

Exclusivity, Transitional Arrangements and Opt-out
Risk of financial disaster for small companies in patent litigation
*Dr. Jochen Pagenberg, Bardehle Pagenberg, Munich/Paris**

I Introduction

The crucial point for success or failure of the whole court system is the quality, efficiency and cost of the proceedings before the new court. The shift of jurisdiction from the national courts to the Unified Patent Court (UPC) after a transitional period of only seven years with exclusive jurisdiction¹ also for EP patents has therefore been a point of dispute from the beginning. Nobody seems to have requested this exclusivity, but nobody in Brussels was willing to change it either.

Keeping the national courts as a back up for litigating *EP patents* would solve a great number of open questions and problems in particular for small and medium enterprises (SMEs) which fear that they have been forgotten in the political discussion.

II Promises of alleged improvements

1. Industry as well as practitioners had always been promised that the introduction of the unitary patent and the corresponding UPC would ensure *expeditious and high quality decisions*² which were to be measured against the best existing national patent courts. In this context users had emphasized that abolishing jurisdiction of the experienced national courts for EP patents before the UPC will have been tested and proven its quality would constitute a serious error. To force patentees of EP patents who only need protection in a few countries into the same judicial system as owners of unitary patents who need protection for the entire EU disregards the different needs of users.

² Recital 6 of the Draft Agreement of 14 November 2012 s16222/12

2. The promises of the EU Commission and the Council over the last five years as to important improvements with respect to the enforcement of patents have been very specific:

- *Lower costs for patent applications and judicial proceedings*
- *Improved efficiency of the court thanks to simple and fair procedural rules*
- *Easy access to the courts through local presence and local language*
- *Predictability of judicial practice and legal certainty for the parties*
- *Judges with maximum quality and proven experience in patent disputes*³

The following few points will show that Commission, Council and Parliament do not bother fulfilling *any* of these promises, since for each point expensive and unsatisfactory provisions are being proposed or no provisions at all.

III Litigation costs

1. The Commission in a draft *Study*⁴ promised that the cost for patent litigation cases filed with effect for the entire EU will be cheaper for SMEs than today's cost. This was apparently based on an expert opinion which assumes that

*“The unified Patent Court will offer litigation at the cost level currently observed in Germany, France and the Netherlands”*⁵.

This however is far from reality, since it assumes that the UPC will be as efficient and the procedure similar to the German procedure. This is unrealistic and overlooks particularities concerning the German practice and the German cost system which cannot be found in the draft Agreement. Only a few points may be mentioned which prove that the UPC will be *much more expensive*.

³ These criteria are contained in numerous papers from Brussels, including the extensive *Commission document* st8302/07 of 4.4. 2007, which can also be found in the latest draft of 14 November 2012 s16222/12, cf. Recital 5 and 6, and Art. 10 (1) Draft Agreement: *Judges shall ensure the highest standards of competence and shall have proven experience in the field of patent litigation*.

⁴ *Preliminary Findings of DG Internal Market and Services - Study on the Caseload and financing of the Unified Patent Court*, https://lt.justice.gov.sk/Attachment/draftStudy_re_UPC_Financing_7_11_2011, cited hereafter as *Study*.

⁵ Opinion *Harhoff* of 26 February 2009 p. 41; there have been more studies prepared for the Commission which cannot be discussed in detail here

- There will be no substantial savings due to a reduction of parallel litigation. One of the opinions *promises savings of 300 million €* due to a reduction of parallel litigation which allegedly amounts to 20% to 30% of all infringement cases filed in the EU. In reality, according to practitioners in the main patent countries, not 20 % but only 5 % to 8 % of the cases are cross border cases. This shows that alleged savings are not even 30% of the sum mentioned and they do not concern the alleged “main beneficiaries”, the *SMEs*, which very seldom litigate abroad⁶ and therefore would not use the UPC anyway.

- Combined litigation is more expensive than a bifurcated system. One must take into account that the litigation figures used for Germany are calculated on *infringement litigation* only. And here the German courts have a high output, since the judges are *very experienced*, and due to their specific procedure⁷ are used to handle on average *four infringement cases per hearing day*, while under the *UPC combined system* of infringement and revocation *one full hearing day per case* will be needed. The EU Commission seems to have taken this difference into account and assumes that the UPC will have an output which corresponds only to 25% of the German output figures. These are realistic, but from a financial point of view a disaster. How can the UPC court earn the same money as a German court with only 25% of its output? So the court fees already for this reason must be *four times higher* than in Germany⁸, and the parties will have to pay for it.

- There will be at least three times more revocation actions in a combined system. Under the German system, where revocation actions cannot be filed before the infringement court, but in a separate case before the Federal Patent Court (“bifurcation”), such actions are only filed in about 25% of the infringement cases⁹. Under the new system, where the defendant would have the possibility to counter-sue before the same court, one must expect a similar practice as in countries with a combined system where ca. 95 % of

⁶ The percentage of 8% can now also be found in a draft *Study* of the Commission dated 7 November 2011 at p. 17. But this is not all as a comment on IPKat of Nov 22, 2011 explains: “*Even if [15 or even 30% were] true that means that 70-85% of disputes will have to go to a unitary court even if there is a perfectly good [and lower cost] national court*”: This is correct, not even the 15 or 30% would want this.

