a particular patent (see Section 1.B above), any third party may decide to initiate a revocation action at the UPC **or** file a notice of opposition at the EPO – **or do both**. The very existence of two venues for challenging validity will lead to comparison and competition.

44 See the EPO's Annual Reports: 3300 notices of opposition were filed in 2007 and 2800 in 2008. In 2010, 3487 notices of oppositions were filed (involving 2804 European patents); the opposition rate was 5,2%, see CA/F 5/11, pages 3 and 12.

45 Article 19(2) EPC.

46 The panel of the central division shall be composed of 2 legally qualified judges and 1 technically qualified judge "with qualifications and experience in the field of technology concerned", see Article 6(6) draft Agreement.

47 Article 15(7) draft Agreement.

48 By contrast, in Germany, a revocation action cannot be initiated at the Federal Patent Court as long as opposition proceedings are pending before the DPMA, see §81(2) Patents Act.

49 Article 15a(8), second sentence, draft Agreement.

Harhoff (2009) addresses this issue briefly and assumes, "for concreteness", an incidence figure of 200 cases (corresponding to 6% of the 3293 oppositions at the EPO in 2006).⁵⁰

Also for the purposes of the present study, it is assumed that some users will indeed initiate revocation actions at the UPC **instead of or in addition to** filing notices of opposition at the EPO. Several considerations made above (Section 1.B and Section 3 which build scenarios about (i) users' decision regarding the opt-out scheme and (ii) users' choice of forum during the transitional period) seem relevant also in the present context. The following additional aspects must be emphasised at this juncture:

- ⊗ the level of the court fees and representation costs associated with proceedings at the UPC will certainly influence many users' choice; likewise, the UPC's practice regarding apportionment of costs will be compared with the practice at the EPO;
- ⊗ procedural risks (for instance, counterclaims for infringement) will have to be carefully assessed;
- ⊗ in some cases, the need for speed will be pivotal – and the only recurrent criticism against opposition proceedings at the EPO is delay;⁵¹ should the UPC be able to expedite revocation actions – for instance within one year⁵² – a third party interested in a quick decision may prefer to challenge validity at the UPC;
- ⊗ the standards applied by the UPC (in particular the tests for novelty and inventive step) will strongly influence users' choice;⁵³
- ⊗ the UPC's practice in cases where parallel proceedings involving the same patent and the same parties have been initiated both at the EPO and at the UPC will also influence users' choice; should the UPC for instance systematically proceed with its proceedings despite pending opposition proceedings at the EPO, third parties may see an interest in contesting the patent's validity in two different fora.⁵⁴

Overall, third parties will have to carry out a risk assessment involving first and foremost the UPC's case-law, practice and efficiency as well as the additional cost exposure of revocation proceedings. As mentioned above (Section 1.B and Section 3), the trust and confidence that the UPC will be able to foster will also matter. Other tactical considerations may also be of relevance for some parties (reliance on a perceived bias or attempts to intimidate the other party or exhaust his financial means) – but some of these considerations will need to be kept firmly in their place by the UPC which will eventually be responsible for ensuring that a sound, consistent and predictable case-law develop so that duplication may as a rule be avoided and legal certainty guaranteed for users of the patent system and the public in general.

50 See Harhoff (2009), page 45, footnote 78.

51 According to DG Competition (2009) page 244, currently the average duration of opposition proceedings at the EPO is approximately 3.6 years from the initiation of the proceedings until the final ruling (including cases with and without appeal).

52 The Preamble of the draft Rules of Procedure of the UPC mentions in §6 the objective to normally decide or otherwise conclude cases at first instance within one year.

53 In the EPO, nearly 40% of opposition proceedings end with a decision to revoke the European patent, while 28% of proceedings end with a decision to maintain the European patent in amended form, see Annual Report of the EPO, 2008, page 23.

54 Oppositions and appeals at the EPO have suspensive effect, and the EPO's Opposition Divisions and Boards of Appeal do not stay proceedings. They may, however, on request by one of the parties, accelerate the processing of the case.

Assumptions regarding plaintiffs' choice of forum for validity issues

As above (Section 1.B and Section 3), extreme scenarios – for instance a massive migration of opposition cases to the UPC – are not considered likely. There are no sound reasons to believe that users would suddenly cease to make use of the tried and tested opposition procedure at the EPO.

In order not to complicate excessively the scenario-building in this Part I,⁵⁵ it is proposed to work with 2 scenarios which tie in with the scenarios presented above:

- o In Scenario 1, it is assumed that the revocation procedure before the UPC will be seen by some users as an alternative to the opposition procedure at the EPO. Even if the overall volume of revocation actions remains limited – compared to the total number of oppositions at the EPO – some users will indeed initiate revocation actions before the UPC instead of starting opposition proceedings at the EPO. This scenario ties in with the first scenarios set out in Section 1.B (Limited use of the opt-out scheme) and in Section 3 (High up-take of the UPC).
- o In Scenario 2, it is assumed that the revocation procedure before the UPC will **not** be seriously considered as an alternative to the opposition procedure at the EPO. A very limited number of opposition cases will migrate to the UPC. This scenario ties in with the second scenarios set out in Section 1.B (Significant use of the opt-out scheme) and in Section 3 (Slow up-take of the UPC).

Again, it must be emphasised that the aim at this stage is not to present any precise estimations but solely to delimit a plausible intermediate range within which it would seem likely that the UPC will have to operate.

Tables I.7 and I.8 present figures for the 2 scenarios, indicating for each the percentage of opposition cases which will be initiated as revocation actions before the UPC.⁵⁶

Scenario 1: The revocation procedure at the UPC is perceived as an alternative to the opposition procedure at the EPO

Table I.7

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028
%	0,5	1	1	2	2	3	3	3	3	3	4	4	4	4
Cases	15	30	30	60	60	90	90	90	90	90	120	120	120	120

⁵⁵ More refined scenarios would need to include estimations regarding (i) the number of patents granted after 2015 (and subject to opposition proceedings for a period of 9 months) and (ii) variations in the opposition rate at the EPO. In addition, patent proprietors' use of the opt-out scheme would have to be reckoned with, including in particular the assumptions regarding the use of the opt-out scheme for European patent **applications**. Finally, use of the revocation procedure at the UPC **in addition to** the opposition procedure at the EPO (parallel proceedings) would have to be reckoned with. It does not appear indispensable at this stage to develop these aspects further.

⁵⁶ The current number of oppositions at the EPO – around 3000 cases per year – appears rather stable and is used for the computations in Tables I.8 and I.9.

Scenario 2: The revocation procedure at the UPC is not considered as an alternative to the opposition procedure at the EPO

Table I.8

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028
%	0,1	0,2	0,2	0,3	0,3	0,4	0,4	0,4	0,4	0,4	0,5	0,5	0,5	0,5
Cases	3	6	6	9	9	12	12	12	12	12	15	15	15	15

Section 5. Estimated caseload of the UPC-CFI

On the basis of the estimations made in Sections 1 to 4, reasonably supported computations relating to the future caseload of the Court of First Instance of the UPC can be made, as follows: for each year,

1. number of patents at risk * likelihood of litigation = total number of patent cases in Europe
2. users' choice of the UPC + opposition cases migrating from the EPO

Tables I.9 and I.10 below show the computations as far as the UPC's Court of First Instance is concerned (years 2015 to 2028). In order to present a rational overall picture of the UPC's caseload, it is necessary to assume some converge between the 2 scenarios proposed at each of the 3 stages above:

- limited or significant use of the opt-out scheme (Section 1.B);
- quick or slow up-take of the UPC during the transitional period (Section 3); and
- migration of some opposition cases to the UPC or insignificant shift (Section 4).

Table I.9 contains an estimation of the number of cases initiated at the UPC-CFI if

- (i) patent proprietors make limited use of the opt-out scheme,
- (ii) plaintiffs quickly bring cases to the UPC during the transitional period and
- (iii) some opposition cases migrate to the UPC.

In the following, this scenario will be referred to as "**High up-take**".

Scenario 1: High up-take

Table I.9

Year	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Total number of cases	123*	260*	454	696	1055	1468	1557	1642	1723	1802	1909

- of which EPO opposition cases migrating to the UPC	15	30	30	60	60	90	90	90	90	90	120
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*computed as 450 000 (see Table I.1, year 2015) * 0,24 (likelihood of litigation) = 1080 cases and 10% (users' choice of UPC in 2015, see Table I.5) of 1080 = 108 + 15 cases (opposition cases migrating from the EPO (0,5% of 3000 cases), see Table I.7) = 123

Table I.10 contains an estimation of the number of cases initiated at the UPC-CFI if

- (i) patent proprietors make significant use of the opt-out scheme,
- (ii) plaintiffs are slow to bring cases to the UPC during the transitional period and
- (iii) only an insignificant number of opposition cases migrate to the UPC.

In the following, this scenario will be referred to as "**Low up-take**".

Scenario 2: Low up-take

Table I.10

Year	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Total number of cases	7*	15*	24	49	96	602	752	899	1042	1183	1324
- of which EPO opposition cases migrating to the UPC	3	6	6	9	9	12	12	12	12	12	15

*computed as 150 000 (see Table I.2, year 2015) * 0,24 (likelihood of litigation) = 360 cases and 1% (users' choice of UPC in 2015, see Table I.6) of 360 = 4 + 3 cases (opposition cases migrating from the EPO (0,5% of 3000 cases), see Table I.8) = 7

Comments

1. The steep increase in 2020 is due to the expiry of the transitional period.
2. In both scenarios, it could be envisaged to increase the estimation regarding the number of cases for 2015 and 2016, for the following reasons:
 - it must be expected that large companies frequently involved in patent litigation will run one or more "test cases" before the UPC soon after it is established to ascertain how the new procedures will work in practice and thus be prepared for "real" cases at a later stage;
 - in the months before the Agreement on the UPC enters into force, a few users might "withhold" cases from national courts in order to initiate actions at the UPC as soon as it starts operations.⁵⁷

⁵⁷ A parallel can be drawn to the EPO's central limitation procedure, available as of entry into force of the EPC2000 for any European patent in force: on 13.12.2007 and in the 3 months thereafter, many more requests for limitations were filed than in the following months (where a steady state was reached).

Tables I.9 and I.10 warrant a few additional explanations:

- ☞ the Tables show the number of actions **initiated** at the Court of First Instance of the UPC, **not** the number of **final decisions**; it goes without saying that many cases will in practice be settled during proceedings or withdrawn before the UPC reaches a final decision;⁵⁸
- ☞ in the context of the present attempt to estimate the future caseload of the UPC, it is **not** assumed that the creation of the UPC will entail any increased willingness to litigate; it is acknowledged that there are some reasons to believe that users from certain Contracting Member States (in particular SMEs in the UK) would be more willing to litigate within a new court system offering litigation at lower costs than the current cost level of their national litigation system;⁵⁹ however, while high costs certainly **prevent** some litigation (and may instead favour settlement out of court), some cases currently "withheld" from the High Court are probably brought instead to national courts **abroad**; in any case, it appears extremely difficult to quantify any increase in the overall volume of patent litigation on the basis of considerations about particular user groups' increased willingness to litigate in a new court system;
- ☞ finally, past increases in the volume of patent litigation appear linked more to the increase in the stock of patents than to any increased propensity to litigate on the part of patent proprietors or third parties; even if the likelihood of litigation is assumed to remain stable (at 0,24%, see Section 2 above), an increase in the overall volume of litigation could well result from an increase in the stock of patents at risk, but **not** from any increased propensity to litigate.

For all intents and purposes, it should be emphasised that the aim of the establishment of the UPC is **not** to increase the volume of litigation. On the contrary, the aim is that the UPC over time develops a unitary and cogent case-law and a consistent practice, enabling potential litigants to ascertain a firm basis for **not** going to court at all or settle their differences early.⁶⁰

Section 6. Estimated caseload: Break-down according to type of action

Various **types of actions** may be initiated before the UPC under Article 15(1)(a) to (g) draft Agreement:

- o actions for actual or threatened infringement (a),

⁵⁸ See Article 52 draft Agreement: "The parties may, at any time in the course of proceedings, conclude their case by way of settlement confirmed by a decision of the Court". See Part III, Section 2 (footnote 117).

⁵⁹ It has been argued that the dauntingly high cost of patent litigation in the UK has suppressed much activity in this field, so that users refrain from bringing cases to court in the UK, see Jackson (2010); with the creation of the UPC, it is predicted that some of these users would again engage in patent litigation. See also Harhoff (2009), page 44.

⁶⁰ [Ideally, this aspect should be calibrated as follows: after 2025, when the UPC will have dealt with 10 000 to 15 000 cases (Scenario 1), a slow decrease of the number of cases would take place, due to the enhanced legal certainty as regard basic patent law questions such as claim interpretation, doctrine of equivalents, scope of protection, validity issues].

- o actions for declarations of non-infringement (a1),
- o actions for provisional and protective measures and injunctions (b),
- o revocation actions (c),
- o actions for damages or compensation derived from the provisional protection conferred by a published patent application (d),
- o actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the patent (e),
- o actions on compensation for licences of right (f);⁶¹
- o actions concerning decisions of the EPO in carrying out the tasks referred to in Article 12 draft UPP Regulation (g).

In addition, the UPC-CFI will hear

- o applications for orders for provisional measures to preserve evidence, lodged before the commencement of proceedings on the merits;⁶²
- o cases referred back to it under Article 47(1) draft Agreement which empowers the Court of Appeal, if the appeal is well-founded and in exceptional cases, to refer the case back to the Court of First Instance for decision.

Also to be reckoned with are various types of **defences** raised by the defendant, in particular counterclaims for revocation and counterclaims concerning licences. In addition, a large number of civil law issues may be raised as defences, in particular questions relating to (a) Rechtsübergang, (b) who is the right defendant (eg, Mittäter, Mittelbarer Täter, Anstifter, Gehilfen), (c) objections of the defendant (eg, need to apply national contract law).⁶³

National courts will retain jurisdiction in respect of actions which do not come within the exclusive jurisdiction of the UPC.⁶⁴ National courts will thus continue to hear actions related to for instance ownership and employees' inventions.

Number of infringement actions

For the purposes of the present study, focus will be on **infringement actions** (with or without **counterclaims for revocation**).

Direct **revocation actions** will also be included in the estimations due to the importance (from a public policy perspective) of the availability of a centralised procedure enabling any person (competitor or general public) to challenge the validity of a patent – be it to clear the patents register of patents which perhaps should never have been granted or to question the practice of the granting authority. It should be kept in mind, however, that most available data indicate that very few direct revocation actions are initiated.⁶⁵ The migration of a limited number of opposition cases from the EPO to the UPC will not change the overall picture.

⁶¹ See Article 11(1) draft UPP-Regulation.

⁶² Article 35a(1) draft Agreement.

⁶³ See the list of Tilmann, GRUR Int. 5/2003, 381 (386-388).

⁶⁴ Article 15(2) draft Agreement.

An attempt to present a break-down for the other actions listed in Article 15(1) draft Agreement will not be made, for the following reasons:

- ⊘ actions for provisional and protective measures and injunctions must be followed by main (infringement) proceedings on the merits (see Article 37(5) draft Agreement). These actions will therefore be counted as infringement actions;
- ⊘ the number of preventive actions (such as actions for declarations of non-infringement) will very much depend on the willingness of the UPC to grant preliminary injunctions: the more easily such injunctions are granted, the more frequent will preventive actions become;⁶⁶ it is neither appropriate nor possible at this stage to indulge in speculations about the willingness of the UPC to grant preliminary injunctions;⁶⁷
- ⊘ separate actions for damages or compensation derived from the provisional protection conferred by a published patent application are extremely rare in practice; where such claims are made, they are part of a claim for damages for the infringement of a granted patent;
- ⊘ actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the patent are very rare;
- ⊘ actions on compensation for licences of right will most likely be very rare;
- ⊘ actions concerning decisions of the EPO will relate to a few formal issues such as the timeliness of the request for unitary effect, the translation to be provided (during the transitional period), entries into the Register of unitary patent protection: the volume of *contentieux administratif* between the EPO and patent proprietors on these issues should remain limited.

Assumptions

- ⊘ Consideration has been given above (Section 4) to the migration of a few opposition cases from the EPO to the UPC. Assumptions in that respect have been included in Tables I.8 and I.9.
- ⊘ As far as the UPC's remaining caseload is concerned, it is assumed that
 - o 90% of cases will be infringement actions (with or without counterclaim for revocation)
 - o 10% of cases will be direct revocation actions

Number of infringement proceedings in which a counterclaim for revocation is raised

65 In Germany, less than 10% of the nullity cases dealt with by the Federal Patent Court are **not** related to pending infringement actions (for 2005: ca. 22 cases) (email Federal Patent Court, 7.1.2010). In France, out of 629 decisions handed down in the period 2000 to 2008, only 19 related to direct revocation actions (3% of 629 decisions) (data P. Véron). In the UK, the figure is higher (R. Jacob). By contrast, recent research carried out by van Zeebroek/Graham (2011) on approximately 9000 decisions from 7 European countries (period 2000-2009) suggests that the number of "stand alone nullity actions" could be somewhat higher (see van Zeebroek/Graham (2011), page 9 and Table 3).

66 Conversely, in France, where the courts are reluctant to grant preliminary injunctions, not more than 1 or 2 action for declaration of non-infringement are commenced each year (data P. Véron).

67 Figures on this for the pharmaceutical industry in DG Competition's Sector Inquiry?

At this juncture, it is appropriate to take one step further and estimate the number of infringement proceedings in which a counterclaim for revocation will be raised. A particular difficulty in this respect is to reconcile – for the purposes of making reasonably supported assumptions for the UPC – the data available from Member States with different patent litigation systems.

Combined system and split system

A well-known fundamental difference between national patent litigation systems of Member States is the way the question of the validity of the patent at suit is dealt with when the validity question is raised during infringement proceedings.

Most Member States have chosen to implement a system in which the court dealing with the infringement action must also deal with any validity question (counterclaim for revocation) raised in the course of the infringement proceedings (hereafter "combined system").⁶⁸

Other Member States (for example AT, BU, CZ, DE, HU, PO, PL, RO, SK) have implemented systems in which infringement and validity issues are in principle dealt with by different courts or authorities (hereafter "split system").⁶⁹ Some variations exist within the split systems: the validity issue may for instance be heard by a separate specialised court (eg, the Federal Patent Court in Germany) or by the national patent office (in AT, CZ, HU, PL). The basic concept behind the split system is that granted patents must be presumed to be valid – and it should therefore be possible to enforce them speedily without burdening infringement proceedings with counterclaims for revocation. This holds true especially in case a patent is granted by a patent office – such as the DPMA – carrying out novelty searches and substantive examination (including *inter partes* opposition proceedings) where all prior art and other facts and evidence can be supposed to have been assessed twice already.

Data from the Member States

Based on the survey carried out by DG Internal market in 2010, a clear trend appears:

- ⊗ in Member States with combined system, counterclaims for revocation are raised as a routine matter in 70 to 95% of infringement proceedings (for instance, FR: 90-95%, NL: 95%, UK: 80%, SE: 70%);
- ⊗ in Member States with split system, counterclaims for revocation (or more accurately, separate revocation actions relating to pending infringement actions) are only raised at the court or authority competent for validity in 20-30% of infringement proceedings (for instance, DE: 20-26%, HU: 20-30%).

It should however be noted that, in Member States with split system (for instance, DE), validity *issues* are at stake in **more** infringement proceedings than the above figures (20-26%) might at first glance suggest:

⁶⁸ Also commonly referred to as "single track system" or "principle of interconnection" ("Verbundprinzip").

⁶⁹ Also commonly referred to as "dual system", "bifurcation" or "principle of separation" ("Trennungsprinzip").

- some infringement actions (around 20-30%) are initiated while opposition proceedings are still pending at the DPMA or at the EPO, so that a revocation action **cannot** be initiated at all at the Federal Patent Court;⁷⁰
- in some infringement proceedings (50-60%), validity issues are raised by the defendants at the infringement court – **but** a preliminary examination of the validity issue by the infringement court shows that there are no serious validity concerns – and eventually the defendant does not lodge a revocation action at the Federal Patent Court.

Assumption

In order not to complicate the scenarios excessively, a simplified model is proposed. It is based on an average between, on the one hand, the almost systematic filing of counterclaims in Member States with combined system and, on the other hand, the more limited occurrences of validity issues (whether validity questions raised before the infringement court or actual revocation actions initiated before separate courts or authorities) in Member States with split system:

- ⊗ A counterclaim for revocation will be raised in **60%** of infringement proceedings before the UPC.

This assumption implies future convergence – in the framework of the draft Agreement's "flexibility system" (see below Part II, Section 3) – of defendants' (currently diverging) strategies in Member States with combined and split systems: at the UPC,

- ⊗ defendants (especially those coming from countries with a combined system) would no longer "routinely" lodge counterclaims for revocation, as they do today; instead they would more thoroughly consider whether a counterclaim for revocation really has prospects of success;
- ⊗ defendants (especially those coming from countries with split system) would not be dissuaded (notably by costs exposure⁷¹ or by the statutory framework⁷²) from lodging counterclaim for revocation, as they may sometimes be today.

Such convergence in the framework of the UPC could have a **positive impact**, by putting an end to what may in some cases amount to a waste of resources:

⁷⁰ See §81(2) DE-Patents Act. This is an important factor in practice because most patents involved in litigation are patents in their early days where filing an opposition is the most convenient way to challenge the validity of the patent. In most other EPC Contracting States, pending opposition proceedings do not prevent the defendant in infringement proceedings from lodging a counterclaim for revocation.

⁷¹ The cost regime in Germany makes it rather risky for a defendant to challenge the validity of the patent before the Federal Patent Court; for example, in a case where the value at stake would be in the range of 2 000 000 €, the cost exposure for the defendant before the Landgericht is about 22 000 € for court fees plus 38 000 € for attorney fees (plus the risk of reimbursement of attorney's fees in the same amount to the other party if the action is lost). Bringing a revocation action before the Federal Patent Court creates an additional – higher – exposure, amounting to an additional 34 000 € court fees and 45 000 € attorney fees (plus the risk of reimbursement of attorney's fees in the same amount to the other party if the action is lost). It follows that the revocation case must be strong to deserve an action; this factor is also important when comparing the situation with France or other countries where challenging the validity of the patent does not create any significant additional cost exposure.

⁷² As explained above (Section 4), the opposition procedure at the EPO has to a large extent been disconnected from the procedures at the UPC.

- in the combined system, the practice of systematic lodging of counterclaims implies that some counterclaims are lodged in cases where it would perhaps not be absolutely necessary (where for instance the validity of the patent is beyond any reasonable doubt) (so-called "frivolous" counterclaims);
- in the split system, if the infringement court deals (even preliminary) with the validity issue, the delimitation of competence between the infringement court and the validity court is blurred; in addition, increased flexibility could contribute to strengthen what is sometimes referred to as the "pedagogic" purpose of challenging the validity of the patent – namely enabling the infringement court to better assess the proper scope of protection to be given to the patent.

Break-down of the cases commenced before the UPC-CFI

Scenario 1: "High up-take"

Table I.11

Year	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028
Total number of cases	123	260	454	696	1055	1468	1557	1642	1723	1802	1908	1968	2028	2088
Direct revocation actions	26*	56	75	130	165	237	246	254	262	270	300			
Infringement actions	97**	204	379	566	890	1231	1331	1388	1461	1532	1599			
- with counterclaim for revocation	58***	122	227	339	534	738	786	832	876	919	959			
<i>[EPO opposition cases migrating to the UPC]</i>	15	30	30	60	60	90	90	90	90	90	120	120	120	120

* Computed as $15(\text{migration}) + 11(10\% \text{ of } 108)$

** computed as $123 - 26 = 97$

*** Computed as 60% of 97

Scenario 2: "Low up-take"

Table I.12

Year	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028
Total number of cases	7	15	24	49	96	602	752	899	1042	1183	1324	1455	1560	1695
Direct revocation actions	3	7	8	13	18	71	86	101	115	129	146	159		
Infringement actions	4*	8	16	36	78	531	666	798	927	1054	1178	1296		
- with counterclaim for revocation	2**	5	10	22	47	319	400	479	556	632	707	778		
<i>[EPO opposition cases migrating to the UPC]</i>	3	6	6	9	9	12	12	12	12	12	15	15	15	15

PART II – SCENARIOS FOR THE SETUP

In order to estimate the costs of establishing the UPC, it is necessary to present various scenarios for the setup of the Court of First Instance of the UPC, in particular the number of local and regional divisions set up in the Contracting Member States (Section 1).

In addition, assumptions regarding the geographical distribution of the UPC's caseload (to which divisions will plaintiffs bring their cases?) must be made (Section 2).

Finally, it is necessary to attempt to estimate the UPC-CFI's use of the options available under Article 15a(2) draft Agreement where a counterclaim for revocation is raised during a pending infringement action (Section 3).

Assumption

⊗ The 25 Member States participating in enhanced cooperation will be parties to the Agreement on a UPC.⁷³

Section 1. Member States' choices regarding the set-up of the UPC-CFI

The UPC shall comprise a Court of First Instance, a Court of Appeal and a Registry (Article 4(1) draft Agreement). The **Court of First Instance** shall comprise a **central division** as well as **local and regional divisions** (Article 5(1) draft Agreement).

The following options are available to Contracting Member States concerning the presence, on their territory, of a division of the UPC-CFI:

<p>1. Local division Any State may set up a local division on its territory (Article 5(2) draft Agreement)</p> <p>2. Additional local divisions States where more than 100 cases/year have been initiated during three successive years may set up an additional local division, up to a maximum of three (Article 5(3) draft Agreement)</p>	<p style="text-align: center;">Combining local and regional presence</p> <p>A State which has set up one or more local divisions on its territory may additionally set up a regional division together with another State</p>
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⁷³ Union Member States not participating in enhanced cooperation may also become parties to the Agreement, and other EPC Contracting States such as Albania, Bosnia-Herzegovina, Croatia, Island, Macedonia and Serbia could be included among the States parties to the Agreement if they join the Union.

<p>4. Regional division Two or more States may together set up a regional division (Article 5(5) draft Agreement)</p>	<p>A State may set up a regional division together with a State which has set up one or more local divisions</p>
<p>5. ⁷⁴Conferral of jurisdiction on the central division States which do not host a local division and do not participate in a regional division confer jurisdiction on the central division (follows implicitly from Article 15a(1), last sentence, draft Agreement)</p>	

Scenarios

The choices made by the Contracting Member States will have a significant impact on the costs of the UPC. Crucial in this respect will be the number of local and regional divisions which will be set up. A central division will be established in any case under Article 5(1) draft Agreement.

Within the framework set out in the draft Agreement, an almost infinite number of scenarios for the setup of the UPC-CFI can be imagined, ranging from "full local presence" (all States set up one or more local divisions) over various degrees of regionalisation, to full centralisation (all States confer jurisdiction on the central division).⁷⁵

Below, five scenarios for the setup of the UPC-CFI are presented, without any prejudice to Contracting Member States' eventual choices. However, the scenarios cannot simply be plucked out of thin air but have been based on the following common sense considerations and reasonably predictable choices:

- ⊗ in all 5 scenarios, it is assumed that
 - o only 1 local division is set up in FR;⁷⁶
 - o 3 divisions are set up in DE;⁷⁷

74 Recommended clarifications

1. It is recommended to more explicitly mention this option which offers several advantages (cost-effectiveness, centralisation, specialisation) for those Contracting Member States in which few patent litigation cases are initiated.

2. In addition, it is recommended to supplement the "advice" to join a regional division – directed to those Contracting Member States hosting a local division with low caseload (see §15 Council Conclusions) – with the alternative of conferring jurisdiction on the central division. From the point of view of financing the UPC, conferral of jurisdiction on the central division would present even more advantages than joining a regional division.

⁷⁵ In any event, the eventual setup will not necessarily be stable over time because Contracting Member States may request to discontinue a local or regional division (See Article 13(3) draft Statute).

⁷⁶ Despite the relatively high number of cases dealt with by the French courts, this is in line with the recent centralisation in Paris of all patent litigation, see Decree n° 2009-1205 of 9.10.2009 on the location and the jurisdiction of courts in IP matters and Article D. 631-2 Intellectual Property Code giving the *Tribunal de Grande Instance* of Paris exclusive jurisdiction to hear cases relating to notably patents and supplementary protection certificates.

⁷⁷ The high volume of patent litigation in Germany amply justifies this assumption.

- ⊘ a Member State's decision to join a regional division (Setup 2 to 5) is based on
 - the desire to avoid costs relating to the facilities for local divisions;⁷⁸
 - the advice to Member States to **join a regional division** rather than setting up a local division which would hear only few cases;⁷⁹
 - general considerations relating to a **common language** (eg, UK, IE; GR, CY)
 - geographic **proximity** (eg, Baltic and Nordic countries);
 - for the [10] Member States in which the national courts currently deal with very few cases (less than 5 cases per year), the awareness that setting up on their territory a local division dealing with very few cases would **not** help enhance the limited expertise available at national level.

It must be strongly emphasised that the 5 scenarios below are solely included here for illustrative purposes. The mention of particular Member States in the scenarios neither derives from any declaration or expression of intent on the part of the State concerned nor pre-empts in any way a State's eventual choice.

Setup 1: "Full local presence"	
All States set up one or more local divisions on their territory <ul style="list-style-type: none"> ⊘ 24 States each set up 1 local division <ul style="list-style-type: none"> ○ <i>[AT, BE, BG, CY, CZ, DK, EE, FI, FR, GR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SK, SI, SE, UK]</i> ⊘ 1 State <i>[DE]</i> sets up 3 local divisions 	Without prejudice to Contracti ng Member States'

⁷⁸ Article 5(4) draft Agreement: A Contracting Member State hosting a local division shall provide the facilities necessary for that purpose. Costs for facilities of regional divisions will be paid by the budget of the UPC.

⁷⁹ §15 Council Conclusions.

	eventual decision
Total number of divisions: 27 local divisions	

Setup 2: "Continuity"	
<p><u>Local divisions</u></p> <ul style="list-style-type: none"> ⌘ 15 States – with a caseload of more than 5 cases/year – set up 1 local division <ul style="list-style-type: none"> o [AT, BE, BG, CZ, DK, FI, FR, HU, NL, PL, PT, RO, SE, SK, SI] ⌘ 1 State [DE] sets up 3 local divisions <p><u>Regional divisions</u></p> <ul style="list-style-type: none"> ⌘ 7 States set up 3 regional divisions <ul style="list-style-type: none"> o [IE, UK – CY, GR – EE, LT, LV] <p><u>Conferral of jurisdiction on the central division</u></p> <p>2 States [LU, MT] confer jurisdiction on the central division</p>	Without prejudice to Contracting Member States' eventual decision
Total number of divisions: 18 local divisions and 3 regional divisions	

Setup 3: "Pooling resources"	
<p><u>Regional divisions</u></p> <ul style="list-style-type: none"> ⌘ 20 States set up 5 regional divisions 	Without prejudice

<ul style="list-style-type: none"> o RD-North <i>[DK, EE, FI, LT, LV, SE]</i> o RD-East <i>[CZ, HU, PL, SK]</i> o RD-Southeast <i>[BG, CY, GR, RO]</i> o RD-West <i>[IE, NL, UK, PT]</i> o RD-Center <i>[AT, DE]</i> <p><u>Conferral of jurisdiction on the central division</u></p> <ul style="list-style-type: none"> ⊘ 3 States <i>[LU, MT, SI]</i> confer jurisdiction on the central division <p><u>Local divisions</u></p> <ul style="list-style-type: none"> ⊘ 2 States set up 1 local division <ul style="list-style-type: none"> o <i>[BE, FR]</i> ⊘ 1 Member State <i>[DE]</i> sets up 2 local divisions <ul style="list-style-type: none"> o in addition to participating in a regional division <i>[with AT]</i> 	<p>to Contracti ng Member States' eventual decision</p>
<p>Total number of divisions: 4 local divisions and 5 regional divisions</p>	

<p>Setup 4: "Regionalisation"</p>	
<p><u>Regional divisions</u></p> <ul style="list-style-type: none"> ⊘ 25 States set up 6 regional divisions <ul style="list-style-type: none"> o RD-North <i>[DK, EE, FI, LT, LV, SE]</i> o RD-East <i>[BG, CZ, HU, PL, RO, SK, SI]</i> 	<p>Without prejudice to Contracti</p>

<ul style="list-style-type: none"> o RD-South [CY, GR, MT] o RD-West [BE, IE, NL, LU, UK] o RD-Centre-West [BE, FR, LU, PT] o RD-Center [AT, DE] <p><u>Local divisions</u></p> <ul style="list-style-type: none"> ⊘ 1 State [DE] sets up 2 local divisions <ul style="list-style-type: none"> o in addition to participating in a regional division [with AT] 	ng Member States' eventual decision
Total number of divisions: 2 local divisions and 6 regional divisions	

Setup 5: "Centralisation"	
<p><u>Conferral of jurisdiction on the central division</u></p> <ul style="list-style-type: none"> ⊘ 16 States confer jurisdiction on the central division <ul style="list-style-type: none"> o [AT, BG, CZ, CY, EE, GR, HU, IE, LT, LV, MT, PL, PT, RO, SK, SI] <p><u>Regional divisions</u></p> <ul style="list-style-type: none"> ⊘ 6 States set up 2 regional divisions <ul style="list-style-type: none"> o [DK, FI, SE – BE, LU, NL] <p><u>Local divisions</u></p> <ul style="list-style-type: none"> ⊘ 2 States [FR, UK] each set up 1 local division ⊘ 1 State [DE] sets up 3 local divisions 	Without prejudice to Contracti ng Member States' eventual decision

Total number of divisions: **5 local divisions and 2 regional divisions**

Following the presentation of the initial findings of the present study, several delegations have indicated their intention to participate in a regional division. While such preliminary and non-binding indications are without prejudice to the States' eventual decision under Article 5 draft Agreement, they do confirm the trend towards regionalisation on which Setup 3 and 4 above are based.

For the purposes of the following study, this trend enables DG Internal Market to limit the otherwise infinite number of scenarios and focus on its **preferred scenario**, which is **Setup 3 "Pooling resources"**.⁸⁰ It is immediately apparent that this Setup comes close to the fundamental objective pursued by the creation of the UPC and the basic ideas behind the project which are to improve the patent litigation system in Europe – by enhancing specialisation, pooling resources, ensuring a proper balance between centralisation and proximity to users,⁸¹ at reasonable costs – and thus do away with the high costs, long delays and legal uncertainty which the current fragmented court system implies in practice. Setup 3 also appears at first glance to present the following significant advantages:

- limited costs for facilities (only 4 local divisions and 5 regional division would be set up)
- low operational costs for the pool of judges, due to limited travelling of judges.

Setup 3 will therefore be used for the estimations in the remaining Parts of this Study. By contrast, Setup 1, 2, 4 and 5 are not pursued further, for the following reasons:

Setup 1 "Full local presence" simply replicates the current system in "European clothes". It would thus entail a fragmented and expensive court system with few advantages over the current system. In particular, this set-up would imply

- o high costs for facilities, as all Member States would have to provide facilities for the many (27) local divisions which they would host on their territory; several of these divisions would be very sparsely used, and the daily work could not develop into the "judicial routine" which is necessary to deal efficiently with litigation in a specialised field of law;
- o very high operational costs for the pool of judges, as most local divisions would hear very few cases so that 2 judges from the pool of judges would have to fly in systematically (on a case-by-case basis);
- o marginal role and under-use of the central division.

The same applies to **Setup 2 "Continuity"**, although to a lesser extent. With 18 local divisions – of which at least half would hear very few cases per year – the objective of cost efficiency appears difficult to attain.

80 The terms "pooling of resources" are used in §13 Council Conclusions.

81 Note in particular that a "regional division may hear cases in multiple locations", Article 5(5) draft Agreement.

Underlying **Setup 4 "Regionalisation"** is the gradual emergence of several highly integrated and competitive cross-border regions in Europe. Here, businesses' need for "regional presence" – which could be ensured by pooling resources in a limited number of specialised divisions evenly distributed across the main regions – by far outweighs the demand for "traditional" local presence. In the long run, such a setup could be more efficient, in an area of litigation mostly involving companies, than local presence in each country.

In **Setup 5 "Centralisation"**, several Contracting Member States with little or no expertise in the field of patent litigation would transfer jurisdiction to the central division – thus enabling users to access, at low cost, a specialised court system – instead of building up or maintaining expertise at national level, only to deal with a few cases per year. For several States, centralisation would however be at the expense of proximity.

At this juncture, it does not appear likely that Member States would opt for a setup along the lines of Setup 4 and 5.

Two specific issues must be addressed at this stage.

1. Will the need to maintain patent expertise in national courts impact the choice made by the Member States?

National courts will continue, at least for the foreseeable future, to deal with litigation relating to patents falling outside the jurisdiction of the UPC (first and foremost national patents but also some classical European patents⁸²). It has therefore been argued that most Contracting Member States would be keen to keep, within their national court systems, the patent law expertise needed to deal with these cases. Most or all of them might consequently choose to set up local divisions on their territory in order to maintain expertise at national level (Setup 1 and 2).

This argument does not resist careful scrutiny: indeed, having a local division is **neither necessary nor sufficient** to guarantee that expertise is available at national level. At least for the [10] States in which the national courts currently deal with very few cases (less than 5 cases per year), the presence on their territory of a local division with an insignificant caseload will not contribute to enhancing the expertise available at national level.

2. To what extent will the setup of the UPC rebound to the jurisdiction *ratione loci* of national patent courts?

During the last 10 to 15 years, several Member States have undertaken far-reaching reforms of their national patent litigation systems. Alongside the implementation of the Enforcement Directive, the most distinctive feature is a centralisation *ratione loci* at first instance, for example in:

- NL (since 1995): exclusive jurisdiction of the District Court of The Hague
- IT (since 2003): creation of specialised industrial property sections in 12 first instance tribunals
- DK (since 2006): exclusive jurisdiction of the Maritime Court in Copenhagen

⁸² Where an opt-out has been notified (Article 58(3) draft Agreement) or where the plaintiff chooses to bring the case to a national court during the 5 year transitional period (Article 58(1) draft Agreement).

- BE (since 2007): jurisdiction of 5 *tribunaux de commerce*
- FR (since 2009): exclusive jurisdiction of the *Tribunal de Grande Instance* of Paris

Also in SE and FI , one first instance court has exclusive jurisdiction for patents (City Court of Stockholm and District Court of Helsinki).

Users of the patent system in Europe have long called for similar reforms in other Member States. The question here is whether the creation of the UPC would reinforce these reforms aiming at centralisation and specialisation at national level. A recent statement by AIPPI-Belgium may hint at a sound scheme:⁸³ if the UPC is created, it is recommended that Belgium request that a local division of the UPC-CFI be set up in Belgium. This division [*with seat in Brussels*] should have jurisdiction not only for European patents (BE) and European patents with unitary effect but also, in its capacity of *Tribunal de Commerce* of Brussels – for national Belgian patents (which today fall under the jurisdiction of 5 *tribunaux de commerce*).

The picture which would emerge could be the following: where a local division of the UPC-CFI is set up to deal with disputes relating to European patents and European patents with unitary effect, the Member State would attribute jurisdiction for disputes relating to **national** patents⁸⁴ to a **single specialised** national court which would **share all its essential components** – facilities, most of the judges⁸⁵ and other staff – with the local division of the UPC-CFI.

This specialised national court will **not** be legally or institutionally linked with the UPC but will constitute a separate national court organ. Nevertheless, in practice, the same judges will be working in the same buildings, but with an UPC "cap" when dealing with actions relating to European patents or European patents with unitary effect and with a national court "cap" where dealing with actions relating to national patents.

To sum up, it appears that a further positive effect of the creation of the UPC could be to contribute to accelerate

- reforms aiming at concentrating, in a single specialised national court instance, all litigation relating to national patents and
- the modernisation of national patent litigation system in the Contracting Member States.

Section 2. Geographic distribution of cases

The present section attempts to present a scenario relating to the question to which divisions of the UPC-CFI the plaintiffs will bring their cases. The legal framework is Article 15a draft Agreement on "Jurisdiction of the divisions of the Court of First Instance".

83 Opinion, 6.11.2009, point 1.

84 Jurisdiction to deal with disputes relating to European patents for which and opt-out has been notified would also be conferred on these national courts.

85 Of course, only judges having the nationality of the Member State concerned could hear cases relating to national patents.

Jurisdiction of local and regional division	
<p>(1) Actions referred to in Article 15(1)(a), (b), (d) and (e) shall be brought before:</p> <p>(a) the local division hosted by the Contracting Member State where the actual or threatened infringement has occurred or may occur, or the regional division in which this Contracting Member State participates; or</p> <p>(b) the local division hosted by the Contracting Member State where the defendant is domiciled, or the regional division in which this Contracting Member State participates.</p> <p>Actions against defendants domiciled outside the territory of the Contracting Member States shall be brought before the local or regional division in accordance with (a)</p>	<p>Article 15(1)</p> <p>(a) actions for actual or threatened infringement,</p> <p>(b) actions for provisional and protective measures and injunctions,</p> <p>(d) actions for damages or compensation derived from the provisional protection conferred by a published patent application,</p> <p>(e) actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the patent</p>
Jurisdiction of central division	
<p>(1) (3rd sentence) If the Contracting Member State concerned does not host a local division and does not participate in a regional division, actions shall be brought before the central division.</p>	

Jurisdiction of central division	
<p>(3) ... the actions referred to in Article 15(1)(a1), (c), (f) and (g) shall be brought before the central division.</p>	<p>Article 15(1)</p> <p>(a1) actions for declarations of non-infringement</p> <p>(c) revocation actions</p> <p>(f) actions on compensation for licences of right</p> <p>(g) actions concerning decisions of the EPO</p>

Agreement of parties	
<p>(6) Parties may agree to bring an action before the division of their choice, including the central</p>	<p>Any</p>

division.	action
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In practice, the plaintiff will often have the possibility to bring the case to different divisions: not only may an alleged infringer frequently be accorded more than one domicile,⁸⁶ but the plaintiff may sue manufacturers, importers or dealers.

It is obviously difficult to predict how plaintiffs will make use of these options. Below, a certain inertness is assumed: plaintiffs will for several years maintain today's habits. The desire for proximity (local presence),⁸⁷ convenience, continuation of established practices and language regime will all imply that, during a long initial period, the geographic distribution of cases will most likely correspond to today's pattern. In short, plaintiffs would start actions at the division in the country where they today start actions.⁸⁸

[It is not possible to assess the impact of inherent consequences of the new framework such as for instance competition between divisions. This is unfortunate because many plaintiffs will tend to choose divisions which will have a reputation for competence and speed. However, it cannot be predicted at this stage which divisions will be quick, efficient and competent – it might be divisions located where most patent litigation takes place, but – given a level playing field (common legal framework, in particular as regards multinational composition of panels, technical support from the Pool of judges, fees) and common procedural rules – any division may be able to emerge as one of the efficient and competent venues to deal with patent litigation in Europe.]

Assumptions

- ⊗ During a long initial period, the geographic distribution of cases is likely to correspond to the pattern apparent from the surveys carried out by the German Presidency in 2007 and by DG Internal Market in 2010.
- ⊗ Plaintiffs would thus initiate actions at the division in the country where they would today commence actions
 - o where a local division replaces today's national forum, plaintiffs will commence actions at that local division
 - o where a regional division replaces today's national forum, plaintiffs will commence actions at that regional division

⁸⁶ The broad interpretation of the term "domicile" in Article 60 Regulation 44/2001 implies that an allegedly infringing legal entity can be accorded more than one domicile. It follows that the plaintiff may often be able to select one out of several possible jurisdictions.

⁸⁷ Cf. users' longstanding insistence on the need for local presence:

- "big and small industry alike insists on a local first instance specialised court in order to preserve proximity and accessibility of justice, with a centralised Community and/or EPLA appeal court in order to guarantee uniform interpretation of the law" (Preliminary findings of the Commission's 2006 Consultation on future patent policy in Europe, page 13).

⁸⁸ The alternative to this simplification would be to indulge in speculations such as

- would some UK companies – which today are said to be deterred from litigating at home due to high costs and instead litigate in DE – revert to a local or regional division located in the UK?

- which divisions would be chosen by the significant number of US and Japanese patent proprietors involved in patent litigation in Europe?

- o where jurisdiction is conferred on the central division, plaintiffs will commence actions at the central division

Table II.1 below presents the average number of patent litigation cases at first instance in each Contracting Member State in recent years. The main basis is the survey carried out by DG Internal Market in 2010, assessed against and confirmed by other recent surveys and studies (see Part I, Section 2.A). The percentage below each Contracting Member State indicates that State's share of the overall volume of patent litigation in Europe.

Table II.1: Average n° of cases per year and share of overall patent litigation in Contracting Member States

AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	GR	HU	IE
⁸⁹ 30	40*	10	3	10	34	1	23	224	1133	n.a.	23	4
1,6%	2,1%	0,3%	0,16%	0,53%	1,8%	0,05%	1,2%	11,9%	60,2%	%	1,2%	0,2%
LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	SE	UK	Total
3	3	1	1	104	30	25	26	5	6	35	108	1882
0,16%	0,16%	0,05%	0,05%	5,5%	1,6%	1,3%	1,3%	0,3%	0,3%	1,9%	5,7%	100%

Comments (*)

The total number of cases (1882) is lower than the figure resulting from the surveys examined above in Part I Section 2.A because the figures from ES and IT are left out for the purpose of computing a key for the geographic distribution of cases in the framework of the UPC.

For AT, CZ, DE and PL – where infringement and validity issues are heard by different courts or authorities – it is assumed that 90% of revocation actions are initiated in connexion with pending infringement actions.⁹⁰

For BE, the data in Table I.4 relate to the number of **decisions**. The number of actions **initiated** is obviously higher.

Explanations to Table II.1

1. The fact that the data in Table I.3 – and the average computed for Table II.1 – do not make any distinction between cases involving European patents and national patents weakens the methodology to some extent. However, as the number of European patents in force in EPC Contracting States which joined the European Patent Organisation only recently will increase over the next 5 to 10 years, the volume of patent litigation relating to European patents will increase concurrently (while litigation relating to national patents will decrease). It therefore appears reasonable to assume that around 2015 (10-12 years after the enlargement of the European Patent Organisation), a significant number of European patents

⁸⁹ Computed as (I) 1079 + 1137 divided by 2 = 1108 and (R) 10% of 275 and of 227 divided by 2 = 25.

⁹⁰ See footnote 65.

will be in force in the new Contracting States, so that patent litigation at the time where the UPC would start operation will predominantly involve European patents.

2. An issue already addressed above (Part I, Section 5) is whether the respective share of the UK should be corrected upwards because the current dauntingly high cost of patent litigation in that country is known to have suppressed much activity in the field of patent litigation.⁹¹ Also at this juncture, it is proposed **not** to take this aspect into account, in view of the considerable uncertainty surrounding any prediction about users' increased willingness to litigate in the framework of the UPC.

For each of the 5 setups of the UPC presented in Part II, Section 1, the caseload of the divisions of the UPC-CFI can be assessed by performing the following operations:

1. starting from the estimates regarding the caseload in Tables I.9 (High up-take) and I.10 (Low up-take),
2. using the pattern of geographical distribution in Table II.1,
3. applying the distribution of cases to the divisions established under a given Setup.

These operations can be carried out at leisure for any possible Setup. Below, the operations are carried out only for Setup 3 "Pooling resources", with the variants "High up-take" and "Low up-take".

It should be emphasised again that the chosen Setup is without any prejudice to Contracting Member States' eventual choices. The overview of geographical distribution of cases is included solely for illustrative purposes, and the mention of particular Member States in the scenarios does not derive from any declaration or

⁹¹ See Lord Justice Jackson "Review of Civil Litigation Costs: Preliminary Report", May 2009 (hereafter "Jackson (2009)"). The argument is that, if costs of litigation before the future court would be markedly lower than today's costs of litigation in the UK, parties who today refrain from bringing cases to the courts in the UK – either by bringing them to national courts abroad or by settling them – will start to bring cases to the local or regional division in the UK. A recent reform of the Patents County Court is intended to address this issue.

expression of intent on the part of the State concerned.

Geographical distribution of infringement actions to local and regional divisions

Scenario 1. "High up-take" and Setup 3. "Pooling resources"

Table II.2: Geographical distribution of infringement actions

	Key	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
IA - dealt w/by LD/RD	100%	97	204	379	566	890	1231	1331	1388	1461	1532	1599
	96,7%	94	197	366	547	860	1190	1287	1342	1412	1481	1546
Regional division												
RD-North*	5,27%	5	10	19	29	45	62	68	71	74	78	81
RD-East**	3,63%	3	7	12	20	31	43	47	49	51	54	56
RD-Southeast***	1,76%	2	3	6	10	15	21	23	24	25	26	27
RD-West****	11,4%	11	22	42	62	98	136	147	153	161	169	176
RD-Center*****	21,6	20	43	79	118	186	257	278	290	305	320	334
Local division												
LD-FR	11,9%	11	23	44	65	102	142	153	160	168	176	184
LD-BE	2,1%	2	4	8	11	18	25	27	28	30	31	32
2 LD-DE	40,1%	39	82	147	219	345	477	516	538	566	594	620

*DK, FI, EE, LT, LV, SE (1,8+1,2+0,05+0,16+0,16+1,9= 5,27)

**CZ, HU, PL, SK (0,53+1,2+1,6+0,3=3,63)

***BG, GR, CY, RO (0,3+0,16+1,3=1,76)

****IE, NL, UK (0,2+5,5+5,7=11,4)

*****AU, DE (1,6+33,3% of 60,2=21,6)

Scenario 2. "Low up-take" and Setup 3. "Pooling resources"

Table II.3: Geographical distribution of infringement actions

	Key	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
--	-----	------	------	------	------	------	------	------	------	------	------	------

92 The local and regional divisions will deal with 96,7% of the infringement actions. The remaining 3,3% of cases (infringement action with counterclaim for revocation) which will be referred to the central division, see below Section 3.

IA - dealt w/by LD/RD	100%	4	8	16	36	78	531	666	798	927	1054	1178
	96,7%	4	8	15	35	75	513	644	722	896	1019	1139
Regional division												
RD-North	5,27%	--	1	1	2	4	27	34	41	47	54	60
RD-East	3,63%	--	--	--	1	3	19	23	28	33	37	42
RD-Southeast	1,76%	--	--	--	1	2	9	11	14	16	18	20
RD-West	11,4%	--	1	2	4	9	58	73	88	102	116	130
RD-Center	21,6	1	2	4	8	16	111	139	167	194	220	246
Local division												
LD-FR	11,9%	1	1	2	4	9	61	77	92	107	121	136
LD-BE	2,1%	--	--	--	1	2	11	14	16	19	21	24
2 LD-DE	40,1%	2	3	6	14	30	206	258	310	359	409	457

Section 3. "Flexibility system": local and regional divisions' use of the options available under Article 15a(2) draft Agreement

At this stage, a much-discussed aspect of the functioning of the UPC must be addressed: when the defendant raises a counterclaim for revocation in the course of infringement proceedings, how will local and regional divisions use the options available under Article 15a(2) draft Agreement?

The following section is solely concerned with identifying relevant factors on which assumptions necessary for the purposes of the present study can be based.

The options offered to local and regional divisions

Four options are offered to a panel of a local or regional division when a counterclaim for revocation is lodged: it may

1. **deal with the whole case** (infringement action **and** counterclaim for revocation) once a technically qualified judge has been allocated to it,
2. **refer the counterclaim** to the central division and **deal with the infringement action**,
3. **refer the counterclaim** to the central division and **stay the infringement action** or
4. **refer the whole case** to the central division.

In view of the above range of possibilities, the system laid down in Article 15a(2) draft Agreement will be referred to as the "flexibility system".

It is important to stress that, under the flexibility system, a panel of a local or regional division has **no power** to deal with a counterclaim for revocation in its standard composition of **3 judges**. When a counterclaim is raised, the panel **must**

- ⊖ either refer the counterclaim to the central division or
- ⊖ if it wants to deal with both the infringement action and the counterclaim, request the allocation of a technically qualified judge.

Factors which could impact the panels' use of the flexibility system

Below, the principal factors which appear likely to impact the panels' use of the flexibility system are identified. A careful analysis of these factors points to the conclusion that – while much can be said at the present stage about the supposed preferences of particular judges and panels – overall very little of this can actually serve as a reasonable basis for building scenarios regarding the eventual practice of the panels. A new specialised European court with international outlook will find its own ways, within a flexible legal framework, to deal efficiently with counterclaims for revocation, taking into account the relevant factors in each particular case and carefully balancing the interests when exercising its discretionary power under Article 15a(2) draft Agreement.

1. Persistence of national practices

A seemingly straightforward assumption would be that

- panels of local or regional divisions located in Contracting Member States with split systems will systematically refer validity issues to the central division
- panels of local or regional divisions located in States with combined systems will refrain from referring validity issues to the central division.

It must however be kept in mind that

- today, in split systems, the referral of a counterclaim for revocation is **mandatory**,⁹³ while referral under Article 15a(2)(b) and (c) draft Agreement will be **optional**;
- the multinational composition of all panels and the possibility to request the allocation of a technically qualified judge from the Pool of judges (see below Part III, Section 1.B) are original features of the UPC which could well over time imply that longstanding practices evolve.⁹⁴

2. Reluctance to make use of new options

Another straightforward assumption would be that judges will be reluctant to use new options which they are not familiar with. In particular judges coming from Member States with combined systems – who are used to deal with both infringement and validity issues – could have a natural propensity to prefer to continue to deal with cases as they have always done, rather than giving up jurisdiction for issues which they deal with today.

It should however be kept in mind that, over the last 30 years, a solid groundwork has been laid for a truly European mindset among patent judges in the Member States who, since the early 1980s, apply harmonised law (especially Article 69 EPC and the Protocol on interpretation) when dealing with European patents⁹⁵ and meet regularly at judges' conferences.⁹⁶ Over the years, willingness to experiment (eg, the practice of issuing cross-border injunctions) has characterised many judges in the field, and harmonisation of procedural law has contributed to foster a common outlook on many patent litigation specialities (eg, *saisie-contrefaçon*). If given a new institutional framework and common rules of procedure (which they will have decisively contributed to devise) as well as ample opportunities for exchange and training, the judges of the UPC could well be willing to relinquish some of their national habits.

3. Complexity of the validity issue

93 Or, more precisely, a **separate** revocation action must be initiated at the competent court or authority.

94 *In any event, to prevent a patent proprietor from running separate arguments on validity and infringement (see European Central Bank v DSS [2008] EWCA Civ 192 (88)) – for instance arguing for a narrow interpretation of his claim when defending it before the central division of the UPC but an expansive interpretation when asserting infringement before the local or regional division, it could be recommended to provide in the Rules of Procedure of the UPC for some kind of "file wrapper estoppel" which would prohibit the plaintiff – and his representative – from submitting 2 different interpretations of the same claims, first to the central divisions and later to a local or regional division.*

95 Noticeable is also the willingness of Supreme Courts in eg UK, DE and NL to quote from each others' decisions in patent cases, see

* House of Lord – Kirin-Amgen v Hoechst Marion Roussel, 21.10.2004, RPC 2005 169 (at 195),

* Bundesgerichtshof, 16.12.2008 – Olanzapin (X ZR 89/07), at 29,

Rechtbank Den Haag – Tiefenbacher cs v Lundbeck, 8.4.2009, at 4.42 and 4.43.

96 Since 2005, the European patent judges are grouped in an association called IPJA (International Patent Judges' Association). Regular meetings include the EPO's Symposium of European patent judges and the Academy/EPLAW meetings in Venice.

At first glance, it would also appear sensible to assume that the complexity of the validity issue will influence the panel's position:

- where a counterclaim for revocation involves intricate technical issues, the panel will more readily refer it to the central division;
- in cases which do not raise complex technical issues, the panel will consider that it can deal properly with the counterclaim once a technically qualified judge has been allocated.

It should however be kept in mind that the technical expertise available on the panels of local and regional divisions [*ITQJ-PoJ, in addition to 3LQJ*] will be the same as the technical expertise on a panel of the central division [*ITQJ-PoJ, in addition to 2LQJ*]. The added-value of referring counterclaims to the central division will consist **not** so much in the additional technical expertise at the central division⁹⁷ – but rather in the **specialisation** which the central division will be able to acquire due to the exclusive focus on validity issues, with resulting expertise in novelty and inventive step issues which often determines validity questions.

4. Language of proceedings

The fact that the language of proceedings before the central division will always be the language in which the patent was granted might also be taken into account. Generally, it would appear preferable to examine validity issues in the language in which the patentability requirements were discussed in the EPO, and the judges may more easily collaborate and coalesce.

5. Position of the parties

Where a civil court exercises discretionary power,⁹⁸ it usually takes into account the position of the parties when balancing the relevant criteria. Particularly where parties can agree on a certain course of action, the court will often attach considerable weight to the position of the parties. In the context of proceedings before the UPC, where the parties wish that the local or regional division deal with the whole case after the allocation of a technically qualified judge – rather than splitting proceedings by a referral to the central division – this will certainly carry much weight.

6. Delay

The time needed by the central division to deal with a counterclaim for revocation will most certainly be a factor which is likely to influence the judges' decision significantly. Delay at the central division – even fear of delay – is likely to automatically lead to much reluctance to refer validity issues to the central division.⁹⁹ However, it should be kept in mind that a counterclaim for revocation will **always** slow down proceedings: the time needed by the central division to deal with the counterclaim must be balanced against the time needed by a local or a

⁹⁷ Technically qualified judges are not – and cannot be – experts in the newest technologies; their role is to provide technical understanding to a panel, not expertise in a particular field.

⁹⁸ For instance, when deciding whether to admit or not late-filed submissions into the proceedings.

⁹⁹ ***Recommended clarification***

Provide in the Rules of Procedure of the UPC for accelerated proceedings in cases where a counterclaim for revocation is referred under Article 15a(2)(b) draft Agreement (with fixed time limits, eg 6 months to decide the validity issue).

regional division to deal with the same claim. In any event, the panel's discretion under Article 15(2)(b) draft Agreement to stay or to continue the proceedings (while the counterclaim for revocation is heard in the central division) ensures that a counterclaim initiated as a dilatory manoeuvre without holding any prospects of success cannot prevent the expeditious conclusion of an infringement proceeding at the local or regional division.

7. Procedural expediency

In some situations, it must be expected that a local or a regional division will normally refer a counterclaim for revocation to the central division in order to ensure expedient proceedings and avoid duplication, for instance where a third party has lodged a direct revocation action¹⁰⁰ or where several infringement actions based on the same patent (but against different defendants)¹⁰¹ have been initiated before different local and regional divisions.¹⁰²

Assumptions

In order to avoid excessive complexity, it is assumed that, where a counterclaim for revocation is raised during infringement proceedings, the panel of the competent local or regional division will

- ⊗ normally (in 2 cases out of 3 or 66,6%) proceed with the whole case (infringement action and counterclaim for revocation) after a technically qualified judge with qualifications and experience in the field of technology concerned has been allocated to the panel;
- ⊗ at times (in 1 case out of 5 or 20%) refer the counterclaim to the central division and stay the infringement action;
- ⊗ occasionally (in 1 case out of 10 or 10%) refer the counterclaim to the central division and proceed with the infringement action;
- ⊗ seldom (in 1 case out of 30 or 3,3%) refer the whole case to the central division.

Local and regional divisions' use of the options under Article 15a(2) draft Agreement

Scenario 1. "High up-take" and Setup 3. "Pooling resources"

Table II.4

	Key	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
IA CFR	100%	97	204	379	566	890	123 1	1331	138 8	146 1	1532	159 9
	60%	58	122	227	339	534	738	786	832	876	919	959
LD/RD request	66,6%	39*	81	151	226	356	491	525	554	583	612	639

¹⁰⁰ In such cases, referral would appear sensible in order to avoid that different divisions reach divergent decisions on the validity issue.

¹⁰¹ Article 15a(3) draft Agreement only deal with the situation where the infringement action involves the same parties.

¹⁰² In such cases, the validity issue could appropriately be dealt with in **one** proceedings before the central division.

TQJ & proceed with whole case												
LD/RD refer case to CD	33,3%	19	41	76	113	178	246	262	277	292	306	319
- whole case	3,3%	2	4	7	10	16	22	24	25	26	28	29
- CFR only w/ stay of IA	20%	11	24	45	68	107	148	157	166	175	184	192
- CFR only and proceed with IA	10%	6	12	23	33	53	74	78	83	87	91	96

* computed as 66,6% of 58

Scenario 2. "Low up-take" and Setup 3. "Pooling resources"

Table II.5

	Key	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
IA CFR	100%	4	8	16	36	78	531	666	798	927	1054	1178	1296
	60%	2	5	10	22	47	319	400	479	556	632	707	778
LD/RD request TQJ & proceed with whole case	66,6%	1	3	7	15	31	213	267	319	370	421	471	518
LD/RD refer case to CD - whole case - CFR only w/ stay of IA - CFR only and proceed with IA	33,3%	1	2	3	7	16	106	133	160	186	211	236	260
	3,3%	--	--	--	1	2	11	13	16	18	21	23	26
	20%	1	1	2	4	9	64	80	96	112	126	140	156
	10%	--	1	1	2	5	32	40	48	56	63	70	78

Section 4. Caseload of the central division

Summing up the estimations regarding the UPC's caseload (Tables I.9 and I.10) and the local and regional divisions' use of the options under Article 15a(2) draft Agreement (Tables II.4 and II.5), the caseload of the central division can be computed. It follows from the assumptions made

above (Section 3) that, where a counterclaim for revocation is raised in connexion with pending infringement proceedings, the central division will

- o deal with the counterclaim in 30% of cases and
- o deal with the whole case in 3,3% of cases.

Scenario 1. "High up-take" and Setup 3. "Pooling resources"

Table II.6

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027
Direct RA - incl.migrat.	26 15	56 30	75 30	130 60	165 60	237 90	246 90	254 90	262 90	270 90	311 120	120	120
Conferral*	-	1	1	2	3	5	5	5	6	6	6		
CFR referred by LD/RD**	17	37	68	102	160	221	236	250	263	276	288		
Whole case referred by LD/RD	2	4	7	10	16	22	24	25	26	28	29		

* in Setup 3, the central division will deal with a few IA by virtue of the conferral by LU, MT and SI of jurisdiction on the UPC (under Article 15a(1), third sentence, draft Agreement) (0,05+0,05+0,3=0,4)

** Article 15a(2)(b) draft Agreement. See below Section 3 (30% of IA w/CFR), Tables II.6 and II.7.

Not included are the infrequent actions referred to in Article 15(1)(a1), (d), (e), (f) and (g) draft Agreement.

Scenario 2. "Low up-take" and Setup 3. "Pooling resources"

Table II.7

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027
Direct RA - incl.migrat.	3 3	7 6	8 6	11 9	18 9	71 12	86 12	101 12	115 12	129 12	146 15	159 15	15
Conferral*	--	--	--	--	--	2	3	3	4	4	5		
CFR sent by LD/RD**	1	2	3	6	14	96	120	144	168	189	210	234	
Whole case referred by LD/RD***	--	--	--	1	2	11	13	16	18	21	23	26	

PART III – NUMBER OF JUDGES NEEDED TO DEAL WITH THE CASELOAD OF THE COURT OF FIRST INSTANCE

In order to estimate the number of judges needed to deal with the caseload of the UPC, it is necessary first to clarify the composition of the panels (Section 1).

A second stage is to estimate the number of cases that the various judges (juge-rapporteur, presiding judge, ordinary judge, technically qualified judge as well as single judge) can deal with per year (Section 2).

Detailed tables can then be drawn up, setting out for each division of the UPC-CFI the number of judges needed to deal with the caseload.

Section 1. Composition of panels

Below, the various formations of the panels in the UPC's Court of First Instance are set out schematically in order to ease the overview.

A. Standard composition: 3 judges

The "standard composition" of a panel of a division of the UPC-CFI is 3 judges

Any panel of the Court of First Instance shall have a multinational composition and sit in a composition of three judges (Article 6(1) draft Agreement)	hereafter "3J"
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The standard composition is declined in the following 5 constellations:

Panel of local division with low case-load (less than 50 cases/year during 3 successive years)	
1 legally qualified judge who is a national of the host State and 2 legally qualified judges who are not nationals of the host State, allocated from the pool of judges on a case by case basis (Article 6(2a) draft Agreement)	hereafter "1PermLQJ+2LQJ-PoJcase-by-case"
Panel of local division with high case-load	

(more than 50 cases/year during 3 successive years)	
2 legally qualified judges who are nationals of the host State and 1 legally qualified judge who is not a national of the host State, allocated from the pool of judges (Article 6(3) draft Agreement)	hereafter "2PermLQJ+1LQJ-PoJ"
Panel of a regional division	
2 permanent legally qualified judges who shall be nationals of the host States, chosen from a regional list of judges and 1 legally qualified judge who shall not be a national of the host State, allocated from the pool of judges (Article 6(4) draft Agreement)	hereafter "2PermLQJ-RLoJ+1LQJ-PoJ"
Panel of the central division	
2 legally qualified judges who are nationals of different Contracting Member States and 1 technically qualified judge allocated from the pool of judges (Article 6(6) draft Agreement)	hereafter "2LQJ+1TQJ-PoJ"
3 legally qualified judges who are nationals of different Contracting Member States when hearing actions concerning decisions of the EPO (under Article 15(1)(g) draft Agreement) (Article 6(5a) draft Agreement)	"3LQJ"

B. The 4 technically qualified judge

The standard composition of three judges may be modified by the allocation from the pool of judges of a 4th judge who shall be a technically qualified judge with qualifications and experience in the field of technology concerned. Allocation shall always take place when a counterclaim

for revocation is raised during infringement proceedings or requested by one of the parties. A panel may also, where appropriate and after having heard the parties, request the President of the CFI to allocate a 4th technically qualified judge.¹⁰³

Where a counterclaim for revocation is brought in the course of infringement proceedings, the local or regional division shall, if it wishes to proceed with both the infringement action and the counterclaim, request the President of the Court of First Instance to allocate from the pool of judges a technically qualified judge (Article 15a(2)(a) draft Agreement)	hereafter "+1TQJ- PoJ"
Upon a request of one of the parties, any panel of a local or regional division shall request the President of the Court of First Instance to allocate from the Pool of Judges an additional technically qualified judge Any panel of a local or regional division may, after having heard the parties, submit such request on its own initiative, where it deems this appropriate, (Article 6(5) draft Agreement)	

In practice, the combined effect of Articles 6(5) and 15a(2)(a) draft Agreement will often be that a 4 technically qualified judge is allocated to the panels of local and regional divisions, for the following reasons:

- o Requesting a technically qualified judge is **mandatory** when the panel wants to deal with a counterclaim for revocation (Article 15a(2)(a) draft Agreement). Two assumptions made above should be recalled:
 - o a counterclaim for revocation will be brought in 60% of infringement cases (see Part I, Section 6) and
 - o in 2/3 of the cases in which a counterclaim is brought, the panel will decide to deal itself with the counterclaim (see Part II, Section 3); this implies a request for the allocation of a technically qualified judge.
- o Where a TQJ does **not** have to be allocated under Article 15a(2)(a) draft Agreement (eg, in case of infringement action **without** counterclaim for revocation),
 - o the **panel** may nevertheless request of its own motion the allocation of a technically qualified judge, under Article 6(5) draft Agreement and
 - o **any of the parties** may request the allocation of a technically qualified judge.

103 Despite the use of the terms "submit" and "request", the President of the UPC-CFI does not appear to have any power to refuse a request.

Requests can be made at any stage of the proceedingsth and will be free of charge for the panel and the party making the request. Both the panel and the parties (or one of them) could have good reasons to wish to reinforce the technical expertise on the panel:

- ⊘ the panel may assess that the presence of a technically qualified judge could increase its chances to reach a "correct" decision on the merits; a presence **throughout** the proceedings could enable the judge-rapporteur to clarify quickly and informally – at any time during the written and interim procedures – the technical facts of the case; at the stage of the oral procedure, the judges could be better placed to discuss technical aspects among themselves and with the parties who generally also possess extensive technical expertise;¹⁰⁴
- ⊘ for the parties, technical expertise on the panel may render superfluous the appointment of an expert – and thus significantly limit their costs and speed up proceedings.^{105 106}

However, there will also be cases (infringement action without counterclaims for revocation) where the panel or the parties do **not** request the allocation of a 4 technically qualified judge, for instance where the case does not raise any technical issues at all. Some panels may also be reticent to request the allocation of a technically qualified judge due to perceived difficulties in achieving coalesce among judges (in particular where 3 LQJ work together on a permanent basis and a 4th TQJ is only allocated *ad hoc* for certain cases).

Assumption regarding the 4th technically qualified judge

This assumption is closely interrelated with the assumptions made above (Part II, Section 3) regarding the panels' use of the options available under Article 15a(2) draft Agreement. The same factors are likely to influence the panel (in particular national experience with technically qualified judges and complexity of the validity issue). In the following, it is assumed that

- ⊘ a 4th technically qualified judge from the pool of judges will be allocated to the panel of a local or regional division in **50%** of infringement actions without counterclaim for revocations.

th Article 6(5), 2nd sentence, draft Agreement lays down that the panel may submit the request "where it deems this appropriate" and "after having heard the parties".

Recommended clarification

To prevent abuse of procedure, it is recommended that a provision be included in the UPC's Rules of Procedure fixing a moment in the proceedings after which a request by a party for the allocation of a TQJ will only be granted if justified in view of changed circumstances, such as new submissions presented by the other party and allowed by the Court. In order to ensure procedural expediency, it would appear sensible to provide that, as a general rule, a request filed after the end of the written procedure (Rule 109 draft Rules of Procedure) should not be granted.

104 See Federal Patent Court on TQJ §8 [[link to website](#)]

105 In proceedings before the German Federal Patent Court, the possibility to request written opinions from technical experts and hear experts during oral hearings is only used in exceptional cases. In practice, technically qualified judges assigned in accordance with their fields of expertise "replace" technical experts (see Federal Patent Court on TQJ §7) [[link to website](#)]

106 In another vein, it has been argued that *parties know what their experts will say, but they can't control the 4th TQJ – this could induce representatives not to ask for a TQJ*

Special case where a LD / RD has referred a counterclaim for revocation to the central division (under Article 15a(2)(b) draft Agreement) and the file "comes back" to the LD / RD (the patent being held valid, with or without amendments):

- ⊗ it must be expected that the panel of the LD / RD will refrain from requesting the allocation of a technically qualified judge;¹⁰⁷
- ⊗ if the allocation of a TQJ is requested, nothing prevents the President of the CFI to allocate to the panel one of the TQJ who dealt with the counterclaim for revocation on the panel of the CD [*advantage: he would already have assimilated all the relevant background and could bring it to the panel of the LD / RD*]

C. The single judge

Where both parties agree, a case may be heard by a single legally qualified judge (Article 6(7) draft Agreement).	hereafter "sj"
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Assumption regarding the single judge

In simple or small cases, some parties may occasionally be able to agree that a single judge should hear the action, in particular with a view to benefit from the higher efficiency and speed which can be expected when a single judge is able to manage and organise proceedings according to one timetable, without the need to involve two or three other judges.

- ⊗ It is assumed that in **5%** of cases parties will agree that a single judge hear the case.

Section 2. Number of cases that the judges can deal with per year

In order to estimate the number of judges needed to deal with the caseload of the UPC, it is necessary to first estimate how many cases the judges can deal with per year. Such an estimation can only be based on a very simplified model, which at first glance appears exposed to criticism for at least 3 good reasons.

1. The model cannot take into account the considerable **differences** that exist between individual cases

- ⊗ not only depending on the type of action (infringement action, revocation action, actions for declaration of non-infringement, actions against decisions of the EPO)
- ⊗ but also depending on the particular circumstances of the case (complexity, technical field, stakes, number of representatives, experts and witnesses involved).

2. Even **within** the same type of action, considerable differences may exist depending on the **defences** raised. It is for instance obvious that there will be much difference between

¹⁰⁷ [*But even then one of the parties will still at times have an interest (or believe that he has an interest) in requesting the allocation of a technically qualified judge.*]

- ⊗ a simple infringement action (without counterclaim for revocation) and
- ⊗ an infringement action involving a counterclaim for revocation and, *a fortiori*, other related defences (eg, counterclaims concerning licences or unfair competition).

3. In practice, many cases will be disposed of **without** a final decision. It is obvious that an action withdrawn or abandoned because the parties have settled will usually bind fewer resources than an action pursued until oral hearing and final decision – although much again depends on **when** parties settle.¹⁰⁸

While it makes little sense to attempt to calibrate such differences for the purposes of the present study, and attempt has been made below – on the basis of inquiries with patent judges in courts hearing a significant number of patent cases – to present a plausible **average** number of cases that a judge can deal with per year. The following should be borne in mind in this context:

- ⊗ it is assumed that a majority of the judges appointed to the UPC will be experienced patent judges;¹⁰⁹ should some less experienced judges be appointed to the UPC, they will in all cases be surrounded by more experienced judges on a particular panel;
- ⊗ it is assumed that there will be an equal mix between easy and complex cases;
- ⊗ the term "case" refers to an infringement action with counterclaim for revocation, pursued until the final decision of the UPC-CFI; where only infringement issues are heard (before a local or regional division) or where only validity issues are heard (before the central division), a higher productivity can be attained.

A. FUNCTIONS OF THE JUDGES

The nature of the work to be carried out determines the productivity. Some aspects of the work of the judges must therefore be highlighted.

The names

Names are given to two of the four judges on a panel (Article 14(1) and (4) draft Statute): the **presiding judge** and the **juge-rapporteur**. The third judge on the panel will be called "**ordinary judge**" in the following. As explained above, a technically qualified judge (called the "**4 technically qualified judge**") will of ten be allocated to panels of local or regional divisions.

As the name suggests, the **single judge** will deal alone with a case where parties have so agreed.

¹⁰⁸ Annex 5 presents data on the number of actions withdrawn or abandoned; on this basis, it will be assumed below (Part IV, Section 1) that (only) 50% of the actions initiated at the CFI will lead to a final decision of the CFI.

¹⁰⁹ In this context, "experienced" means having dealt with at least 100 patent cases on the national level before appointment to the UPC.

The tasks

Summarised on the basis of the draft Rules of Procedure of the UPC, the main tasks of each of the above judges will be the following:

- ⊘ The **juge-rapporteur** shall
 - o deal with any preliminary objection,
 - o monitor the exchange of written pleadings (including requests for extension of time periods),
 - o acquaint himself with the parties' initial pleadings (in particular the Statement of claim and the Statement of defence, any Counterclaim for revocation and Reply, any Request to amend the claim and Rejoinder),
 - o at the end of the written procedure, decide whether any further exchange of written pleadings is necessary,
 - o manage the case during the interim procedure (where appropriate convening an interim conference) and prepare the case for the oral hearing (including, where appropriate, allowing final written submissions),
 - o participate in the oral hearing and in the deliberations and voting,
 - o draft and sign the written decision.th
- ⊘ The **presiding judge** who must be a legally qualified judge¹¹⁰ shall
 - o at the outset of the proceedings, designate the juge-rapporteur,
 - o after the closure of the interim procedure, take over the management of the case and convene the panel to discuss aspects of the case,
 - o conduct the oral hearing,
 - o chair the deliberations of the panel and sign the written decision.
- ⊘ The **ordinary judge** shall
 - o before the oral hearing, read the file and discuss aspects of the case with the other judges on the panel,
 - o participate in the oral procedure, including the oral hearing, deliberations, voting and signing the written decision.
- ⊘ The **4 technically qualified judge** shall
 - o at any stage of the written or interim procedure, on request by the juge-rapporteur, acquaint himself with particular (technical) aspects of the case, in order to be able to assist the juge-rapporteur,
 - o before the oral hearing, read the file and discuss aspects of the case with the other judges on the panel,
 - o participate in the oral procedure, including the oral hearing, deliberations, voting and signing the written decision.
- ⊘ The **single judge** shall carry out all the functions of a panel.th

Non-judicial functions to be carried out by the judges

th Without prejudice to the right of the other judges on the panel to express dissenting opinions "in exceptional circumstances" (Article 51(2) draft Agreement) or otherwise participate in drafting the decision.

¹¹⁰ Article 6(8) draft Agreement.

th Article 14(3) draft Statute.

In addition to their core work, the judges will have to carry out some non-judicial functions, for instance in the Presidium where the CFI will be represented by the President and three of its judges. Under Article 11(3) draft Statute, the Presidium shall in particular

- o before the entry into force of the Agreement: (a) give an opinion on the proposal for the Rules of Procedure, (d) establish the guidelines for the training programme for judges and (f) lay down the rules governing the Registry including sub-registries;
- o after entry into force: (b) draw up proposals for the amendment of the Rules of Procedure and (c) and prepare the annual budget and the annual accounts.

B. TIME NEEDED TO DEAL WITH A CASE

It appears appropriate to draw a distinction between

- ⊘ an **initial 2 year period** where the work-flow of the UPC, training needs and additional time needed by judges to acquaint themselves with new procedures and practices and develop a European case-law do **not** yet allow the highest level of efficiency to be reached and
- ⊘ a **steady state**, starting in the year where the caseload of the CFI nears 500 cases [*2017 in Scenario 1: "High up-take"*].¹¹¹

INITIAL PERIOD [2015-2016]

- ⊘ To deal with a case as **juge-rapporteur**, an average of **14 working days** will be needed.
- ⊘ To deal with a case as **presiding judge**, an average of **6 working days** will be needed.
- ⊘ To deal with a case as **ordinary judge**, an average of **4 working days** will be needed.
- ⊘ To deal with a case as **technically qualified judge**, an average of **4 working days** will be needed – whether his presence has been requested by the panel or a party or is required following the lodging of a counterclaim for revocation.
- ⊘ An average of **12 working days** will be needed to deal with 1 case as **single judge**.

STEADY STATE [2017 onwards]

- ⊘ To deal with a case as **juge-rapporteur**, an average of **11 working days** will be needed.
- ⊘ To deal with a case as **presiding judge**, an average of **5 working days** will be needed.
- ⊘ To deal with a case as **ordinary judge**, an average of **3 working days** will be needed.
- ⊘ To deal with a case as **technically qualified judge**, an average of **3 working days** will be needed.
- ⊘ An average of **10 working days** will be needed to deal with 1 case as **single judge**.

¹¹¹ The concept of "steady state" implies a significant and stable caseload which will obviously not be reached in all divisions at the same time. For simplification, it is nevertheless assumed that a caseload of 500 cases at the CFI will warrant a significant caseload in several divisions (for instance, more than 50 cases/year) and overall enable higher productivity.

As mentioned above, term "case" refers to an infringement action with counterclaim for revocation, pursued until the final decision of the UPC-CFI.

Assumptions re. the number of cases that a judge can deal with per year

Full-time judges

In practice, it appears sensible that judges should take turns. Each year (220 working days), the work of a full-time judge of a local or regional division of the UPC's CFI could for instance be distributed as follows:

Number of cases dealt with per year Judge of the Court of First Instance	
Initial period	Steady state
- on 112 working days, work on cases as juge-rapporteur [8 cases à 14 days] and - on 48 working days, work on cases as presiding judge [8 cases à 6 days] and - on 48 working days, work on cases as ordinary judge or as technically qualified judge [12 cases à 4 days] and - on 12 working days, work on cases as single judge [1 case à 16 days].	- on 110 working days, work on cases as juge-rapporteur [10 cases à 11 days] and - on 45 working days, work on cases as presiding judge [9 cases à 5 days] and - on 45 working days, work on cases as ordinary judge or as technically qualified judge [15 cases à 3 days] and - on 20 working days, work on cases as single judge [2 cases à 10 days].

As far as judges of the central division are concerned, they will deal almost exclusively with validity issues (revocation actions and counterclaims for revocation). It is therefore safe to assume a much higher productivity at the central division. Annex --- sets out the higher figures for the judges of the central division (initial period and steady state) as well as a "grille" summarising the assumptions which are necessary to complete Tables III.1 and 2 below.

Comparison with national courts

In the past, assumptions of this nature have been challenged in particular in view of the higher figures from German patent courts.¹¹² It should be recalled however that the infringement courts in Germany deal **only** with infringement actions (and not with counterclaims for revocation). By

112 See for instance documents WPL/SUB 4/03, page 4 and WPL/SUB 24/01, page 5: "The Düsseldorf Court receives ca. 300 cases per year and consists of 6 judges".

contrast, it is assumed that the local and regional divisions of the UPC will deal with **both infringement and validity issues in 2 cases out of 3** (see Part II, Section 3).

It is also common ground that larger multinational cases in areas such as telecommunications and pharmaceuticals may bind more resources than smaller mechanical cases. Should the UPC attract some of these larger cases – which often have pan-European implications – the proportionality requirement in Article 23 draft Agreement¹¹³ will imply that more time be devoted to such cases. Again, this warrants lower assumptions regarding the average number of cases that the judges of the UPC will be able to deal with per year.

In the same vein, it is plain that proceedings in an international environment involving parties and representatives from different countries and speaking different languages will – at least in an initial phase – require more time than dealing with cases in a purely national environment. Speed and efficiency may be reduced in the interaction with parties, representatives, experts and witnesses with different national background and legal cultures – not to speak of delays when translations must be produced. At hearings, the slowness of simultaneous interpretations illustrates how "European" proceedings may often appear unwieldy. This rigidity and delay in the "procedural time" is likely to have a cost in terms of resources (man/year), especially in the first years of operations of the UPC.

Part-time judges: flexibility as regards the amount of time worked for the UPC

The possibility to make use of part-time judges will be key in keeping the costs of the UPC at a reasonable level, especially in the first years of operations. The legal framework has been designed to enable national judges to work part time for the UPC: both legally qualified judges and technically qualified judges of the UPC may exercise other functions beside their work as judges of the UPC,¹¹⁴ as follows

- o legally qualified judges may continue to exercise other judicial functions at national level;¹¹⁵
- o as far as technically qualified judges are concerned, they may exercise other functions provided there is no conflict of interest.

The challenge will be to adequately accord the number of judges to the incoming caseload, especially in the first years where it will be difficult to predict not only how many cases will be initiated but also to which divisions parties will bring their cases.¹¹⁶ Obviously, the number of incoming cases cannot be controlled by the UPC but depends on the parties; even the number of judges appointed is to some extent determined in the legal framework (Article 3(5) draft Statute). Only the amount of time that the judges work for the UPC can be flexibly calibrated to the workload and thus contribute to balance, as precisely as possible, the necessary human resources with the number of incoming cases, in order to keep down remuneration costs. Flexible arrangements enabling national patent judges to work part-time – 25%, 50% or 75%, as the caseload may require –

113 See also the Preamble (§2) of the draft Rules of Procedure of the UPC.

114 Article 12(4) draft Agreement.

115 Similarly, the judges of the Benelux Court of Justice – who are recruited from the Supreme Courts of the Benelux countries – continue to assume their national functions during their office as judges of the Benelux Court of Justice, see Council document 13984/11, page 3.

116 Article 15a(1) draft Agreement.

as judges of the UPC's CFI must therefore be in place. In practice, a judge could then, on a case-by-case basis, deal with cases at the division of the UPC where he resides, while working as a national judge the rest of the time.

Assumptions regarding part-time arrangements

- o For simplification, it is assumed that a part-time judge is a judge **working 50%** for the UPC.
- o Also a part-time judge should take turns and act alternatively as juge-rapporteur, ordinary judge and presiding judge (but not as single judge). Each year (110 working days), the work of a part-time judge could for instance be distributed as follows:

Initial period	Steady state
- on 56 working days, work on cases as juge-rapporteur [4 cases à 14 days] and - on 30 working days, work on cases as presiding judge [5 cases à 6 days] and - on 24 working days, work on cases as ordinary judge or as technically qualified judge [6 cases à 4 days].	- on 55 working days, work on cases as juge-rapporteur [5 cases à 11 days] and - on 25 working days, work on cases as presiding judge [5 cases à 5 days] and - on 30 working days, work on cases as ordinary judge or as technically qualified judge [10 cases à 3 days].

Pool of judges: flexibility as regards places where work is carried out

The Pool of judges is another flexible means to adjust the need for judicial man-power to the number of incoming cases. The composition of the Pool of judges is laid down in Article 13 draft Agreement.

Pool of judges shall be composed of	
all full-time LQJ + all full-time TQJ + part-time TQJ - not included: part-time LQJ	hereafter "PoJ = FT-LQJ+FT-TQJ+PT-TQJ"
¹¹⁷ The Pool of judges shall include at least one TQJ with qualifications and experience per field of technology	

¹¹⁷ For comparison, the experience of the German Federal Patent Court should be noted: there, around 40 technically qualified judges are needed to equip panels with the required technical knowledge in all fields of technology. According to the Federal Patent Court, with a lower number of technically qualified judges, it would at times be necessary to resort to a court expert. Such experts are provided for in Article 36 draft Agreement.

The mobility implied is the pivotal aspect of the Pool of judges. In practice, in case of an infringement action with a counterclaim for revocation heard in a local division with a low caseload, the ordinary judge and the 4 technically qualified judge will often come from the Pool of judges, and will (physically) join the panel only in the day(s) preceding the hearing. The rest of the time, they will be able to work elsewhere on a more permanent basis (in the central division or in another local or regional division). The possible disadvantages of mobility (expenditures for travelling and allowances and lack of judicial serenity due to adaptation time) are set off by the improved possibilities for the judges to collaborate or coalesce on a European level to develop a common application and interpretation of harmonised European patent law.

Number of judges needed to deal with the caseload of the UPC-CFI: initial period (2015-2016) and steady state (2017-2019)
Scenario 1. "High up-take" and Setup 3. "Pooling resources"

Table III.1

	2015		2016		2017		2018		2019	
	cases	judges	cases	judges	cases	judges	cases	judges	cases	judges
Total n° of cases / judges	123	3F+17P	260	13F+23P	454	24F+26P	696	40F+33P	1055	59F+37P
Central division in the composition 2LQJ+1TQJ-PoJ										
Revocation actions	26	--	56	--	75	--	130	--	165	--
CFR+whole cases (Art.15a(2)(b)&(c))	19	--	41	--	75	--	112	--	176	--
Total*	45	1F+3P	97	3F+3P	150	5F+7P	244	9F+2P	341	12F+3P
Regional divisions in the composition 2PermLQJ-RLoJ+1LQJ-PoJ (IA only) or 2PermLQJ-RLoJ+1LQJ-PoJ+1TQJ-PoJ (IA with CFR)										
RD-North [DK, EE, FI, LT, LV, SE]	5	1P	10	2P	19	3P	29	4P	45	3F+2P
RD-West [IE, NL, UK]	11	2P	22	1F+2P	42	2F+4P	62	4F+3P	98	7F+3P
RD-East [CZ, HU, PL, SK]	3	1P	7	2P	13	2P	20	3P	31	5P
RD-Southeast [BG, CY, GR, RO]	2	1P	3	1P	6	1P	10	2P	15	2P
RD-Center [AU, DE]	20	1F+2P	43	3F+3P	79	4F+5P	118	8F+5P	186	15F+4P
Local divisions in the composition										
(i) panel with low caseload: 1PermLQJ+2LQJ-PoJ case-by-case (IA only) or 1PermLQJ+2LQJ-PoJ case-by-case+1TQJ-PoJ (IA with CFR)										
(ii) panel with high workload: 2PermLQJ+1LQJ-PoJ (IA only) or 2PermLQJ+1LQJ-PoJ+1TQJ-PoJ (IA with CFR)										
LD-FR	11	(i) 2P	23	(i) 1F+2P	44	(ii) 3F+2P	65	(ii) 4F+3P	102	(ii) 7F+3P
LD-BE	2	(i) 1P	4	(i) 1P	8	(i) 1P	11	(i) 2P	18	(i) 3P
2 LD-DE	39		82		147		219		345	
[D]	24	(i) 1F+2P	55	(ii) 4F+4P	98	(ii) 7F+3P	146	(ii) 11F+4P	230	(ii) 17F+7P
[M]	15	(i) 3P	27	(i) 1F+3P	49	(ii) 3F+3P	73	(ii) 4F+5P	115	(ii) 8F+5P

Provisos – not calibrated

1. maximum use is not made of PTJ: in several instances, two or more PTJ could replace a FTJ

2. a few other cases heard by the central division are not reckoned with (IA conferred by LU, MT and SI on the central division as well as the actions referred to in Article 15(1)(a1), (d), (e), (f) and (g) draft Agreement)

Number of judges needed to deal with the caseload of the UPC- CFI: steady state (2020-2026)

Scenario 1. "High up-take" and Setup 3. "Pooling resources"

Table III.1 (continued)

	2020		2021		2022		2023		2024		2025					
	case	judges														

	s		s		s		s		s		s								
Total n° of	1468	101F+45P	1557	106F+44P	1642	114F+50P	1723		1802		1909								
Central division in the composition 2LQJ+1TQJ-PoJ																			
Revocation actions	237	--	246	--	254	--	262	--	270	--	300	--							
CFR+whole cases	243	--	260	--	275	--	289	--	304	--	317								
Total	480	15F+9P	506	17F+10P	529	18F+10P	551	20F+5P	574	21F+5P	617	22F+6P							
Regional divisions in the composition 2PermLQJ-RLoJ+1LQJ-PoJ (IA only) or 2PermLQJ-RLoJ+1LQJ-PoJ+1TQJ-PoJ (IA with CFR)																			
RD-North	62	4F+3P	68	4F+3P	71	4F+4P	74	4F+5P	78		81								
RD-West	136	10F+6P	147	11F+4P	153	11F+5P	161	11F+6P	169	12F+5P	176								
RD-East	43	2F+4P	47	2F+4P	49	2F+4P	51	3F+3P	54		56								
RD-Southeast	21	3P	23	3P	34	5P	35	1F+3P	36	1F+3P	37								
RD-Center [AU, DE]	257	20F+6P	278	22F+4P	290	23F+3P	305	24F+5P	320	25F+4P	334								
Local divisions in the composition																			
(i) panel with low caseload: 1PermLQJ+2LQJ-PoJ case-by-case (IA only) or 1PermLQJ+2LQJ-PoJ case-by-case+1TQJ-PoJ (IA with CFR)																			
(ii) panel with high workload: 2PermLQJ+1LQJ-PoJ (IA only) or 2PermLQJ+1LQJ-PoJ+1TQJ-PoJ (IA with CFR)																			
LD-FR	142	(ii) 11F+4P	153	(ii) 11F+5P	160	(ii) 11F+6P	168	(ii) 12F+5P	176	(ii)	184	(ii)							
LD-BE	25	(i) 4P	27	(i) 4P	28	(i) 4P	30	(i) 5P	31	(i) 5P	32	(i)							
2 LD-DE	477		516		538		566		594		620								
[D]	286	(ii) 24F+3P	310	(ii)	323	(ii)	340	(ii)	356	(ii)	372	(ii)							
[M]	191	(ii) 15F+4P	206	(ii)	215	(ii)	226	(ii)	238	(ii) 17F+7P	248	(ii)							
				(ii)		(ii)													
				15F+5P		15F+5P													

Summary of Table III.1:

Table III.2 - Overview of the number of judges of the UPC-CFI needed to deal with the caseload (Scenario 1. "High up-take" and Setup 3. "Pooling resources")

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
	Initial phase		Steady state								
Cases	123	260	454	696	1055	1468	1557	1642	1723	1802	1909
Judges	3F+17P	13+23P	24F+26P	40F+33P	59F+37P	101F+45P	106F+44P	114F+50P			

Two similar tables would be required for Scenario 2. "Low up-take" in Setup 3. "Pooling resources". However, as the caseload of the UPC-CFI would be very low in the first years in Scenario 2. "Low up-take" (7, 15, 24 and 29 cases in the years 2015 to 2018 respectively), no meaningful picture would emerge from the presentation of the detailed calculations. Such tables would nevertheless illustrate the practical difficulty in creating a court hearing less than 50 cases per year in the first years of operations. Only after 2020 would the caseload increase, and the number of cases for 2023 (around 1050) would be equal to the number of cases in the year 2019 in Scenario 1. "High up-take". To sum up, this implies 4 to 5 years "delay".

PART IV – CASELOAD AND JUDGES OF THE COURT OF APPEAL

The present Part follows closely the scheme and models developed in Parts I and III – where estimations were made concerning the caseload of the Court of First Instance and the number of judges needed to deal with that caseload.

Section 1. Caseload of the Court of Appeal

The Court of Appeal shall hear the following appeals under Article 45(1a) draft Agreement:

- ⊘ appeals against final decisions of the UPC-CFI (hereafter "full appeals")
- ⊘ appeals against the orders of the Court of First Instance referred to in Articles 29(4), 35, 35a, 35b, 37 and 39 draft Agreement (hereafter "interlocutory appeals"):
 - o order to use the language in which the patent was granted as language of the proceedings;th
 - o order to produce evidence and to communicate banking, financial and commercial documents;¹¹⁸
 - o order to preserve evidence and to inspect property;¹¹⁹
 - o freezing order;¹²⁰
 - o order to grant provisional and protective measures,¹²¹ to seize or deliver up goods suspected of infringing a patent and to seize movable or immovable property of the alleged infringer;¹²²

th Articles 29(4) draft Agreement.

¹¹⁸ Article 35(1)(2) draft Agreement.

¹¹⁹ Article 35a(1) draft Agreement.

¹²⁰ Article 35b draft Agreement.

¹²¹ Article 37(1) draft Agreement.

¹²² Article 37(3) draft Agreement.

- o order to communicate information;¹²³
- ⊖ appeals against other orders of the UPC-CFI, subject to leave to appeal granted by the Court of Appeal,¹²⁴ for instance
 - o order to take appropriate measures with regard to infringing goods and to materials and implements used in the creation or manufacture of those goods;¹²⁵
 - o order to restrict or prohibit the collection and use of evidence in proceedings before the Court and to restrict access to such evidence to certain persons;¹²⁶
- ⊖ requests for a rehearing.¹²⁷

Assumptions

As mentioned above in Part III, Section 2, the number of actions started at the Court of First Instance will be much higher than the number of decisions eventually rendered by the Court of First Instance: parties will frequently manage to settle their dispute, and many actions will be withdrawn or abandoned before the final decision of the Court of First Instance.¹²⁸ In the following, it is assumed that

- ⊖ only 50% of the actions initiated at the Court of First Instance will result in a final decision of the Court of First Instance.

It is likely – and desirable – that parties will appeal against some of the Court of First Instance's first decisions, so that fundamental patent law issues can be clarified and a stable procedural practice developed as soon as possible. It is assumed that

- ⊖ the appeal rate for appeals against final decisions of the Court of First Instance will be 33% during the first 2 years of operations [2016-2017], 20% thereafter;¹²⁹
- ⊖ the duration of proceedings at the Court of First Instance will be 1 year,¹³⁰ so that the first full appeals will be heard by the Court of Appeal in [2016].

As far as interlocutory appeals are concerned, it is again likely that parties will immediately appeal against some of the Court of First Instance's first orders. The Court of Appeal will therefore need to start hearing interlocutory appeals soon after the Court of First Instance has started operations. It is assumed that

- ⊖ the CFI will issue one (directly) appealable order in each case lodged at first instance;

123 Article 39(1)(2) draft Agreement.

124 If leave to appeal is not granted, the order may only be appealed together with the final decision.

125 Article 38 draft Agreement.

126 Article 40 draft Agreement.

127 Article 55 draft Agreement.

128 See Annex --- on the rate of withdrawal and settlement.

129 Compare with COM(2003)828 final, page 51: in 25% of cases an appeal is likely to be filed.

130 This is the objective set out in Recital 6 of the draft Rules of Procedure of the UPC.

- ⊖ the rate for interlocutory appeals will be 50% during the first 2 years [2015-2016], 20% thereafter;
- ⊖ such appeals will be lodged already in the first months of operations [2015).

In order not to complicate excessively the estimations in this Part, assumptions regarding appeals against orders which are only appealable together with the final decision¹³¹ are not included below. Requests for a rehearing¹³² are also not taken into account at this stage: it is safe to assume that such requests will not be very numerous.¹³³

Scenario 1. "High up-take"

Table IV.1 - Number of appeals

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Final decisions (CFI)	61*	130	227	348	527	734	778	821	861	901	954
Full appeals	0	20*	43	45	70	105	147	156	164	172	180
Orders (CFI)	123	260	454	1055	2055	1468	1557	1642	1723	1802	1909
Interlocutory appeals	61	130	91	139	211	293	311	328	345	360	382
Total number of appeals	61	150	134	184	281	398	458	484	509	532	562

* computed as 50% of 123 (Table I.9, year 2015)

** computed as 33% of 61 (final decisions dated 2015).

Scenario 2. "Low up-take"

Table IV.2 - Number of appeals

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Final decisions (CFI)	4	8	12	25	48	301	376	450	521	592	662
Full appeals	0	1	2	2	3	10	60	75	90	104	118
Orders (CFI)	7	15	24	49	96	602	752	899	1042	1183	1324
Interlocutory appeals	4	8	5	10	19	120	150	180	208	237	265

131 Article 45(1a), 2nd sentence draft Agreement.

132 Article 55 draft Agreement.

133 Since December 2007, Article 112a EPC provides for a "petition for review" similar to the rehearing of the draft Agreement. In 2010, 21 petitions for review were received at the EPO; that same year, around 2000 cases were dealt with by the EPO's Boards of Appeal.

Total number of appeals	4	9	7	12	22	130	210	255	298	341	383
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Section 2. Composition of panels at the Court of Appeal

Any panel of the Court of Appeal shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges (nationals of different Contracting Member States) and two technically qualified judges (Article 7(1) draft Agreement)	hereafter "5J"
¹³⁴ ... when a case is of exceptional importance, and in particular when the decision may affect the unity and consistency of the jurisprudence of the Court, the Court of Appeal may decide, on the basis of a proposal from the presiding judge, to refer the case to the full Court (Article 16(2) draft Statute)	hereafter "FullCourt"

The roles

For each appeal case, in the standard composition of 5 judges, there will be

- o a presiding judge who must be a legally qualified judge¹³⁵: "One judge of the panel shall be appointed as the presiding judge ..."¹³⁶
- o a juge-rapporteur: "One judge of the panel shall act as Rapporteur"¹³⁷
- o one or two technically qualified judges (where the juge-rapporteur is a technically qualified judge, only one additional technically qualified judge would be needed)
- o one or two ordinary judges

Also expressly mentioned in the draft Agreement is the President of the Court of Appeal: "The Court shall be represented by the President of the Court of Appeal ...".¹³⁸

¹³⁴ When it sits as full court, a decision of the Court of Appeal "shall be valid only if it is taken by at least [3/4] of the judges comprising the full court" (Article 34(3) draft Statute).

¹³⁵ Article 7(2) draft Agreement.

¹³⁶ Article 16(1) draft Statute.

¹³⁷ Article 16(4) draft Statute.

¹³⁸ Article 3a(3) draft Agreement.

Non-judicial functions

In addition to their core work, the judges of the Court of Appeal will carry out some non-judicial functions, for instance in the Presidium where the Court of Appeal will be represented by its President and two of its judges.¹³⁹ Article 11(3) draft Statute lists the tasks to be carried out by the Presidium (in particular proposing amendments to the Rules of Procedure and prepare the annual budget and the annual accounts).

Section 3. Number of cases that a judge of the Court of Appeal can deal with per year

Again, the distinction must be drawn between (i) full appeals against final decisions of the Court of First Instance and (ii) interlocutory appeals against the orders of the CFI referred to in Articles 29(4), 35, 35a, 35b, 37 and 39 draft Agreement.

A **full appeal** to the Court of Appeal may be based on points of law and matters of fact.¹⁴⁰ However, the submission of new facts and evidence is limited.¹⁴¹ It appears that appeal proceedings at the Unified Patent Court – while not amounting to a rehearing of the entire case decided by the Court of First Instance – will in many cases be more than just a control by the Court of Appeal that the law has been applied correctly by the first instance.

As regards **interlocutory appeals** against orders of the CFI, they will be preliminary or accessory in nature (despite their critical importance in particular cases): the Court of Appeal will have to decide, often quickly if not on the spot, on one specific issue on the basis of a short exchange with the parties (or even *ex parte* in case of an order under Article 35a(4) draft Agreement). The Court of Appeal's control of the Court of First Instance's order will therefore be limited in its scope, and it is safe to assume that the resources needed to deal with such appeals will, in the vast majority of cases, be limited, as compared to the resources needed to deal with a full appeal.

Assumptions

The productivity of the judges of the Court of Appeal is assumed to be the same as the productivity of the judges of the central division of the Court of First Instance (steady state). This simplification appears justified in view of the difficulty to calibrate the differences between the 2 instances:

- o 5 judges will sit on the panel of the Court of Appeal (not 3 or 4 as in the first instance);
- o judges appointed to the Court of Appeal should be more experienced than CFI judges;
- o cases raising fundamental issues may require additional time at the appeal stage;

139 Article 11(1) draft Statute.

140 Article 45(3) draft Agreement.

141 Article 45(4) draft Agreement.

- o interlocutory appeals will often require much less time;
- o more cases appear to be withdrawn or settled at the appeal stage than at the first instance.¹⁴²

An initial phase with lower productivity is not reckoned with (contrary to the period 2015-2016 at the CFI) in view of the lavish initial appointment of 10 Court of Appeal judges.¹⁴³

Following the pattern explained at length above (Part III, Section 2), the work of a judge of the Court of Appeal could each year be distributed as follows (220 working days):

Number of cases dealt with per year Judge of the Court of Appeal - 2015 onwards -
- on 120 working days, work on cases as juge-rapporteur [22 cases à 5,5 days] and
- on 50 working days, work on cases as presiding judge [20 cases à 2,5 days] and
- on 50 working days, work on cases as ordinary judge or as technically qualified judge [33 cases à 1,5 days].

A "grille" summarising the above assumptions for the purposes of completing Tables IV.3 and 4 is included in Annex 6.

Section 4. Number of judges of the Court of Appeal needed to deal with the caseload

On the basis of estimations regarding the number of appeals and judges' productivity, Tables IV.3 and IV.4 below set out the number of judges needed to deal with the caseload of the Court of Appeal.

Scenario 1. "High up-take"

Table IV.3 – Number of judges of the Court of Appeal needed to deal with the caseload

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Total number of appeals	61	150	134	184	281	398	458	484	509	532	562
Full appeals	0	20	43	45	70	105	147	156	164	172	180

142 See Annex --- on the rate of withdrawal and settlement.

143 Article 3(5) draft Statute. See Section 4 below.

Interlocutory appeals	61	130	91	139	211	293	311	328	345	360	382
Judges	5*	8*	8*	10	16*	22	26	28			

* the caseload in 2015, 2016 and 2017 would not justify the initial appointment of 10 judges as provided for in Article 3(5) draft Statute

Scenario 2. "Low up-take"

Table IV.4 Number of judges of the Court of Appeal needed to deal with the caseload

	201 5	201 6	201 7	201 8	201 9	202 0	202 1	202 2	202 3	202 4	2025
Total number of appeals	4	9	7	12	22	130	210	255	298	341	383
Full appeals	0	1	2	2	3	10	60	75	90	104	118
Interlocutory appeals	4	8	5	10	19	120	150	180	208	237	265
Judges	?	?	?	?	?	5	12	14	17	19	21

Initial appointments

The issue of initial appointment to the Court of Appeal deserves special attention, in view of Article 3(5) draft Statute which provides for the initial appointment of 10 judges to the Court of Appeal.¹⁴⁴

On the one hand, there are good reasons for such a high number. The Court of Appeal will have to take some key decisions already in the first months and years of operations – since parties will undoubtedly appeal against the first orders and decisions of the Court of First Instance. These first decisions will decisively set the course for the judicial practice of the CFI and constitute the first European patent jurisprudence.¹⁴⁵ It could therefore be desirable that an enlarged bench of Europe's most experienced patent judges be in place to decide these first landmark cases: an initial appointment of 10 judges has therefore been provided for so that the Court of Appeal may sit as "full Court" when one of these first cases is of exceptional importance.¹⁴⁶

On the other hand, the number of appeals in the first years is manifestly too low to enable 10 Court of Appeal judges to fully deploy their judicial activities.¹⁴⁷ It must be feared that some of them would have to remain idle at a time when their competences and experience would be badly

144 See Article 3(5), 2nd sentence, draft Agreement: "Initially, the Administrative Committee shall appoint the necessary number of judges for setting up ... at least two panels ... in the Court of Appeal".

145 These first decisions will also rebound to national courts hearing infringement and revocation actions relating to European patents for which opt-out has been notified and to national patents. Also the granting practice of the EPO and of national patent offices is likely to be influenced by the jurisprudence of the UPC.

146 Article 16(2) draft Statute.

147 This is particularly true because most of the appeals will be interlocutory appeals which require much less work than full appeals.

needed at the UPC's Court of First Instance. Such a waste of resources would be particularly detrimental in the first years of operations of the UPC where initial contributions from the Contracting Member States will be required to balance the UPC's budget due to limited income from court fees.

A solution which could flexibly balance the above factors would be to provide for the appointment of "external judges" to the Court of Appeal, on the model of the external members appointed to the EPO's Enlarged Board of Appeal.¹⁴⁸ Such "external judges" could be appointed for a shorter period than "normal" judges¹⁴⁹ and should continue their activities at the national level. They would be called upon to sit on the full Court on a case by case basis in the first years when cases of exceptional importance would reach the Court of Appeal.¹⁵⁰

In order not to distort the picture of the UPC's total costs (Part VII) by an unjustified high number of appointments to the Court of Appeal in the first years of operations, it is assumed above that the number of judges appointed to the Court of Appeal in 2015, 2016 and 2017 will correspond to the expected caseload – and not to the 10 initial appointments prescribed in Article 3(5) draft Statute. It goes without saying that this assumption is without prejudice to Contracting Member States' eventual decision in this regard.

[Other solutions: could Court of Appeal judges act as judges of the Court of First Instance during an initial period?

The concept would be that judges appointed to the Court of Appeal could be allocated in individual cases [according to the principle of the gesetzlicher Richter] to panels of the Court of First Instance. See EPLA Article 40 Statute on "Membership of both the Court of First Instance and the Court of Appeal":

"During the first seven calendar years ..., judges may be members of both the Court of First Instance and the Court of Appeal at the same time, if this is necessary in order to staff the European Patent Court with judges having sufficient experience of patent law. A majority of two-thirds of the votes of the Contracting States represented and voting in the Administrative Committee shall be required for decisions appointing judges as members of both the Court of First Instance and the Court of Appeal. ..."

148 See Article 11(5) EPC. Originally, this scheme was laid down as a transitional measure in Article 160(2) EPC 1973, and also external members of the EPO's legal and technical boards of appeal were provided for.

149 For "normal" judges, a period of 6 years is provided for in Article 3(4) draft Statute. For external members, a period of 2 or 3 years would be appropriate, including a possibility for re-appointment.

150 Such a scheme would also cater for the unfortunate situation where one or more of Europe's most experienced patent judges could not be appointed to the Court of Appeal due to an age too close to the age of retirement.

Five years after start of operations, an evaluation was to take place, following which the scheme could be terminated or extended.

It appears that the ECourtHR does not raise any objections to such schemes, provided (obviously) that an appeal judge does not participate in deciding appeals against first instance decisions in which he/she has previously participated.]

PART V – REMUNERATION OF JUDGES, REGISTRARS AND STAFF

The following Part addresses the issue of the remuneration of the judges, Registrar and Deputy-Registrar and other staff of the Unified Patent Court.

It is common ground that the remuneration of staff constitutes by far the most important cost item in any judicial system.¹⁵¹

The overall aim of any remuneration scheme for the UPC must be to attract the best judges. In order to foster users' trust and confidence in the future court, it is indispensable that most of the judges appointed to the UPC be experienced patent judges with the highest qualifications. The judges of the UPC must "ensure the highest standards of competence and proven experience in the field of patent litigation".¹⁵² Legally qualified judge shall possess the qualifications required for appointment to judicial offices in the Member States. Technically qualified judge shall have a university degree and proven expertise in a field of technology as well as proven knowledge of civil law and procedure". The Council Conclusions also stress the need to guarantee the high quality and efficiency of the UPC's work and the legal and technical expertise required by the judges.¹⁵³

Section 1. Remuneration of national judges and of judges in international organisations

A comparison with the remuneration of national judges may be useful.

Table V.1 Remuneration in € at the beginning of the career

Member State	First instance	Second instance
Austria (AT)	43 393	105 251
Belgium (BE)	56 487	122 196
Bulgaria (BG)	5 676	11 136

151 In 2008, the budget of the CJEU was 218 650 000€. Salaries of members of the institutions (judges and registrar) and of other staff amounted to 76% of the budget, see <http://curia.europa.eu/>

152 Article 10 draft Agreement.

153 §§13-14 Council Conclusions.

Czech Republic (CZ)	21 838	42 760
Denmark (DK)	91 904	130 341
Finland (FI)	50 000	105 000
France (FR)	35 777	105 317
Germany (DE)	38 829	86 478
Hungary (HU)	30 430	42 154
Ireland	127 664	222 498
Italy (IT)	37 454	122 278
Latvia (LV)	13 677	31 686
Netherlands (NL)	70 000	115 000
Poland (PL)	14 904	37 403
Portugal (PT)	33 477	80 478
Romania (RO)	6 936	34 082
Slovak Republic (SK)	18 995	27 438
Slovenia (SI)	23 736	48 660
Sweden (SE)	96 500	152 000
United Kingdom (UK)	151 439	259 216
Average	46 583	94 069

Source: CEPEJ Studies number 11, European Judicial Systems, 2008 edition, p.189

Remuneration of judges at international courts and members of Boards of appeal

The remuneration of judges in international courts is traditionally higher. This is warranted in particular by their (presumed) higher competences, the need to confer additional standing, the requirement to move abroad to take up duties and knowledge of foreign languages.

Table V.2 Remuneration in €

Court or organisation	Remuneration	
CJEU	CFI: 275 000	ECJ: 300 000
ECHR	198 342	
ICC	Judges: 180 000	President, Vice-Presidents: 190 000
EPO Boards of Appeal	Ranging from 102 180 to 145 296	
OHIM Boards of Appeal	97 416 (member, AD 11)	118.554 (chairman, AD 13)

Section 2. Remuneration of the judges of the UPC-CFI

The Administrative Committee sets the judges' remuneration: "The Administrative Committee shall set the remuneration of the President of the Court of Appeal, the President of the Court of First Instance, the judges".¹⁵⁴ The proposals made below are obviously without prejudice to any future decision of the Administrative Committee relating to judges' remuneration.

The level of individuals' remuneration is traditionally a sensitive issue. It is however necessary for the purposes of the present study to tentatively develop a remuneration scheme adapted to the UPC's particular features. The following objective considerations would appear relevant:

- o to foster users' trust and confidence in the UPC, remuneration should be high enough to attract patent judges with the highest qualifications
- o most judges of the UPC-CFI will continue to work in the place where they currently reside (either as part-time judges of a national court or as full-time judge of a local division hosted by the State where they currently reside); only a few judges will have to move abroad to take up a position at the Court, namely
 - o judges appointed to the central division and
 - o judges allocated on a long term basis to a particular division (where necessary for the efficient functioning of a division with high workload).

On this basis, it is tentatively proposed, for the purposes of the present study, to work with the following remuneration scheme

- o the **basic remuneration** of the judges of the UPC-CFI would be set at 140 000€/year (full-time); an internal tax [17% or 23 800€] would be deducted from the basic remuneration (for pension and health insurance purposes)
- o the basic remuneration would be supplemented by an **expatriation allowance** [30% of basic salary or 36 000€] for those judges who take up duty at a division not located in the place where they were previously in office

Under such a scheme, the yearly remuneration of a CFI judge having to move abroad would amount to 152 200€¹⁵⁵ while a CFI judge not having to move abroad would earn 116 200€.¹⁵⁶

As far as the President of the Court of First Instance is concerned, his functions – "direct the judicial activities and the administration of the Court of First Instance"¹⁵⁷ – warrant a higher basic remuneration of 160 000€/year. Internal tax would be deducted and expatriation allowance added where appropriate.

As the judges will take turns as presiding judge, this function does not warrant a higher remuneration.

154 Article 9a draft Statute.

155 Computed as 140 000-23 800+36 000.

156 Computed as 140 000-23 800€.

157 Article 10a draft Agreement.

An aspect not pursued further at this stage is whether a special scheme for the remuneration of technically qualified judges should be provided for: other remuneration schemes than the one proposed above could be devised, for instance a lump sum per case instead of a fixed remuneration. A separate inquiry into the number of technically qualified judges needed to cover all fields of technology¹⁵⁸ and the functioning and mobility of the Pool of judges would be required to further develop this aspect.

Unit cost

For the calculations in Part VII below (Total costs of the UPC), a yearly "unit cost" of a judge of the Court of First Instance must be computed. This unit cost is best set as an average between the remuneration of a judge having to move abroad (152 200€) and the remuneration of a judge not having to move abroad (116 200€), that is at 134 000€. ¹⁵⁹

Part-time judges

As it is assumed above that part-time judges would work 50% for the UPC, their basic remuneration should be 50% of the basic remuneration of full-time judges, or 70 000€. As part-time judges would neither contribute to pension and health insurance schemes¹⁶⁰ nor receive any expatriation allowance, 70 000€ would also be the unit cost of a part-time judge.

Section 3. Remuneration of the judges of the Court of Appeal

As above, the proposals relating to the remuneration of Court of Appeal judges are without prejudice to the eventual decision of the Administrative Committee in this respect. When tentatively devising a remuneration scheme for Court of Appeal judges, some of the above considerations apply, in particular the need to attract the most experienced judges to the Court of Appeal. Furthermore, additional standing should be conferred to the judges of the second instance. Finally, in contrast to most CFI judges, most of the judges of the Court of Appeal would have to move abroad to take up a position at the seat of the Court.¹⁶¹

Tentatively, for the purposes of the present study, the basic remuneration of a judge of the Court of Appeal could be set at 160 000€/year, from which an internal tax [17% or 27 200€] would be deducted (for pension and health insurance schemes). Where the seat of the Court of Appeal would be located in a place where the judge was not residing before, an expatriation allowance of 48 000€ [30% of basic salary] would be added.

158 See footnote 128 on the experience at the German Federal Patent Court.

159 It could be argued that this is too high an average as most of the judges would not move abroad. However, as the question of the destination of the internal tax to be deducted from the basic salary is beyond the scope of the present study, the actual remuneration is used for computing an average "unit cost".

160 This would imply that part-time judges continue to assume functions at a national court or authority during their office as judges of the UPC, as do the judges of the Benelux Court of Justice, see Council document 13984/11, page 3.

161 Article 7(4) draft Agreement.

The functions of the President of the Court of Appeal¹⁶² warrant a higher basic net remuneration: 180 000€/year (with internal tax scheme and expatriation allowance as above).

Unit cost

Also for Court of Appeal judges, a unit cost is needed for the computations in Part VII. This unit cost is set at 180 800€.¹⁶³

Section 4. Non-judge staff: Registrar, Deputy-Registrar and other staff

This Section outlines the roles and functions of the Registrar, the Deputy-Registrar and the assistant-registrars and defines what other staff will be needed at the UPC.

Starting point is the Commission's 2003 Legislative Financial Statement annexed to the Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the CJEU's Court of First Instance.¹⁶⁴ In this proposal, more than 100 staff (officials or temporary staff attached to the CJEU) were foreseen: 7 registrars, 10 assistant rapporteurs, 12 legal secretaries, 21 clerical secretaries, 2 researchers, 2 *lecteurs d'arrêts*, 24 translators, 24 interpreters, 1 librarian and 1 driver.¹⁶⁵

The 2003 Statement was made for a fully centralised jurisdictional system and cannot easily be applied to the UPC. In particular, the UPC's decentralised concept will require more staff (for instance in the sub-registries). However, the categories of staff considered necessary at the time will likewise be needed at the UPC, as follows:

- ⊗ assistant-registrars to support the Registrar and the Deputy-registrar
- ⊗ legal secretaries and researchers, clerical secretaries and auxiliaries
- ⊗ interpreters
- ⊗ staff for the training framework and for the Patent mediation and arbitration centre

These categories of staff are elaborated on below.

Registrar, Deputy-Registrar and assistant-registrars

¹⁶² Article 3a(3) draft Agreement.

¹⁶³ Computed as 160 000€-27 200€+48 000€.

¹⁶⁴ COM(2003) 828 final, page 52.

¹⁶⁵ The annual cost of these staff was set at 108 000€/man on average.

The Registrar is expressly mentioned in several places in both the draft Agreement and draft Statute. It is immediately apparent that the UPC's Registrar has been conceived along the lines of the Registrar at the CJEU as a high-ranking official with the overall responsibility for assisting the Court and the judges in the performance of their functions. The Registrar shall be appointed for a term of 6 years by the Court which shall also lay down the rules governing his service.¹⁶⁶

Specific responsibilities of the Registrar will relate to the organisation and activities of the Registry:¹⁶⁷

- o keep the register which shall include records of all cases before the Court;
- o keep and administer lists:
 - o list of judges included in the Pool of judges¹⁶⁸
 - o list of European Patent Attorneys entitled to represent parties before the Court¹⁶⁹
 - o list of court experts¹⁷⁰
- o keep and publish a list of notifications of opt-out (including any withdrawal of opt-out).¹⁷¹

The Registrar will also have overall responsibility for publishing the decisions and the annual reports of the Court.

The responsibilities of the Deputy-Registrar relate in particular to the organisation and activities of the sub-registries. He or she will have overall responsibility for centralising at the Registry information about all cases started before the different divisions of the CFI.¹⁷²

In the decentralised court structure of the UPC – which could include at least two or three seats (central division of the CFI, Court of Appeal, Patent mediation and arbitration centre) and several local and regional divisions in various Contracting Member States – the Registrar and the Deputy-Registrar. They will of necessity need to be supported by assistant registrars.

Both in the Registry and in the sub-registries which will be set up at all divisions of the Court of First Instance,¹⁷³ assistant-registrars will be responsible for handling formal and administrative aspects of the divisions' work and functions. They will in particular be responsible for correspondence, maintaining files of pending cases and will assist the judge-rapporteur with drawing up minutes of interim conferences and oral

166 Article 8(4) draft Agreement, cf. Article 17 draft Statute.

167 Article 18(2) draft Statute.

168 Article 15(1) draft Statute.

169 Article 28(3) draft Agreement.

170 Article 36(2) draft Agreement.

171 Article 58(3) and (4) draft Agreement.

172 Article 20(2) draft Statute.

173 Article 8(3) draft Agreement.

hearings. They will also manage judicial time periods and schedules (under the supervision of the judge-rapporteur) and directly assist the judges before, during and after court sessions.

Assistant-rapporteurs will have to operate in a particularly complex environment, as contacts and correspondence will take place with parties and legal representatives from all Union Member States, and even sometimes from non Union countries. They will need to be able to process incoming correspondence relating to private party litigation in all the official languages of the Contracting Member States and will have to respond orally and in writing to requests made by the parties (e.g. request for information on state of the case, scheduling of hearings etc.) or the judges (e.g. request for additional information, missing documents etc.). In order to safeguard the proper functioning of the Court, such day to day contact between the parties and the Court cannot rely on regular translation or interpretation services but will have to be provided by the staff of the Registry directly.¹⁷⁴

Other non-judge staff

- ⊗ Legal secretaries: perform both clerical and administrative duties, gather information, prepare documentation and manage any information which is pertinent to the case; type up legal documents and correspondence, conduct relevant legal research and handle the publications of the Court
- ⊗ Legal researchers: identify and retrieve the information that is needed to support legal decision-making in a case; work closely together with the judge-rapporteur in the written and interim procedures
- ⊗ Clerical secretaries, auxiliaries and technical staff: coordinate the administration and organisation of the Court (including IT equipment), maintain the documentation filing system

Specific tasks of these other staff will be to

- o assist the Presidium in preparing proposals for the amendment of the Rules of Procedure and for Financial Regulations of the Court and in preparing the annual budget and the annual accounts of the Court
- o keep the various lists provided for in the draft Agreement and Statute:
 - list of mediators and arbitrators¹⁷⁵
 - list of European Patent Attorneys entitle to represent parties¹⁷⁶
 - list of experts¹⁷⁷
 - list of judges included in the Pool of Judges¹⁷⁸

174 COM(2003)828 final, page 52.

175 Article 17(5) draft Agreement.

176 Article 28(3) draft Agreement.

177 Article 36(2) draft Agreement.

178 Article 15 draft Statute.

- o inform the EPO and any national patents office concerned of revocation decisions

Interpreters: costs related to the language regime

Article 31(2) draft Agreement imposes an obligation on both the Court of First Instance and the Court of Appeal to provide "interpretation facilities to assist the parties concerned at oral proceedings", "at the request of one of the parties, and to the extent deemed appropriate". The Council Conclusions emphasise that any division of the UPC "should provide translation and interpretation facilities in oral proceedings to assist the parties concerned to the extent deemed appropriate, in particular when one of the parties is an SME or a private party."¹⁷⁹

A appropriate model for a well-functioning and flexible simultaneous interpretation service exists at the EPO which has provided for special conditions of employment for interpreters (who are considered as a separate category of staff alongside permanent employees, contract staff and auxiliary staff).¹⁸⁰ Contracts with interpreters "of the highest standard of ability, efficiency and integrity" are concluded for the duration of a conference, seminar, meeting or oral proceedings.¹⁸¹ Their daily remuneration is set at 652€, applicable at all the venues (within Europe) at which interpreters may be required.¹⁸² Special provisions relate to overtime, cancellation and travel costs.¹⁸³

In practice, if a party requests simultaneous interpretation, one or more interpreters specialised in the relevant technical field and in the relevant language(s) are contacted by the EPO well in advance of the oral proceedings; a standard contract is then concluded between the interpreter and the EPO for the duration of the oral proceedings (usually one day). A week before the oral proceedings take place, basic documentation can be sent to the interpreters.

Every day, simultaneous interpretation is requested in several of the oral proceedings held at the EPO (mostly in *inter partes* opposition and appeal proceedings).¹⁸⁴ The system described above is said to function smoothly, to the satisfaction of the parties and the representatives involved in these proceedings.

As far as the UPC is concerned, it is assumed that a similarly flexible scheme can be put in place for simultaneous interpretation during oral hearings. However, in view of the relatively limited sums at stake, it makes little sense to attempt to go into further details in order to estimate the costs of such a scheme which would depend on

179 §21 Council Conclusions.

180 See Decision of the Administrative Council of 24 October 2002.

181 Articles 2 and 3(2) of the Decision of the Administrative Council.

182 Article 5(1) of the Decision of the Administrative Council.

183 Articles 6, 7, 8 and 9 of the Decision. Article 10 on social security and pensions provides that "interpreters shall demonstrate that they are covered by a social security and pension scheme".

184 Oral proceedings are held at the EPO in one of the EPO's official languages.

- o the number of oral hearings held each year¹⁸⁵ and the duration of each hearing,¹⁸⁶
- o the languages to and from which simultaneous interpretation will be needed and
- o the number of cases where the Court dispenses with the oral procedure.¹⁸⁷

Instead, it is proposed to allocate each year a lump-sum to interpretation services, starting at 150 000€ in the year 2015¹⁸⁸ and increasing by 100 000€ each year in view of the increase of the Court's workload.

Staff for the Training framework

Some of the judges appointed to the UPC will have heard only a limited number of patent cases and will need intensive training already in the years preceding the entry into force of the draft Agreement.¹⁸⁹

A comprehensive training framework for judges must therefore be in place already before the UPC will start operations. And even after the UPC has started operations, resources will have to be devoted to training.¹⁹⁰ The caseload in the initial period should enable the more experienced judges of the UPC to devote time to training judges with less experience in patent litigation.¹⁹¹

A cautious estimate is that [100] experienced legally qualified judges are active in the patent field already today – concentrated however in the (few) countries where patent litigation actually takes place.¹⁹² To achieve a broader geographical coverage, it is indispensable that training be offered early on to a larger group of judges. Ideally, soon after the Agreement would be signed by Contracting Member States, a provisional or transitional training framework should be set up. A Declaration by the signatory States at the diplomatic conference adopting the Agreement

185 The number of cases initiated at the CFI or the number of appeals lodged at the Court of Appeal cannot be used for this purpose, since many cases will be settled before the case reaches the oral procedure, see Annex 5.

186 Rule 114 of the draft Rules of Procedure of the UPC provides that "... the presiding judge shall endeavour to complete the oral hearing within one day".

187 Article 21(3) draft Agreement.

188 If the daily cost (652€) of an interpreter at the EPO is used as a basis for calculation, 230 "interpretation-days" could be financed with the 150 000€ proposed for the year 2015 – where only 123 cases would be started at the Court of First Instance and 61 appeals lodged at the Court of Appeal.

189 See §13 Council Conclusions: "Experience [with patent litigation] could also be acquired through theoretical and practical training which should be provided in order to improve and increase available patent litigation expertise".

190 According to Article 14(3) draft Agreement, the training framework shall provide for continuous training.

191 This important aspect of the daily work of the UPC in its early years has been taken into account above (Part III, Section 2.B) where the "productivity" of the judges of the CFI is assumed to be much lower in an initial phase (2015 and 2016) than in a later steady state.

192 This estimate is based on data provided by the delegations involved in the discussions on the EPLA, see WPL/SUB 4/03, pages 2 and 13 and WPL/SUB 4/03 Add. 1f, page 1. The term "experienced" does not imply that a judge deals exclusively with patent cases but that he or she has dealt with more than 100 patent cases, see footnote 118.

could for instance state that the signatory States commit themselves to put in place a provisional or transitional training framework along the lines defined in the draft Agreement and provide appropriate funding for that purpose.¹⁹³

After the UPC's has started operations, the Presidium shall establish "guidelines for the training framework"¹⁹⁴ and adopt "Training Regulations" ensuring the implementation and overall coherence of the training framework.¹⁹⁵ On this basis, an annual work programme and training guidelines shall be drawn up, which shall include for each judge an annual training plan identifying his or her main training needs.¹⁹⁶

The objective of the training framework is to improve and increase an adequate number of judges' expertise in patent litigation. Focus should be in particular on

- (a) internships in national patent courts or – after the UPC has started operations – in divisions of the Court of First Instance hearing a substantial number of patent cases;
- (b) improvement of language skills;
- (c) technical aspects of patent law;
- (d) civil procedure in general (especially for technically qualified judge) and the UPC's Rules of Procedure in particular;
- (e) the preparation of candidate-judges.

Furthermore, regular meetings are to be organised between all judges of the UPC in order to discuss developments in patent law and to ensure consistency of jurisprudence.¹⁹⁷

Finally, the training framework shall provide a platform for the exchange of expertise and a forum for discussion, in particular by:

- (a) organising courses, conferences, seminars, workshops and symposia,
- (b) co-operating with international organisations and education institutes in the field of intellectual property and
- (c) promoting and supporting further vocational training.

For the purposes of the computations of the total costs of the UPC, it is assumed that the practical organisation of the training framework will require a limited number of staff (two staff responsible for contents, one for organisational matters), to be added to the overall staff of the UPC-CFI. In addition, a lump sum will be needed for sending less experienced judges on internships in more experienced courts (costs of travelling

193 *[Including cooperation agreement with existing educational centers, such as the EPO's Academy or CEIPI?]*.

194 Article 11(3)(d) draft Statute.

195 Article 9(1) draft Statute.

196 Article 9 draft Statute.

197 Article 14 draft Agreement.

and allowances) and organise meetings and seminars. An annual funding of 500 000€ would appear appropriate for this purpose in the first years.¹⁹⁸ Contracting Member States should endeavour to make funding available for this purpose already in 2013 and 2014 (as advances).

Staff for the Patent mediation and arbitration centre

It is also foreseen that a Patent mediation and arbitration centre be set up. It is intended that the Centre shall have its own seat.¹⁹⁹

The Centre shall provide facilities for mediation and arbitration of patent disputes falling within the scope of the Agreement on the UPC. The underlying idea is that in each case the juge-rapporteur should explore with the parties during the interim procedure the possibilities for a settlement through mediation and arbitration. The facilities of the Centre may be used for this purpose. The Centre shall establish its own Mediation and Arbitration Rules and shall draw up a list of mediators and arbitrators to assist the parties in the settlement of their dispute.

For the purposes of the computations of the total costs of the UPC, it is assumed that the Patent mediation and arbitration centre will require a limited number of 2 staff attached to the Court of First Instance. In Tables VI.1 to 4 below, these 2 staff are added to the overall staff of the UPC-CFI.

Staff for the Committees

Three Committees shall be set up to ensure the effective implementation and operation of the Agreement on the UPC: an Administrative Committee,²⁰⁰ a Budget Committee²⁰¹ and an Advisory Committee.²⁰² Each Committee will be composed of one representatives from each Contracting Member State who may be assisted by an expert.

The Committees will need to meet before the Agreement on the UPC enters into force (see below Part X). After entry into force, the Administrative Committee and the Budget Committee can be expected to meet twice a year, while the Advisory Committee will meet less frequently.²⁰³ only meet every 6 year, to establish the list of the most suitable candidates to be appointed as judges and, where necessary, make

¹⁹⁸ After 2019, this funding could reasonably be reduced to 250 000€ per year.

¹⁹⁹ Article 17(1) draft Agreement.

Article 9 draft Agreement.

²⁰⁰ Article 57 draft Agreement.

²⁰¹ Article 57a draft Agreement.

²⁰² Article 57b draft Agreement.

²⁰³ Meetings of the Advisory Committee will be required for the purposes of

- establishing the list of the most suitable candidates to be appointed as judges,
- making proposals for the guidelines for the training framework and
- delivering opinions on the proposals of the Administrative Committee concerning the requirements for qualifications of European patent attorneys.

proposals for the guidelines for the training framework and deliver opinions on the proposals of the Administrative Committee concerning the requirements for qualifications of European patent attorneys.²⁰⁴

The meetings of the Committees will be prepared by the staff of the UPC. A dedicated secretariat or staff exclusively working on preparing such meetings do not appear appropriate.

Delegations' costs of travelling and allowances should be paid directly by the Contracting Member States. Due to budgetary constraints, the UPC would not be able to bear such costs.

Ratio "judge/other staff"

It does not appear necessary at this stage to attempt to estimate exactly how many staff from each category will be needed at the UPC. Instead, it is proposed to use the ratio "judges / other staff" known from other courts. At the German Federal Patent Court for instance, there were 120 judges and 138 members of the non-judicial staff in 2008, corresponding to a ratio of 1,15 non-judicial staff for each judge. Despite the decentralised concept behind the UPC, it is proposed to keep a ratio of 1,15 staff/judge – but to count not only full-time judges but also part-time judges when computing the number of non-judge staff.

Section 5. Remuneration of Registrar, Deputy-Registrar and other non-judge staff

Article 9a draft Statute lays down that "The Administrative Committee shall set the remuneration of ... the Registrar, the Deputy-Registrar and the staff". For the purposes of computing the total costs of the UPC, it is assumed that

- o the annual remuneration of the Registrar will be equal to the remuneration of a judge of the Court of Appeal (180 800€)
- o the annual remuneration of the Deputy-Registrar will be equal to the remuneration of a judge of the Court of First Instance (134 000€)
- o the annual remuneration of assistant-registrars, legal secretaries, researchers, clerical secretaries, auxiliaries, staff for the training framework and for the Patent mediation and arbitration centre will be 60% – respectively 40% – of the basic remuneration of a judge of the CFI;²⁰⁵ for simplification, an average of 50% (or 70 000€) is used as unit cost for such staff.²⁰⁶

It can be left open at this stage to what extent the UPC could make use of temporary staff or contract staff. Some of the services needed by the UPC could also conveniently be outsourced (security, maintenance).

²⁰⁴ Article 28(2) draft Agreement.

²⁰⁵ This differentiated percentage is based on the nature of the work carried out: secretarial tasks warrant a rate of 40% while legal tasks warrant 60%. Model is the distinction between AD staff and AS staff in the Commission.

²⁰⁶ In order not to complicate the computations, expatriation allowance (where appropriate,) and contribution to social schemes are not included in this figure.

Section 6. Overview of the number of judges and non-judge staff at the UPC

Court of First Instance

Table VI.1 Scenario 1. "High up-take"

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Cases	123	260	454	696	1055	1468	1557	1642	1723	1802	1909
Judges	3F+17P	13F+23P	24F+26P	40F+33P	59F+37P	101F+45P	106+44	114+50			
Deputy - Registrar	1	1	1	1	1	1	1	1	1	1	1
Staff*	28**	46	63	89	115	173	177	194			

* includes staff for the training framework (3) and the Patent mediation and arbitration centre (2)

** computed as $20 \times 1,15 + 2 + 3$

Court of Appeal

Table VI.3 Scenario 1. "High up-take"

	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Appeals	61	150	134	184	281	398	458	484	509	532	562
Judges	5	8	8	10	16	22	26	28	29		
Registrar	1	1	1	1	1	1	1	1	1	1	1
Staff	6	9	9	12	18	25	30	32			

PART VI - FACILITIES

This Part deals briefly with costs for facilities.

Section 1. Concept of facilities

Costs for facilities are understood as costs for rented premises (offices and court rooms) and costs for acquisition of equipment (stationery, ICT facilities, library). It also includes costs for maintenance and security.

Facilities will be needed for

- local divisions, regional divisions and the central division of the Court of First Instance, including the sub-registries set up at all the divisions of the Court of First Instance
- the Court of Appeal, including the Registry
- the training framework for judges
- the Patent mediation and arbitration centre
- the Administrative, Budget and Advisory Committees

The judicial functions of the Unified Patent Court create specific constraints which drive up costs, for instance publicity of proceedings²⁰⁷ which will have a significant cost as it requires public access to the UPC (court rooms) and security. At least one public interim conference and oral hearing is likely to be held in each case. Occasionally, a case will attract public interest and the attention of the media, causing additional costs to ensure publicity and security.

As regards facilities for the Registry and the sub-registries, it is apparent that the Registry will be physically "part" of the Court of Appeal.²⁰⁸ It will have an important centralising function in an otherwise decentralised system.²⁰⁹ The Registry shall be public.²¹⁰ It shall keep records of all cases before the Court. Sub-registries shall set up at all the divisions of the Court of First Instance.²¹¹

The decentralised concept behind the UPC requires the Court – and especially the Registry and the sub-registries – to make best use of electronic procedures, such as electronic filing of submissions of the parties and stating of evidence in electronic form, as well as video conferencing.²¹² This will imply modern IT-systems and facilities for video-conferences, not only for the UPC's internal work but also for communication with the parties.

207 Article 26 draft Agreement.

208 Article 8(1) draft Agreement provides that the Registry shall be "set up at the seat of the Court of Appeal".

209 See for instance the obligation for all sub-registries to notify every case to the Registry upon filing, Article 8(3) draft Agreement.

210 Article 8(1), 2nd sentence draft Agreement.

211 Article 8(2) draft Agreement.

212 Article 25 draft Agreement.

Facilities will also be needed for simultaneous interpretation, in the form of interpreters booths and adequate IT-equipment.

As regards facilities for the seats of the Court (central division of the Court of First Instance, Court of Appeal), it is suggested that premises physically separated from national courts should be considered in order to ensure the standing of the new Court.

As far as facilities for the training framework for judges and for the Patent mediation and arbitration centre are concerned, Contracting Member States will have the choice between lavishly equipped and staffed units with proper seats²¹³ or lighter structures attached to existing infrastructure (Court of First Instance or Court of Appeal). The considerations above in Part V, Section 4 are based on the latter approach.

Finally, the Administrative Committee, Budget Committee and Advisory Committee will need a meeting room with capacity for 50-60 persons.

Section 2. Financing of costs for facilities

Costs relating to facilities shall be financed from 2 sources:

- ⊖ Contracting Member States hosting a local division shall provide the facilities necessary for that purpose;²¹⁴
- ⊖ Similarly, the Contracting Member State hosting the central division shall provide the necessary facilities;²¹⁵
- ⊖ Other facilities of the UPC shall be financed by the Court's budget:²¹⁶
 - ⊖ the regional divisions of the Court of First Instance
 - ⊖ the Court of Appeal
 - ⊖ the Registry and sub-registries.

An attempt to assess the precise expenditures at stake for the many items coming under the heading "Facilities" makes little sense. However, all available experience shows that, compared to remuneration of judges and other staff, costs relating to facilities are negligible.²¹⁷ A generally

213 Article 17 draft Agreement provides that the Patent mediation and arbitration centre shall have a seat to be agreed upon by the Contracting Member States. Any seat is not required for the training framework for judges, although an attractive location in Southern Europe has recently been favoured for judges' meetings.

214 Article 5(4) draft Agreement.

215 Article 5(1a) draft Agreement.

216 Article 19 Draft Agreement.

217 This holds true as long as premises are rented. In a calculation carried out in 1985 when the setting up of the Common Appeal Court for the Community patent was discussed, the costs relating to facilities were set at 6% of remuneration costs. See Report of the Working party I to the Interim Committee for the Community patent, Brussels 10.10.1985, CIBC/835/85, page 10.

accepted thumb-rule is that, when setting up new agencies or institutions, costs relating to facilities amount to around 8 to 10% of costs for remuneration in a steady state.²¹⁸

Assumption

- o Given the decentralised concept of the UPC, costs for facilities can reasonably be set at 10% of the costs for remuneration.

PART VII – TOTAL COSTS OF THE UNIFIED PATENT COURT

This Part computes the various cost items estimated above, in order to reach an overall figure for the costs of the UPC. The total costs of the UPC will consist of

- costs of remuneration for judges of the Court of First Instance and of the Court of Appeal (see Part V, Sections 2 and 3)
- costs of remuneration of the Registrar, the Deputy-Registrar and other non-judge staff (including staff for the training framework and for the Patent mediation and arbitration centre) (see Part V, Sections 4 and 5),
- lump-sums for interpretation and training framework for judges (see Part V, Section 4) and
- costs for facilities (see Part VI).

Scenario 1: "High up-take" and Setup 3. "Pooling resources"

Table VII.1 – Total costs of the UPC, in €

	2015	2016	2017	2018	2019
Judges CFI	3F+17P 1 592 000	13F+23P 3 352 000	24F+26P 5 036 000	40F+33P 7 670 000	59F+37P 10 496 000
Judges Court of Appeal	5 904 000	8 1 446 400	8 1 446 400	10 1 808 000	16 2 892 800
Registrar and Deputy-Registrar	2 314 800	2 314 800	2 314 800	2 314 800	2 314 800
Staff, incl. staff for TFJ and PMAC	28+6 2 380 000	46+9 3 850 000	63+9 5 040 000	89+12 7 070 000	115+18 9 310 000
Interpretation (lump-sum)	150 000	250 000	350 000	450 000	550 000
Training (lump-sum)	500 000	500 000	500 000	500 000	500 000

²¹⁸ Harhoff (2009), page 35, assumed 8%. In WPL/SUB 4/03, page 12, the ratio for the German Federal Patent Court is 7,7% (13 million€ salaries and 1 million€ fixed costs). The Federal Patent Court is however a well-established fully centralised court created back in 1961.

Facilities (10%)	584 080	971 320	1 268 720	1 781 280	2 406 360
Total costs	6 424 800*	10 684 520	13 955 920	19 594 080	26 469 960

*computed as $3f_{CFI-j} \cdot 134\,000 + 17p_{CFI-j} \cdot 70\,000 + 5 \cdot 180\,800 CoA-j + Registrars + 34staff \cdot 70\,000 + 150\,000$ (lump-sum interpretation) + 500 000 (lump-sum training framework) = 5 840 800 + 10% (facilities or 584 080)

Table VII.1 – Total costs of the UPC, in €

	2020	2021	2022	2023	2024	2025
Judges CFI	101F+45P 16 684 000	106F+44P 17 284 000	114F+50P 18 776 000			
Judges Court of Appeal	22 3 977 600	26 4 700 800	28 5 052 400			
Registrar and Deputy-Registrar	2 314 800	2 314 800	2 314 800			
Staff, incl. staff for TFJ and PMAC	173+25 13 860 000	177+30 14 490 000	194+32 15 820 000			
Interpretation (lump-sum)	650 000	750 000	850 000			
Training (lump-sum)	250 000	250 000	250 000			
Facilities (10%)	3 573 640	3 778 960	4 107 320			
Total costs	39 310 000	41 568 560	45 180 520			

Comments

- After a relatively modest start in 2015 and 2016 followed by a slow progressive rise in costs in the following 2 years, the end of the transitional period in 2019 would lead to a steep increase in 2020, due to the rise in the number of cases brought to the UPC in 2020;²¹⁹
- after 2021, the progression would again be slow as the number of cases brought to the UPC nears a steady state of ca. 2000 per year.

"Unit cost" of central, local and regional divisions of the UPC-CFI

²¹⁹ From ca. 1050 cases in 2019 to 1470 cases in 2020.

For the purpose of the present study, it is of relevance to attempt to estimate the "unit cost" of the various divisions of the Court of First Instance. Basis for the estimation is Setup 3. "Pooling resources" in Scenario 1. "High uptake": in that scenario, 5 regional divisions and 4 local divisions would be set up by the Contracting Member States, in addition to the central division.

As set out above, the cost for facilities in Scenario 1. "High uptake" and Setup 3. "Pooling resources" would be

2015	2016	2017	2018	2019	2020	2021	2022	2023
584	971	1 268 720	1 781	2 406	3 573	3 778	4 107	
080	320		280	360	640	960	320	

On that basis, an attempt can be made to calculate the unit cost of the CFI's divisions by dividing the costs for facilities by the number of divisions. however, to reflect the size of the various divisions, which will vary considerably, it is proposed that the central division and any local or regional division with high caseload (more than 100 cases per year) "count double".²²⁰

In **Scenario 1. "High up-take" combined with Setup 3. "Pooling resources"**, the unit cost of a division could thus tentatively be estimated at

- o year 2016: **53 000€** for each of the 5 **regional divisions** and for each of the 4 **local divisions** and **106 200€ for the central division**
[computed as 584 000€ (costs for facilities) divided by 11 (number of divisions)]
- o year 2016: **88 300€** for each of the 5 **regional divisions** and for each of the 4 **local divisions** and **176 600€ for the central division**
- o year 2017: 105 726€ for each of the 5 **regional divisions** and for each of the 4 **local divisions** dealing with less than 100 cases and **211 500€ for the central division** and for the **local divisions** dealing with more than 100 cases
- o year 2018: **137 000€** for each of the 4 **regional divisions** and for each of the 3 **local divisions** dealing with less than 100 cases and **274 000€ for the central division** and for the **local and regional divisions** dealing with more than 100 cases
- o year 2019: **151 000€** for each of the 3 **regional divisions** and for the only **local division** dealing with less than 100 cases and **300 800€ for the central division** and for the 3 **local and 2 regional divisions** dealing with more than 100 cases

Such a unit cost is inevitably the result of a very gross simplification – it may nevertheless hint at an order of magnitude for the costs for facilities for individual divisions of the CFI.

220 This will lead to dividing the costs for facilities

- by 11 (5RD+4LD+"2CD") in 2015 and 2016

- by 12 (5RD+"5LD"+"2CD") in 2017

- by 13 ("6RD"+"5LD"+"2CD") in 2018

- by 16 ("7RD"+"7LD"+"2CD") in 2019.

PART VIII – OVERVIEW OF COURT FEES AT NATIONAL LEVEL

A short comparison of the various national fee systems and fee levels in some of the Member States is relevant in the context of the present study.

Section 1. National systems of court fees

The systems for court fees in patent litigation cases differ significantly from Member State to Member State. Although this overview does not claim to be exhaustive, it identifies the four main systems of court fees that exist in the Member States:

- o Systems where no fees are charged by the courts for civil litigation (including patent litigation); Member States where no fees are charged include ES, FR and LU where access to justice can be said to be free of charge.
- o Systems of fixed fees, which imply that fees are fixed by the legislator at a certain level regardless of the value or nature of the claim; two Member States with fixed systems are FI and SE where fixed court fees set at a low level are payable (see Table VIII.1).
- o Systems of variable fees where the level of fees depends on the value of the claim; the graduation is usually as follows:
 - for claims with low value, the fee constitutes a high percentage of the value
 - as the value of the claims increases, a smaller percentage of the value is levied.Member States that use a variable system are for example AT and DE (see Table VIII.4).
- o Systems with mixed fees are in use in several Member States such CZ, DK, IT, LT, NL, PL, SK and UK (see Tables VIII.2 and VIII.5). Such systems combine fixed fees and variable fees depending on the value of the dispute.

Section 2. Level of fees

Not only do Member States have different systems but there are also significant variations in the levels of court fees that are charged. Some fees are so low that they are almost a symbolic cost, whereas others are so high that they alone constitute a first barrier for some potential plaintiffs.

Fixed Fees

- a) The fees in fixed systems are generally low, or even more of a symbolic nature.

Table VIII.1 Fixed fees in fixed systems

Member State	Fee at 1 st instance (€)	Fee at 2 nd instance (€)
Finland	160	160
²²¹ Sweden	43	0

b) The fixed fees that form part of mixed systems – i.e. the fees levied jointly with variable fees – vary considerably between Member States. For some Member State employing a mixed system, there is only one fixed fee (DK, LT and PL) whereas others provide for several fixed fees (UK). There are naturally differences in the level of the fixed fees.

Table VIII.2. Fixed fees in mixed systems

Member State	Fee at 1 st instance (€)	Fee at 2 nd instance (€)
²²²²²³ Czech Republic	24 or 40	24 or 40 (200)
Denmark	67	200
²²⁴ Lithuania	30	30
Poland	141	141
²²⁵ Slovak Republic	99.50	99.50
²²⁶ UK	Many misc. fees, see below	134 or 223

Table VIII.3 Overview of fixed fees in the UK²²⁷

Stage of proceedings	Fee
Allocation to track	- Small Claims Track: €39 (£35) - Fast track & Multi track Claims: €223 (£200)
Pre-trial checklist (previously "listing questionnaire fee")	€111 (£100) (only fast- and multi-track)
²²⁸ Hearing fees	- Small Track Claim: €28-335 (£25-300)

221 See <http://www.pbr.se/maletsgang.htm>

222 If the claim is lower than €600, the fee will be €24 (if the value of the claim exceeds €600 the fee will become variable – see Table XI.4). The fee will be €40 for non-monetary claims.

223 Ibid. Also, if a case is appealed at the Supreme Court in the Czech Republic, and if the value of the claim exceeds €4,000, a fixed fee of €200 will be levied.

224 This fixed fee is only applicable to claims that are non-monetary.

225 This fixed fee is only applicable when it is not possible to assess the monetary value of the claim.

226 The fixed fee levied depends on which court hears the appeal – the County Court charges €134 whereas the High Court charges €223.

227 Fee levels found at http://www.hmcourts-service.gov.uk/courtfinder/forms/ex50_e.pdf.

228 Variable fees, depending on the value of the claims.

	- Fast Track Claim: €558 (£500) - Multi Track Claim: €1,115 (£1,000)
Non-money claims	- High Court: €446 (£400) - County Court: €167 (£150)
Application on notice where no other fee is specified	€84 (£75)
Application to set aside a County Court Judgment	€84 (£75)
Application by consent or without notice where no other fee is specified	€45 (£40)
Application to vary a judgment or suspend enforcement	€39 (£35)
Application for a summons or order for a witness to attend	€39 (£35)
Application for a certificate of satisfaction of a judgment debt	€17 (£15)
Application for the assessment of costs	€45 (£40)
²²⁹ Application for the detailed assessment of costs	€156-5,572 (£140-£5,000)
Application for a judgment summons	€111 (£100)

Variable Fees

a) The fees in variable fee systems depend of the value of the case. In the field of patent litigation, which always involve businesses – and usually innovative and competitive companies – the value of the cases are often high,²³⁰ with corresponding high court fees.

Table VIII.4 Variable fees in variable systems

Member State	Fee for Value Claim of ≤ €10,000	Fee for Value Claim of ≈ €100,000	Fee for Value Claim of ≥ €300,000	Fee for Value Claim of ≈ €1,000,000
²³¹ Austria	641 (6.4%)	2,518 (2.5%)	6,296 (2.1%)	13,754
²³² Germany	196 (2%)	856 (0.9%)	2,056 (0.7%)	13,368

b) Also the variable fees in mixed systems vary considerably. Some Member States have fees that constitute as much at 6% of the value of the claim (SK) whereas others have fees as low as 0.27% of the claim (IT).

²²⁹ The cost of this detailed assessment is dependent both on whether the filing party has legal aid or funding, and on the amounts of costs claimed. For a detailed compilation of these costs, please see http://www.hmcourts-service.gov.uk/courtfinder/forms/ex50_e.pdf p.8.

²³⁰ In DE, the average value of a patent case is 600 000€.

²³¹ See Annex 4, Table 4.1.

²³² See Annex 4, Table 4.2.

Table VIII.5 Variable fees in mixed systems²³³

Member State	Fee (€) for Value Claim of ≤ €10,000	Fee (€) for Value Claim of ≈ €100,000	Fee (€) for Value Claim of ≥ €300,000
²³⁴ Czech Republic	400 (4%)	4,000 (4%)	12,000 (4%)
Denmark	200 (2%)	2,000 (2%)	6,000 (2%)
²³⁵ Italy	170 (1.7%)	500 (0.5%)	800 (0.27%)
²³⁶ Lithuania	300 (3%)	2,000 (2%)	3,000 (1%)
²³⁷ Poland	500 (5%)	5,000 (5%)	15,000 (5%)
²³⁸ ²³⁹ Slovak Republic	600 (6%)	6,000 (6%)	16,596 (5.5%)
²⁴⁰ United Kingdom	251 (2.5%)	905 (0.9%)	1,710 (0.6%)

Section 3. Lessons from the overview of national systems of court fees

It is immediately apparent that fixed fee systems are easy to understand for potential parties and the public at large: by consulting a fee schedule, the amount to be paid for bringing a case to court can be ascertained easily. When considering whether to engage in patent litigation – an area where cost drivers are numerous and very difficult to estimate in advance – a potential plaintiff will at least know what court fees are payable.

By contrast, in variable fee systems, the need to estimate the value of the case appears to introduce a first obstacle for potential parties, and professional advice is often required already at this stage. Combining a variable fee system with fixed fees appears to reduce transparency and predictability even more. This is not to say that such systems cannot function properly in a purely national setting where parties and representatives are used to it. There is also an element of fairness inherent in such systems, in so far as the level of each fee is proportional to the value of the case (variable fee systems) and a fee is charged for individual steps or requests in proceedings (fixed fees in variable fee systems).

²³³ Although care has been taken to ensure that these figures are as accurate as possible, difficulties arise as a result of Member States using different value parameters when establishing their variable fees. Consequently, the values (≤ €10,000, ≈ €100,000, ≥ €300,000) are approximations (as are the examples given).

²³⁴ See Annex 4, Table 4.3. The Czech Republic levies a fee of 4% on monetary claims that exceed €600, but it has a maximum fee of €40,000.

²³⁵ See Annex 4, Table 4.4.

²³⁶ See Annex 4, Table 4.5.

²³⁷ The fees are set at 5% according to Article 13 of the Polish Act on Court Costs in Civil Cases. Poland has set the maximum fee at 100,000 zł (≈ €24,500).

²³⁸ See Annex 4, Table 4.6.

²³⁹ This is the maximum fee that can be charged according to the Slovakian court fee system.

²⁴⁰ See Annex 4, Table 4.7.

The inherent complexity of variable and mixed fee systems has been acknowledged in some Member States where recent reforms of national fee systems have been undertaken,

- either by moving away from variable/mixed systems towards fixed systems,
- or by undertaking reviews to determine how such a move could be possible in the future.

The NL has for instance implemented a new and straightforward fixed fee system in 2010, in which the court fees is not only fixed but also set at a much lower level than they currently are.²⁴² Furthermore, the UK has undertaken several reviews of its mixed system, which is presently held as too expensive and complex.²⁴³ Recommendations have been made for the UK to adopt a low-cost fixed system with an upper financial limit in order to both enable and incentivise SMEs to invest and engage in IP protection.

For the purposes of the present study, **a fixed fee system will be used** below to estimate the UPC's income from fees. This choice is made not only because such a system is more straightforward for potential plaintiffs and simpler to design but also because it avoids the difficulty of predicting the value of the cases brought in future to the UPC – which is a separate topic going beyond the scope of this study. In addition, for a new common court like the UPC, a European fee scheme must endeavour to avoid the complexity of longstanding national systems, especially with a view to users coming from countries which do not have variable or mixed fee systems.

PART IX – PRINCIPLES FOR A FEE SYSTEM AND LEVEL OF FEES

This Part presents initial reflexions on the principles for a fee system at the UPC and tentatively proposes a fixed fee system with fees for 5 types of actions. For the purposes of illustrating the income which could be generated from fees if the workload of the UPC would reach the level referred to as "High uptake" in Part I, three scenarios for fee levels also presented. Closely linked to the level of fees are instruments such as legal aid and targeted support measures for SMEs and micro-entities which are briefly also discussed.

Section 1. Principles

241 In England and Wales, the civil courts are predominantly (80%) funded by the fees paid by the litigants at the commencement of any procedures, see <http://www.hmcourts-service.gov.uk/infoabout/fees/whywecharge.htm>. The remaining 20% derive from taxes. In the field of patent litigation, it is noticeable that DE which is one of the countries charging the highest fees is not only the country where most cases are heard but also the country where the patent courts are to a large extent self-financed, see WPL/SUB 4/03 ---

242 See Annex 4, Table 4.8.

243 Jackson (2009). See also Intellectual Property Court Users' Committee "Working Group's Consultation on Proposals for Reform of the Patents County Court", 2009.

Article 18(3) draft Agreement sets out the principles for the fee system at the UPC:

"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 and micro entities 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."

Several important principles should be distinguished:

- o the UPC will bring economic benefits to private parties by solving disputes that they have not been able to solve themselves; they should therefore contribute financially to the costs of the UPC;
- o access the UPC should be ensured also for parties with limited resources;²⁴⁴
- o Contracting Member States expressly set the objective of a self-financed UPC.²⁴⁵

The difficulty lies in finding a "right balance" between these principles.

As shown above in Part VIII, in many Member States court fees are low if not symbolic. In these States, the overriding concern is access to justice, and courts are traditionally financed mainly by public budgets; this holds true even when they deal with litigation between private parties.²⁴⁶ The same applies to international courts such as the CJEU, the European Court of Human Rights and the EPO's Boards of Appeal. Also in the field of patent litigation, it appears that Member States' courts are only to a very limited extent financed by fees paid by the parties (with the exception of some German patent courts).²⁴⁷

When deciding on the UPC's fee system, Contracting Member States in the Administrative Committee will need to consider in particular the following:

- o the general basis of the system (full cost recovery or reallocation of means);
- o use of fees as an instrument of judicial policy by promoting or discouraging procedural choices (eg, high fee for counterclaim for revocation or for rehearing²⁴⁸);
- o the basis on which the level of fees is fixed (kind of case, quality of the litigating parties);
- o the moment when the court fee is imposed (eg, at the start of a procedure, at the filing of a form, after the outcome of the case) and the moment when it is due;
- o the possibility of layered charging (building up the fee as the case evolves).

²⁴⁴ See Council document 11622/07, dated 12.7.2007, page 8, which refers to the concerns expressed by the European Parliament.

²⁴⁵ Also referred to as "full-cost recovery", that is setting the court fees at a level which ensure that they cover the full cost of the court service to which they relate

²⁴⁶ See Council document 11622/07, dated 12.7.2007, page 8.

²⁴⁷ See WPL/SUB 4/03, pages 13 and 27.

²⁴⁸ Article 55 draft Agreement. As rehearing should be an exceptional means of review, a high fee would appear justified.

Section 2. Proposals for a fee system of the UPC

The Administrative Committee shall adopt the UPC's fee system.²⁴⁹ The proposals made below are without prejudice to any future decision of the Administrative Committee relating to the fee system.

For the purposes of the present study, it is necessary to tentatively design a fee system adapted to the procedures before the UPC. The following features are proposed as starting points:

- ⊗ fees should be fixed;
- ⊗ for actions before the Court of First Instance, one fee should be payable when the plaintiff lodges the action;
- ⊗ in case of counterclaim, a separate fee should be payable by the defendant;
- ⊗ one fee should be payable by the appellant when appealing against final decisions of the Court of First Instance;
- ⊗ a separate fee should be payable by an appellant when an interlocutory appeal is lodged against orders or decisions of the Court of First Instance which do not terminate proceedings.

Article 43 draft Agreement provides that parties to proceedings before the Court shall pay court fees. Court fees shall be paid in advance.

The draft Rules of Procedure of the UPC are based on the following approach:

- o at the outset of the proceedings, the plaintiff pays an "initial fee";
- o where the defendant reacts by a counterclaim (eg, a counterclaim for revocation or a counterclaim for infringement), a "fee for counterclaim" is payable by the defendant;
- o a party appealing against orders or decisions of the Court of First Instance which do not terminate proceedings must pay a "fee for interlocutory appeal";
- o a party appealing against a final decision of the CFI must pay the an "appeal fee";
- o other separate fees will also be charged, eg a fee for requesting provisional measures or a fee for rehearing.²⁵⁰

Section 3. Proposals for fee levels at the Unified Patent Court

Regularly, on the occasion of high-profile cases involving as well huge multinational companies as SMEs or micro entities, the issue of parties' actual costs when bringing patent cases to court is in focus. Usually, sky-high costs of representation and of experts are incriminated – never

²⁴⁹ Article 18(3) draft Agreement.

²⁵⁰ See Article 55 draft Agreement.

court fees, even where these are very high, as for instance in larger patent cases in Germany or Austria where court fees above 15 000€ are not uncommon. In any discussion on the level of court fees at the UPC, it should always be kept in mind that a very substantial part of parties' costs will relate not to court fees but to costs of representation and experts.

The Administrative Committee shall fix the level of the UPC's fee and shall review the level periodically.²⁵¹ The proposals made below are without prejudice to a future decision of the Administrative Committee relating to the level of fees.

A few policy considerations of relevance for setting the level of court fees at the UPC should to be emphasised:

- the more judges must deal with a case (for instance, a 4 technically qualified judge in case of a counterclaim for revocation heard by a LD/RD), the more expensive will the case be for the UPC – and the higher a court fee should be charged;
- a too high fee level would not only deter SMEs and micro entities but would also impact negatively parties' overall willingness to bring disputes before the UPC;
- a low fee for the revocation action would enable any interested party to request the revocation of a European patent – with or without unitary effect – which should perhaps not have been granted by the EPO; however, it is not intended that the revocation procedure at the UPC should replace the central opposition procedure before the EPO;th
- ...

Scenarios for the level of court fees

To illustrate the income which different fee levels could generate for the UPC's budget, 3 scenarios are set out below. The aim is to enable an informed discussion on the principles and criteria which should prevail when the level of the fees are set, not to discuss precise figures.

The scenarios are limited to income from fees for infringement actions, for counterclaims for revocation, for revocation action, for appeals and for interlocutory appeals. Income from other court fees is not included. However, there will also be fees for the other actions falling within the competence of the UPC such as actions for declarations of non-infringement and for provisional and protective measures and injunctions, actions on compensation for licences of right, actions concerning decisions of the EPO in carrying out the tasks referred to in Article 12 draft UPP Regulation and requests for rehearing.²⁵²

Scenario A. "Low court fees"

²⁵¹ Article 18(3) draft Agreement.

th The fee for filing a notice of opposition at the EPO is 635€.

²⁵² As explained above (Part I, Section 6), these other actions will most likely be few in numbers.

Fee for infringement action: 3000€
 Fee for counterclaim for revocation: 2000€
 Fee for revocation action: 3000€
 Fee for appeal against final decision: 6000€
 Fee for appeal against interlocutory order:
 3000€

Table IX.1 - Scenario A. Low court fees (with Scenario 1. "High up-take")

	2015	2016	2017	2018	2019	2020	2021	2022
IA	97	204	379	566	890	1231	1331	1388
CFR	58	122	227	339	534	738	786	832
RA	26	56	75	130	165	237	246	254
Full appeal	0	20	43	45	70	105	147	156
Intappeal	61	130	91	139	211	293	311	328
Fee income	668000	153400	234700	3 453	5 286	7 385	8 118 000	8510000
	*	0	0	000	000	000		
Costs of UPC	6,4m	10,6m	13,9m	19,5m	26,4m	39,5m	41,5m	45,2m
% of budget	10,4%	14,5%	16,9%	17,7%	20,1%	18,8%	19,6%	18,8%

* computed as $3000 * n^{\circ}IA + 2000 * n^{\circ}CFR + 3000 * n^{\circ}RA + 6000 * n^{\circ}full\ appeals + 3000 * n^{\circ}interlocutory\ appeals$

Scenario B. "Intermediate court fees"

Fee for infringement action: 6000€
 Fee for counterclaim for revocation: 4000€
 Fee for revocation action: 6000€
 Fee for appeal against final decision: 9000€
 Fee for appeal against interlocutory order:
 4500€

Table IX.2 - Scenario B. Intermediate court fees (with Scenario 1. "High up-take")

	2015	2016	2017	2018	2019	2020	2021	2022
IA	97	204	379	566	890	1231	1331	1388
CFR	58	122	227	339	534	738	786	832
RA	26	56	75	130	165	237	246	254
Full appeal	0	20	43	45	70	105	147	156
Intappeal	61	130	91	139	211	293	311	328
Fee income	1244500	2813000	442850	6562500	1004550	14023500	1532850	1606000
	*		0		0		0	0
Costs of UPC	6,4m	10,6m	13,9m	19,5m	26,4m	39,5m	41,5m	45,2m
% of budget	19,4%	26,5%	31,8%	33,6%	38%	35,5%	36,9%	35,5%

* computed as $6000 * n^{\circ}IA + 4000 * n^{\circ}CFR + 6000 * n^{\circ}RA + 9000 * n^{\circ}full\ appeals + 4500 * n^{\circ}interlocutory\ appeals$

Scenario C. "High court fees"

Fee for infringement action: 12 000€
Fee for counterclaim for revocation: 7000€
Fee for revocation action: 12 000€
Fee for appeal against final decision: 20 000€
Fee for appeal against interlocutory order: 10 000€

Table IX.3 - Scenario C. High court fees (with Scenario 1. "High up-take")

	2015	2016	2017	2018	2019	2020	2021	2022
IA	97	204	379	566	890	1231	1331	1388
CFR	58	122	227	339	534	738	786	832
RA	26	56	75	130	165	237	246	254
Full appeal	0	20	43	45	70	105	147	156
Intappeal	61	130	91	139	211	293	311	328
Fee income	2492000	567400	880700	1301500	1990800	27812000	3047600	3192800
	*	0	0	0	0		0	0
Costs of UPC	6,4m	10,6m	13,9m	19,5m	26,4m	39,5m	m	m
% of budget	38,9%	53,5%	63,3%	66,7%	75,4%	70,7%	73,4%	70,6%

* computed as $12000 * n^{\circ}IA + 7000 * n^{\circ}CFR + 12\ 000 * n^{\circ}RA + 20\ 000 * n^{\circ}full\ appeals + n^{\circ}10\ 000 * n^{\circ}interlocutory\ appeals$

Section 3. Legal aid and targeted support measures for SMEs and micro-entities

The need for legal aid and targeted support measures for SMEs and micro-entities is closely linked to the level of court fees. The higher the level is set by the Administrative Committee, the more parties will apply for legal aid and other support measures.

Legal aid is well-known from the legal systems of the Member States.²⁵³

- o in most States, only natural persons may receive legal aid (except CZ, NL, PL and PT where also legal persons may receive legal aid);
- o legal aid is usually available in all civil cases (except in BG, DE and the UK) and includes
 - o full or partial exemption from court fees (except in CZ, LV, LT and the UK) and
 - o legal assistance from representatives
- o The representative is usually appointed by the competent court or authority (mostly from a list) or chosen by the party from a list (except in FI, DE, LU and NL where the party may choose freely).

In the framework of the UPC, legal aid to natural persons who are unable to meet the costs of the proceedings at the UPC is provided for in Article 44 draft Agreement. The terms "costs of the proceedings" include not only court fees but also costs of representation. The level of legal aid shall be set by the Administrative Committee, but it will be up to the UPC to decide in a particular case whether legal aid should be granted to a party (in full or in part) or refused.

In practice, patent litigation almost always involves companies, and very few cases involve natural persons. It is therefore safe to assume that legal aid will not constitute a significant cost factor for the UPC.

Targeted support measures for SMEs and micro-entities are briefly referred to in the draft Agreement which mentions that such measures "might be considered" by Contracting Member States.²⁵⁴ The objective of such measures would be to ensure that the UPC – despite a level of court fees which might be higher than in most Contracting Member States – remains accessible for SMEs, YICs and micro-entities – whether they act as plaintiffs or as defendants.

²⁵³ Council Directive 2002/8/EC lays down an obligation to ensure legal aid in cross-border and commercial disputes in any court or tribunal of the Member States, on the basis of the economic situation of the applicant (natural persons only).

²⁵⁴ Article 18(3), last sentence, draft Agreement.

It will be up to the Contracting Member States – either early on when the Agreement on the UPC is adopted or at a later stage in the Administrative Committee – to decide whether to put in place such measures, including their scope and financing. The laudable objective to ensure access to the UPC will however have to be balanced against a few risks which should be carefully assessed:

- o support schemes would not only reduce the UPC's income from court fees but also create administration costs, as dedicated staff in the UPC would have to examine applications for support;
- o well-known difficulties in delimiting beneficiaries could give rise to particular problems in the patent field, where so-called "non-practising entities" (or "patent trolls") – which do qualify as SMEs or micro-entities under the criteria laid down in Recommendation 2003/361/EC²⁵⁵ – have in the past attempted to abuse court procedures to extort licensing payments from third parties.²⁵⁶

PART X – FINANCING THE UNIFIED PATENT COURT

Financial provisions for the UPC are contained in Part II of the draft Agreement. The objective set out by Contracting Member States is that the budget of the UPC shall be financed by the UPC's own financial revenues.²⁵⁷

The UPC's "own financial revenues" are defined as court fees and other revenues.²⁵⁸

- o "court fees" will constitute by far the bulk of the UPC's income;
- o "other revenues" include periodic penalty payments payable to the UPC to ensure compliance with a permanent injunction²⁵⁹ or if a party does not comply with the terms of an order of the UPC;²⁶⁰ a party may also be ordered to pay any unnecessary costs that it has caused to the UPC.²⁶¹

Financing of the UPC by four other sources are provided for:

- o Contracting Member State setting up a local division shall provide the facilities necessary for that purpose;
- o the Contracting Member State hosting the central division shall provide the necessary facilities for that purpose;²⁶²

²⁵⁵ SME definition: Commission Recommendation of 6.5.2003, OJ L 124 of 20.5.2003, p. 36, defines SMEs as enterprises with less than 250 staff and an annual turnover below 50m €; micro-entities are defined as enterprises with less than 10 staff and a turnover below than 2m€.

²⁵⁶ See Harhoff (2009), page 49-50.

²⁵⁷ Article 18(1) draft Agreement.

²⁵⁸ Article 18(2) draft Agreement.

²⁵⁹ Article 37a draft Agreement.

²⁶⁰ Article 56(4) draft Agreement.

²⁶¹ Article 42(3) draft Agreement.

²⁶² Article 5(1a) draft Agreement.

- o on the date of entry into force of the Agreement, the Contracting Member States shall provide initial financial contributions necessary for the setting up of the UPC,²⁶³
- o if the UPC is unable to balance its budget out of its own resources, the Contracting Member States shall remit to it special financial contributions.²⁶⁴

Table X.1 below sets out

- o the total costs of the UPC (as computed in Part IX),
- o the fee income generated under three fee scenarios (low fees, high fees and fees allowing the UPC to be self-financed) (as set out in Part XI) and
- o the costs to be borne by Contracting Member States hosting the central division and setting up local divisions.

The last row in Table X.1 sets out the amount of initial and special contributions to be paid by Contracting Member States in order to ensure that the budget of the UPC be balanced.²⁶⁵

Table XV.1 – Financing of the UPC, in €

	2015	2016	2017	2018	2019	2020	2021	2022
Total costs of UPC	6,4m	10,6m	13,9m	19,5m	26,4m	39,5m	41,5m	45,2m
Fee income								
- low fees	668000	1534000	2347000	3453000	5286000	7385000	8118000	8510000
- intermediate fees	1244500	2813000	4428500	6562500	10045500	14023500	15328500	16060000
- high fees	2492000	5674000	8807000	13015000	19908000	27812000	30476000	31928000
Facilities of LD in CMS	212 400	353 200	528 700	685 100	1 052 800			
CD in host State	106 200	176 600	211 500	274 000	300 800			
Initial/special contribution								
	5413400	8536800	10812800	15087900	19760400			

²⁶³ Article 19(2) draft Agreement. In §29 of the Council Conclusions, a link is made between the period for initial contributions and a 5 year transitional period.

²⁶⁴ Article 18(4) draft Agreement.

²⁶⁵ Article 18(1) draft Agreement.

n	4836900	7257800	8731300	11978400	15000900			
-w/low fees	3589400	4396800	4352800	5525900	5138400			
- w/intermediate fees								
- w/high fees								

It should not come as a surprise that the objective of a fully self-financed UPC cannot be attained in the first years of operations. Despite the express statement that the UPC should be organised "in the most efficient and cost effective manner",²⁶⁶ Contracting Member States will need to contribute financially to the UPC. Already when the Community patent jurisdiction was discussed in 2003, the Commission made clear that "self-financing is not possible".²⁶⁷ Similarly, the EPLA also provided for initial and special contributions by Contracting Parties.²⁶⁸

The costs and financing of the UPC will be regularly monitored by the Administrative Committee, and the level of the court fees will be reviewed periodically.²⁶⁹ At the end of the transitional period, the Administrative Committee should consider the adoption of measures aimed at the objective of self-financing.²⁷⁰

266 Article 21a(3) draft Agreement and Council Conclusions §32.

267 COM(2003)828 final

268 Articles 21 and 91 draft EPLA.

269 Article 18(3) draft Agreement and Council Conclusions §33.

270 Council Conclusions §34.

Costs occurring before entry into force

A number of costs will accrue before the UPC starts operations. Contracting Member States should provide for advances in order to enable the UPC to start operations.²⁷¹

Establishing the training framework for judges

Most notably, the training framework for judges will need to be established and actual training of judges will have to start as early as possible. As suggested above (Part V, Section 4), the Contracting Member State could, at the time of adopting the Agreement on the UPC, establish a provisional or transitional training framework for judges and commit the necessary funds, so that actual training of the future judges of the UPC could start immediately, even before the UPC would start operations.

Initial meetings of the Committees

Several meetings will need to take place before the UPC starts operations, in particular in order to:

- o establish a list of the candidates to be appointed as judges (Advisory Committee);²⁷²
- o appoint the first judges (Administrative Committee) and the Registrar and Deputy-Registrar (Presidium);²⁷³
- o giving an opinion on the Rules of Procedure (Presidium);²⁷⁴
- o adopt the Rules of Procedure (Administrative Committee), following broad consultations with users and an opinion of the Commission;²⁷⁵
- o lay down the rules governing the Registry and the sub-registries (Presidium);²⁷⁶
- o prepare the annual budget for the first year of operations (Presidium).²⁷⁷

Some of these tasks could possibly be done by an *ad hoc interim* Committee

- or Contracting Member States could continue to make use of the existing framework in the Council (Council's Working Party on IP ("Patents")).

Facilities and IT-systems

Before the start of the operational phase of the UPC, high one-off costs for facilities (rental arrangements) and stationery, in particular IT-systems, must be reckoned with. Facilities and IT-systems must be ready and fully operational at the latest when the UPC starts its activities. This

²⁷¹ See for instance Article 41(1) EPC and Article 22 EPLA.

²⁷² Articles 11(1) and 57b(1)(a) draft Agreement.

²⁷³ Articles 3(5) and 11(3)(e) draft Statute.

²⁷⁴ Article 22(2) draft Agreement and Article 11(3)(a) draft Statute.

²⁷⁵ Article 22(2) draft Agreement.

²⁷⁶ Article 11(3)(f) draft Statute.

²⁷⁷ Article 11(3)(c).

implies in particular that a fully-fledged and secure IT-network be in place, which must link the various divisions and seats of the UPC closely together and enable immediate exchange of documents and information. The software required for the UPC's register and sub-registries must also be fully tested and ready to function on the date where the UPC would start operations.

Vis-à-vis the public, a comprehensive court website must be designed (which should be available in the languages of all the Contracting Member States), allowing access to operational electronic procedures enabling parties to file writs and submissions in electronic form. Similarly, IT-systems for video-conferences, audio- and video-recording and simultaneous interpretation will need to be in place. It has also been suggested that online forms, including model pleadings and toolboxes for parties, should also be prepared.

PART XI – CONCLUSIONS AND PROPOSALS

The Unified Patent Court will be the highest court in the Contracting Member States for patent litigation relating to European patents and to European patents with unitary effect. Its decisions will lead to a definitive interpretation of the law in matters for which it has competence, subject only to the interpretation of Union law by the CJEU.²⁷⁸

The estimations made in Parts I to VI have shown that a sustainable court system can be built up which will meet the needs of users of the patent system in Europe:

- a considerable stock of European patents exists already, and the arrival of European patents with unitary effect require the creation of a common patent court;
- a certain willingness of Contracting Member States to share resources in the field is apparent, for instance by setting up regional divisions, providing for multinational composition of all panels, centralising validity cases, establishing a comprehensive training framework, ...;
- contributions from Contracting Member States will take various forms: bearing the costs of the local divisions and the central division and initial contributions in the UPC's first years of operations.

...

It should be recalled that many Contracting Member States today subsidize –out of public budgets – their national courts dealing with patent litigation. In future, the Unified Patent Court will deal with this field of litigation, and there will of necessity be a correlation between the caseload of the UPC and the caseload of national courts: over time, as the number of cases brought to the UPC will increase, the number of cases heard by national courts will decrease. Likewise, as expenditures for the UPC increase, expenditures for national courts will decrease. To some extent, financing the Unified Patent Court therefore amounts to "shifting" expenditures from national courts to the UPC.

²⁷⁸ Council document 13984/11, page 11.

...

Further ideas could be pursued to bring costs down and enhance efficiency,

- o During an initial period, a number of bilateral agreements between the UPC and national courts of the Contracting Member States could enable the local and regional divisions of the UPC's Court of First Instance to use existing national facilities as sub-registries (in particular court rooms and offices for judges and non-judge staff).
- o A Contracting Member State setting up a local division should pay not only for the division's facilities but also for the staff of the sub-registry set up at the division.²⁷⁹
- o Similarly, States setting up a regional division should share among themselves the costs for the staff of the sub-registry.

Generally: since initial and special contributions will be necessary

- should a Member State conferring jurisdiction on the central division contribute financially to the regional divisions of other States?

- should Member States joining a regional division indirectly contribute financially to the local divisions of other States?

Huge differences must be expected in the size of the various local divisions: should a State where a local division hears only a few cases contribute as much as a State where the local division hears many cases?

An important separate criteria would be that the Contracting Member States hosting one of the seats of the UPC (particular central division, Court of Appeal, Patent mediation and arbitration centre) or setting up several local divisions should contribute more than other

- this would be justified because seats and divisions will generate economic activity and income in the form of better business opportunities for lawyers and patent attorneys, travelling of parties and representatives from other Member States.

Creating further incentives for smaller States to confer jurisdiction on the central division or join a regional division?

Financing models

²⁷⁹ This was proposed in Article 21a(1) EPLA, see explanatory remarks to Article 21a: "a Contracting State setting up a Regional Division staffed and equipped in accordance with its own needs bear all the costs except the judges' salaries". The risk that a division would not be adequately equipped was perceived: "A Regional Division's support staff, in particular the registrars, must also be adequately qualified, for example in respect of language skills, and should therefore be appropriately paid by the Contracting States setting up a Regional Division".

As explained above, Contracting Member States will have to provide **initial financial contributions** necessary for the setting up of the UPC. Later on, they may have to remit to the UPC **special financial contributions**. Below, two models for sharing such contributions among Contracting Member States are examined.

The two models envisaged in the following will be referred to as the EPLA model and the Community Patent Court 1989 model

1. EPLA model: Articles 91 and 21 EPLA

Under Article 91 EPLA, Contracting States would have provided **initial financial** contributions necessary for actually setting up the European Patent Court. The level of these initial contributions would have been determined by the Administrative Committee in accordance with a distribution key based on 3 factors:

- x = number of European patents in force in the Member States (theoretical probability of patent litigation)
- y = number of European patents in force in the Member States and subject of litigation before national courts (actual patent litigation)
- z = equal parts borne by the Member States

The relevant years would have been the last 3 years preceding the entry into force of the EPLA.

Article 21(2) EPLA provided for **special contributions** from Contracting States in case the European Patent Court would have been unable to balance its budget out of its resources. The level of such special contributions would have been determined by the Administrative Committee in accordance with a distribution key based on similar factors:

- x = number of European patents in force in the Member States (theoretical probability of patent litigation)
- y = number of European patents in force in the Member States and subject of litigation before the EPLA court (actual patent litigation)
- z = equal parts borne by the Member States

Two factors (x and y) were to be recalculated every (5) year after entry into force of the EPLA.

In both cases, in discussions between the interested Member States at the time (in particular DE, UK, NL, SE), the following values were tentatively attributed to x , y and z : $x=40$, $y=40$ and $z=20$

2. Community Patent Court 1989 model

In the Protocol on Litigation concerning the infringement and validity of Community patents – which was attached to the 1989 Agreement on the Community patent – the creation of a Common Appeal Court (hereafter "COPAC") was provided for. As regards financing of the COPAC,

Article 10(1)(b) of the Protocol on Litigation laid down that expenditure of the COPAC was to be covered by (a) the COPAC's own resources and (b) financial contributions from the Member States.

Noticeable is that the amount of these financial contributions had to be determined in accordance with the scale agreed upon for the distribution of annual renewal fees for Community patents to the Member States.²⁸⁰ While the actual scale is today of limited relevance²⁸¹ – due to accession of many new Member States to the Union – the concept that the scale agreed upon by Member States for the distribution of annual renewal fees for unitary European patents could serve as a basis for sharing among the Contracting Member States the financial contributions to the Unified Patent Court deserves further consideration.

Also of relevance is the provision in the Protocol on Litigation that a Member State could ask the EPO to pay directly to the COPAC the financial contribution which that State would have been bound to make, by drawing from the revenue due to that State for annual renewal fees for Community patents.

This model could be referred to as "holistic" – thereby putting the emphasis on the overall system of patent protection and enforcement in Europe which is composed of several legal instruments (in particular the patent laws of Contracting Member States, the EPC and in future the UPP-Regulations) and public institutions (the national patents offices, the EPO and in future the UPC) – all of which should to some extent cross-finance each other in order to provide users with an optimal patent system.

It should be noted however that the COPAC would have dealt only with litigation relating to patents (not with litigation relating to classical European patents). By contrast the UPC is created to deal not only European patents with unitary effect but also with classical European patents.

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²⁸¹ Belgium 5,25%, Denmark 5,2%, Germany 20,4%, Greece 4,4%, Spain 6,3%, France 12,8%, Ireland 3,45%, Italy 7%, Luxembourg 3%, Netherlands 11,8%, Portugal 3,5%, United Kingdom 16,9%.

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UPC, UPC-CFI, UPC-CoA

Unified Patent Court, Court of First Instance of the UPC, Court of Appeal of the UPC

WPL

Working Party on Litigation

Abbreviations used in the tables and graphs

LD = local division, RD = regional division, CD = central division

IA = infringement action, CFR = counterclaim for revocation, RA = revocation action

TQJ = technically qualified judge, LQJ = legally qualified judge

pj = presiding judge; jr = juge-rapporteur, oj = ordinary judge, sj = single judge

poj = pool of judges

PrInj = Preliminary injunction

PTJ = part-time judge

FTJ = full-time judge

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[1975 Community patent Convention, OJ EC - L 401, 30.12.89](#)

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Filings, grants and stock of European patents in the period 2012-2015

The estimations made below are only intended to reflect orders of magnitude. The purpose of the present study is **not** to estimate the future number of European patents granted by the EPO – but to base the estimation of the volume of patent litigation before the UPC on reasonably supported estimations regarding the stock of European patents. Even significant variations in the figures below will only have a limited impact on the volume of patent litigation.²⁸²

The starting point for any attempt to estimate the number of European patents in force in future must be the EPO's long-term planning: for the period 2011 to 2015, a steady increase is expected both in the number of filings and grants.²⁸³

Table 1.1: Filings (Euro-direct and Euro-PCT intern. phase)

2011	2012	2013	2014	2015
214 100	216 200	219 400	223 800	228 300

Table 1.2: Grants of European patents

2011	2012	2013	2014
62 000	65 882	70 143	74 358

In addition, the following should be kept in mind:

²⁸² If the likelihood of litigation is assumed to 0,24% (see below, Part I, Section 2), an additional 100 000 patents at risk would mean 240 actions more.

²⁸³ See CA/35/10, CA/35/09 Add. 1 and CA/40/09, Business Plan 2010-2014, page 14.

- the increase in the number of **filings** which started in the 1990s impacts the overall stock **with much delay** (due to long processing time at the EPO and because the years with few grants – especially the early 1990s – are still included); only in 2003 was the steady state in the number of **grants** reached (around 60 000 grants/year);²⁸⁴ it follows that the "EP-peak" (maximum number of European patents in force) will only be reached around 2020;
- the number of grants is **not directly linked** to the number of filings due to statutory time limits and delays in the procedure; the EPO's production capacity – rather than the number of filings – is decisive for any increase in the number of grants; it follows that, even if the number of **filings** would decrease after 2015, the number of **grants** would continue to increase for several years;
- reduced validation and translation requirements in the EPC Contracting States which have ratified or acceded to the London Agreement could also contribute to an increased stock of European patents in future.

On this basis, a reasonably supported estimation regarding the number of European patent in force in at least one Contracting Member States in 2015 is 600 000.^{285 286}

ANNEX 2

Use of the opt-out scheme

Scenario 1: Users make limited use of the opt-out scheme

Opt-out is notified for 25% of the stock of European **patents** in force on 31.12.2014.

Table 2.1: Number of European patents for which opt-out has been notified (Scenario 1)

284 Number of grants per year since 2000

285 The increase is computed as follows:

- estimation of newly granted European patents for each year up to 2020,
- subtraction of European patents that will expire after reaching the statutory limit of 20 years and
- subtraction of European patents predicted to lapse due to non-renewal.

Stable trends regarding renewal rate and lapse following non-renewal are assumed.

286 This estimation is lower than Harhoff's estimations for March 2013 (627 5000) (see Harhoff (2009), page 38, figure 6.1) in view of the downward trend illustrated by CA/35/10, page 15 which reduces by 14% the estimations relating to the number of filings and by CA/F 5/11, page 4 which registers a 3% decline in the number of European patents still in force.

2015	2016	2017	2018	2019	2020	2021	2022
²⁸⁷ 150 000	141 000	132 000	123 000	114 000	105 000	96 000	87 000
2023	2024	2025	2026	2027	2028	2029	2030
78 000	69 000	60 000	51 000	42 000	33 000	24 000	15 000

Opt-out is notified for 25% of European patent **applications** pending on 31.12.2014. The EPO's long-term forecasts relating to future "examination stock" (defined as "all files actually in the EPO up to the point where the EPO has fully concluded its activities") is **579 547** for 2014.²⁸⁸ In the period 2015 to 2019,²⁸⁹ the applications for which opt-out has been notified will be withdrawn, refused or granted. Grant rate is assumed to be 45%.

Table 2.2: Number of European patents granted on applications for which opt-out has been notified (Scenario 1)

²⁹⁰ ²⁹¹ ²⁹² Opt-out is notified for 144 886 European patent applications. Assuming a grant rate of 45%, 65 198 European patents falling outside the jurisdiction of the UPC will be granted in the years 2015 to 2019, amounting to 13 039 grants each year on average. In the period 2020 to 2032, these European patents will gradually lapse.								
2015	2016	2017	2018	2019	2020	2021	2022	2023
13 039	26 078	39 117	52 156	65 198	61 284	57 373	53 462	49 551
2024	2025	2026	2027	2028	2029	2030	2031	2032
45 640	41 729	37 818	33 907	29 996	26 085	22 174	18 263	14 352

Table 2.3: Total number of European patents falling outside the jurisdiction of the UPC (Scenario 1)

2015	2016	2017	2018	2019	2020	2021	2022
²⁹³ 150 000	154 039	158 078	162 117	166 156	170 198	157 284	144 373

²⁸⁷ Computed as 25% of 600 000 = 150 000 European patents which are assumed to lapse gradually in the period 2016-2030. A 6% annual decrease is assumed (based on data relating to average maintenance rate, see van Pottelsberghe/Danguy (2009).

²⁸⁸ See CA/40/09, Business Plan 2010-2014, page 14, which contains estimates regarding future "examination stock" (defined as "all files actually in the EPO up to the point where the EPO has fully concluded its activities"): 571 900 (2012,) 577 842 (2013), **579 547 (2014)**.

²⁸⁹ An average duration of the grant procedure before the EPO of 3½ years is assumed (without opposition and appeal proceedings).

²⁹⁰ Computed as 25% of 579 547 (examination stock in 2014) = 144 886.

²⁹¹ Computed as 45% of 144 886.

²⁹² A 6% annual decrease is assumed, see footnote 293.

²⁹³ Computed as 141 000 (see Table 2.1 year 2016) + 13 039 (see Table 2.2 year 2015).

2023	2024	2025	2026	2027	2028	2029	2030
131 462	118 551	105 640	92 729	79 818	66 907	53 996	41 085

Scenario 2: Users make significant use of the opt-out scheme

Opt-out is notified for 75% of the stock of European patents in force on 31.12.2014.²⁹⁴

Table I.8: Number of European patents for which opt-out has been notified (Scenario 2)

2015	2016	2017	2018	2019	2020	2021	2022
²⁹⁵ 450 000	423 000	396 000	369 000	342 000	315 000	288 000	261 000
2023	2024	2025	2026	2027	2028	2029	2030
234 000	207 000	180 000	153 000	126 000	99 000		

Opt-out is notified for 75% of European patent **applications** pending on 31.12.2014.²⁹⁶ In the period 2016 to 2019,²⁹⁷ the applications for which opt-out has been notified will be withdrawn, refused or granted. Grant rate is assumed to be 45%.

Table I.9: Number of European patents granted on applications for which opt-out has been notified (Scenario 2)

²⁹⁸ ²⁹⁹ ³⁰⁰ Opt-out is notified for 434 660 European patent applications. Assuming a grant rate of 45%, 195 597 European patents falling outside the jurisdiction of the UPC will be granted in the years 2015 to 2019, amounting to 39 119 grants each year on average. In the period 2020 to 2036, these European patents will gradually lapse.							
	2015	2016	2017	2018	2019	2020	2021
	39 119	78 238	117 357	156 476	195 597	183 860	172 125
2022	2023	2024	2025	2026	2027	2028	2029
160 390	148 655	136 920	125 185	113 450	101 715	89 980	78 245
2030	2031	2032	2033	2034	2035	2036	

²⁹⁴ The stock of European patents in force in 2015 is estimated to be 600 000, see Annex 1.

²⁹⁵ Computed as 75% of 600 000 = 450 000 European patents which are assumed to lapse gradually in the period 2016-2030. A 6% annual decrease is assumed.

²⁹⁶ In 2014, the "examination stock" at the EPO is estimated to be 579 547, see footnote 294.

²⁹⁷ An average duration of the grant procedure before the EPO of 3½ years is assumed (without opposition and appeal proceedings).

²⁹⁸ Computed as 75% of 579 547 (examination stock in 2014) = 434 660.

²⁹⁹ Computed as 45% of 434 660 = 195 597.

³⁰⁰ A 6% annual decrease is assumed, see above footnote 293.

66 510	54 775	43 040	31 305	19 570	7 835	0	
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Table I.10: Total number of European patents falling outside the jurisdiction of the UPC (Scenario 2)

2015	2016	2017	2018	2019	2020	2021	2022
489 119	501 238	513 357	525 476	537 597	498 860	460 125	421 390
2023	2024	2025	2026	2027	2028	2029	2030
382 655	343 920	305 185	266 450	227 715	188 980		

ANNEX 3

Cost items not included in the present study

It does not appear sensible to attempt to assess at the present stage costs relating to

- experts appointed by the Court:³⁰¹ in any event, the presence of a technically qualified judge on the panels in most cases will reduce the need for court experts;
- auditors,³⁰² who will not be part of the staff of the UPC;
- travel costs and daily subsistence allowances for delegations in the Committees (Administrative, Budget and Advisory Committees);³⁰³
- travel costs and allowances of judges from the Pool of judges; these costs will depend very much on the number of cases in which judges from the pool will be involved, which again will depend on the workload of the "smaller" local and regional divisions; particularly difficult to estimate at this stage.

Not taken into account at this stage are costs of travelling for judges from the Pool of judges having to travel within Europe. A daily subsistence allowance (of for instance 300€) should be accorded to judges when travelling is required.

An aspect not pursued further at this stage is whether a special scheme for the remuneration of technically qualified judges should be provided for: other remuneration schemes than the one proposed above could be devised, for instance a lump sum per case instead of a fixed remuneration. A separate inquiry into the number of technically qualified judges needed to cover all fields of technology³⁰⁴ and the functioning and mobility of the Pool of judges would be required to further develop this aspect.

301 Article 36 Draft Agreement.

302 Article 28 Draft Statute.

303 In the EPO's budget, the post "Meetings of the Administrative Council and other bodies" amounts to 1,325 million€.

304 See footnote 128 on the experience at the German Federal Patent Court.

ANNEX 4

Overview of the national court fees

Table 4.1. Austrian variable fees:

³⁰⁵³⁰⁶ Value of the dispute (€)	1 st instance fee (€) (Vienna Commercial Court, "Handelsgericht Wien")	2 nd instance fee (€) (appeal, "Berufung" / Court of Appeal, "Oberlandesgericht")
up to 150	20	16
over 150 to 360	39	35
over 360 to 730	55	61
over 730 to 2.180	92	124
over 2.180 to 3.630	148	246
over 3.630 to 7.270	271	493
over 7.270 to 36.340	641	986
over 36.340 to 72.670	1.258	1.851
over 72.670 to 145.350	2.518	3.704
over 145.350 to 218.020	3.778	5.555
over 218.020 to 290.690	5.037	7.407
over 290.690 to 363.360	6.296	9.260
over 363.360	1,2% of value of dispute+1.754 €	1,8% of "interest of appeal"+2.580 €

Table 4.2. German variable fees:³⁰⁷

Value of Dispute (€)	FEE (€)
1,200	55
3,000	89
5,000	121
10,000	196

³⁰⁵ The website of the Austrian Ministry of Justice gives a basic overview of the organization of courts and successive stages of appeal in civil law: <http://www.bmj.gv.at/EN/justiz/content.php?nav=44> (04.11.2009). For claims under the Austrian Patents Act (first instance) the Vienna Commercial Court has exclusive jurisdiction regardless of the value of the dispute according to § 162 of the Austrian Patents Act.

³⁰⁶ Cf. § 4 Jurisdiktionsnorm (of 01.08.1895; last revision in 2009).

³⁰⁷ See Annex 2 of the German Court Fees Act (Gerichtskostengesetz, GKG), available at http://www.gesetze-im-internet.de/gkg_2004/BJNR071810004.html.

50,000	456
110,000	856
200,000	1,456
320,000	2,056
500,000	2,956
1,000,000	13,368
2,000,000	22,368
5,000,000	49,368
10,000,000	94,368
30,000,000	274,368

Table 4.3. Czech variable fees:

APPLICATION	FEE
The payment of a certain sum of money not more than 15 000 CZK (circa 600 €)	600 CZK (circa 24 €)
The payment of a certain sum of money of more than 15 000 CZK (circa 600 €)	4% of that sum, with a maximum of 1 million CZK (circa 40 000 €)
All other cases unless provided otherwise	1000 CZK (circa 40 €)
e.g. issuing of an interlocutory injunction	500 CZK (circa 20 €)

Table 4.4. Italian variable fees:

Value of Dispute (€)	FEE (€)
Up to 1,100	30
1,100 – 5,200	70
5,200 – 26,000	170
26,000 – 52,000	340
52,000 – 260,000	500
260,000 – 520,000	800
520,000	1,110

Table 4.5. Lithuanian variable fees as a percentage:

Value of Dispute (€)	FEE as a percentage of the value
Up to 30,000	3%
30,000 – 90,000	2%

100,000	1%
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Table 4.6. Slovakian variable fees:

APPLICATION	FEE
The payment of a certain sum of money	6% of that sum, with a minimum of 16, 50 € and a maximum of 16 596.50 € / 33 193.50 € in commercial matters
If there is not possible to assess value of the subject-matter	99.50 €
Issue or revocation of an interlocutory injunction	33 €

Table 4.7. Examples of British variable fees:

CLAIM	FEE
£300	€34 (£30)
£300.01 - £500	€50 (£45)
£500.01 - £1,000	€73 (£65)
£1,000.01 - £1,500	€84 (£75)
£1,500.01 - £3,000	€95 (£85)
£3,000.01 - £5,000	€121 (£108)
£5,000.01 - £15,000	€251 (£225)
£15,000.01 - £50,000	€402 (£360)
£50,000.01 - £100,000	€704 (£630)
£100,000.01 - £150,000	€905 (£810)
£150,000.01 - £200,000	€1,106 (£990)
£200,000.01 - £250,000	€1,306 (£1,170)
£250,000.01 - £300,000	€1,509 (£1,350)
more than £300,000 or an unlimited amount	€1,710 (£1,530)

Table 4.8. Recent reform of the Dutch fee system:

Claim	Fee natural persons	Fee legal persons	Fee persons with few financial resources
Matters relating to a claim or a request for an indefinite value or an amount not exceeding €12 500 in principal	640€	280€	280€
Matters relating to a claim or a	1745€	640€	280€

request with an amount of more than €12 500 and not more than €100 000 in principal			
Matters relating to a claim or a request with an amount of more than €100 000 in principal	4650€	1455€	280€

ANNEX 5

Survey carried out by DG Internal Market, January 2010

In January-February, the Commission (DG Internal Market) carried out a survey among delegations in the Council's Working Party on Patents.

Requests for information about the following were addressed to delegations:

- (1) the number of patent cases initiated each year before the competent courts of first instance in your country;
- (2) a break-down of the number of patent cases into (a) cases involving European patents and (b) cases involving national patents could be made.
- (3) the number of patent infringement proceedings in which a counterclaim for revocation is raised.

It was stressed that, where precise data were not available, estimations or indication of orders of magnitude would suffice for building reasonably supported assumptions for the UPC.

ANNEX 6

Number of cases that a judge can deal with per year

In Part III, Section 2, assumptions are made regarding the number of cases that a judge of the a local or regional division of the CFI can deal with per year. Higher assumptions are warranted for judges of the CFI's central division, where only validity issues will be dealt with. The overview below schematically illustrates how the work of a full-time judge of the CFI's central division could be distributed each year (220 working days):

Number of cases dealt with per year Judge of the CFI's central division	
Initial period	Steady state
- on 112 working days, work on cases as juge-rapporteur [16 cases à 7 days] and	- on 110 working days, work on cases as juge-rapporteur [20 cases à 5,5 days] and

<ul style="list-style-type: none"> - on 48 working days, work on cases as presiding judge [16 cases à 3 days] and - on 48 working days, work on cases as ordinary judge or as technically qualified judge [24 cases à 2 days] and - on 12 working days, work on cases as single judge [2 cases à 6 days]. 	<ul style="list-style-type: none"> - on 45 working days, work on cases as presiding judge [18 cases à 2,5 days] and - on 45 working days, work on cases as ordinary judge or as technically qualified judge [30 cases à 1,5 days] and - on 20 working days, work on cases as single judge [4 cases à 5 days].
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In order to complete Table III.2, a "grille" summarising the assumptions regarding the number of cases that the judges (at local and regional divisions and at the central division of the Court of First Instance) can deal with per year (initial period and steady state) must be drawn up:

Full-time judge at local and regional divisions of the CFI	
Initial period	Steady state
16 cases as jr or 37 cases as pj or 55 cases as oj or TQJ or 18 cases as sj	20 cases as jr or 44 cases as pj or 73 cases as oj or TQJ or 22 cases as sj

Full-time judge at central division	
Initial period	Steady state
32 cases as jr or 74 cases as pj or 110 cases as oj or TQJ or 36 cases as sj	40 cases as jr or 88 cases as pj or 146 cases as oj or TQJ or 44 cases as sj

Similarly, to complete Tables IV.3 and IV.4, a "grille" is required. Productivity of judges of the Court of Appeal is assumed to be the same as the productivity of the judges at the central division of the CFI in a steady state.

Judge at the Court of Appeal

40 cases as jr or 88 cases as pj or 146 cases as oj or TQJ
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ANNEX 7

Instruments, Declarations and lists

Instruments

1. Agreement on the Unified Patent Court
2. Statute of the Unified Patent Court (attached to the Agreement)
3. Rules of Procedure of the Unified Patent Court (attached to the Agreement)
4. Schedule of Court fees
 - to be set by Administrative Committee (Article 43(1) Draft Agreement)
5. Level of legal aid and rules of bearing the costs of legal aid
 - to be set by Administrative Committee, on proposal from the Court (Article 44(3) draft Agreement)
6. Instructions to the Registry
 - to be adopted by Presidium (Articles 11(3)(d) and Article 19(1) draft Statute)
7. Rules of Procedure of the Administrative Committee
 - to be adopted by Administrative Committee (Article 57a(1) draft Agreement)
8. Rules of Procedure of the Advisory Committee
 - to be adopted by Advisory Committee (Article 9(4) draft Agreement)
9. Financial Regulations
 - to be adopted by Administrative Committee on proposal from the Court (Article 30 draft Statute)
10. Requirements for qualifications for European Patent Attorneys
 - to be established by Administrative Committee (Article 28(2) draft Agreement)
11. Staff Regulations of officials and other servants of the Court
 - to be adopted by Administrative Committee (Article 12(2) draft Statute)
12. Training Framework for Judges (Article 14(1) Draft Agreement, see Article 11(3)(c) draft Statute: "guidelines for the training programme for judges", to be established by the Presidium)

Declarations of Contracting Member States at the time of adopting the Agreement on the UPC

1. Agree on and commit funding to a provisional training framework for judges as set out in the draft Agreement

2. Recommendations regarding the facilities for local and regional divisions (see formerly Article 5(4) draft Agreement)
3. Provide for advances to enable to UPC to cover costs before entry into force of the Agreement

Lists

1. List of mediators and arbitrators (Article 17(5) draft Agreement)
2. List of European Patent Attorneys entitled to represent parties before the Court (Article 28(3) draft Agreement)
3. List of experts (Article 36(2) draft Agreement)
4. List with the names of the judges included in the Pool of Judges (Article 15 draft Statute)

ANNEX 8

Rate of withdrawal and settlement

Available data on the number of cases which were disposed of by courts in the Contracting Member States **without** a final decision on the merits.

In FR, the number of cases reaching a final decision represents roughly 40% of the cases brought (60% terminate without judgment) (P. Véron, email 29.12.2009). In the UK, settlements are known to be even more frequent – around 50% according to Holzer (2005).

From WPL/SUB 4/03, page 6 (data from 1999-2002):

DE: Average 40%

NL: In 2000, 17; in 2001, 10; in 2002, 19 (out of ca. 70 cases initiated each year)

DK: Between 4 and 7 cases settled or abandoned each year (out of ca. 15 new cases started each year)

SE: Very rare that cases are disposed of without a decision on the merits

FI: Withdrawals and settlements: in 2002, 10 (out of ca. 20 new cases each year)

FR: En 2002, 300 décisions ont été rendues dont 170 jugements statuant sur le fond, les autres affaires (130) ayant donné lieu à des radiations, retraits du rôle ou désistements.

At the appeal stage, the rate seems to be even higher:

UK:	Decisions	Withdrawals & settlements
1999	4	13
2000	13	7

2001 9 7

DE: In nullity proceedings before the Bundesgerichtshof: 15 decisions, 30 cases settled otherwise

FR: En 2000, 154 décisions ont été rendues en appel, dont 77 sur le fond (37 confirmations, 25 confirmations partielles et 15 infirimations). Le surplus consiste notamment en 16 désistements, 32 radiations et 1 conciliation des parties.