⁷ The German infringement procedure is “front-loaded” and primarily based on written submissions with a comparatively short hearing at the end of the exchange of arguments of the parties

⁸ Where the salaries however are only one third of the salaries of the future UPC judges

⁹ 10% of these cases are not related to a pending infringement suit, so the percentage of counter actions in Germany is even lower

defendants in infringement cases *counter-sue* by way of a revocation action¹⁰. This does not only considerably *slow down a procedure* in comparison to “pure” infringement cases, but it also brings about an increase in cost, since the additional number of invalidity cases, in comparison to the German practice of today, would need more manpower – and thus require more money¹¹.

- *Considerably higher cost through central revocation actions*

EPO opposition proceedings today can be conducted in the EPO within a reasonably cost frame. With centralized jurisdiction of the UPC which would include EP patents, defendants in an infringement case will be able to file a *central revocation attack* before a court which will open the doors for an international battle of considerable size with expert opinions on each side, court experts, witness hearings etc.

Art. 16 of the Draft Agreement provides

Territorial scope of decisions

Decisions of the Court shall cover, [...] in the case of a European patent, the territory of those Contracting Member States for which the European patent has effect.

This means that a central attack against all patents in the different designated countries will even be assumed if the revocation plaintiff does not request it. So SMEs on both sides could be involved in lengthy trials, since SMEs file 50% of the EP patents. Companies with tight budgets would have to reconsider their filing strategy, if EP patents remain under the exclusive jurisdiction of the UPC. Smaller companies might be forced to go back to the national offices and file their patents there¹². What consequences this may have for the budget of the EPO is still open. But it would certainly not be reasonable to take this risk, which is unnecessary under the circumstances.

¹⁰ This is independent of the optional bifurcation under the UPC system, since the counteraction will be a convenient defence against an injunction request which it is not under the German system. The hope of the Commission in its *Study* that only 60% revocation actions must be expected is therefore somewhat optimistic.

¹¹ Also additional attorneys’ time for the preparation and conducting the revocation action will more than double the average cost of an infringement case only.

¹² To the SMEs must be added a number of large pharmaceutical applicants which fear that a central attack will unnecessarily endanger their valuable patents, so that the national offices are preferable.

- Translation requirements. One must add extensive translation requirement for documents as well as interpretation services which will render litigation by far more costly, not to speak of the additional expenses of foreign judges sitting in the local and regional panels for whom language facilities, travelling cost and accommodation expenses must be taken into account. The latter apply also for the parties and their representatives who will have to travel to a much greater extent than under the existing court systems. One may also consider that UPC judges will earn ca. three times as much as an average German judge¹³ which must be added to the cost for new facilities, staff etc.

2. These few points show already that for the majority of average infringement cases the parties will have to face substantial *additional costs* and *delays* at the expense of a rapid enforcement of rights¹⁴ since combined proceedings are practically an invitation for the defendant to file a counterclaim. A *multiplication of litigation cost* for average cases whether by a *factor five or six* as predicted by practitioners, is by no means affordable for the large majority of parties which so far were used to much lower fees and which will remain the main users of EP patents, therefore they need the national courts for enforcing them¹⁵.

3. It follows that nobody can *seriously promise* that the cost before the UPC will be lower or equal in comparison to today's cost of national litigation, if the EU system shall be *self-financing*. An action will in reality only be cheaper if it is filed as a cross-border case, and only if it covers at least five countries. But if only 8% are presently cross-border cases, 92% of the parties will have to pay more than today *without any additional benefit*. Even if one assumes that some plaintiffs might consider enlarging a case to more countries if they can litigate in one court, the advantages (efficiency, predictability and cost) must be so evident that they see a considerable advantage. This is certainly not the case in view of the uncertainties mentioned before. Therefore as long as

¹³ A German judge earns between 40.000 to 85.000 €, the salary of an UPC judge will amount to 140.000 – 152.200 €, cf. *Study* p. 70.

¹⁴ As pointed out by *Kley*, CEO of the Pharma and Chemical company Merck, President of the Federation of German Chemical Industry, member of the advisory boards of BMW and Bertelsmann, in a presentation at the occasion of the 50th Anniversary of the German Federal Patent Court, http://www.bundespatentgericht.de/cms/media/Das_Gericht/Veranstaltungen/Symposien/bpatg_tagungsband_2011.pdf, p. 27: "[The bifurcation principle], in which nullity suits are separated from the infringement itself ... usually shortens legal proceedings considerably."

¹⁵ SMEs in Europe employ 65% of the total work force, and they file 50% of the applications at the EPO

there is no well-established practice of the UPC which allows such comparison politicians should admit that the UPC is not fit for smaller cases and smaller budgets.

4. For technically and legally *difficult international infringement cases* which would otherwise be litigated in parallel in different countries, the *combination system* can provide a *centralisation of legal and factual issues* which would certainly be welcomed by parties which apply for EU patents. This is even more apparent, if a case requires voluminous expert opinions that otherwise would have to be obtained in different languages in each country. These cases will be made easier and possibly cheaper to conduct. For *these cases* the UPC may offer advantages once the *quality of the judges* can be ascertained, and if parties are ready to pay the resulting higher cost - for which so far not even the rules and calculation method have been agreed. *But these cases amount to less than 20% of the entire case load!*

This shows that a lack of differentiation between small and large parties is in conflict with the business interests of more than 80% of the users, namely SMEs. My large clients know that I am not hostile towards big industry. But they all agree that with the present proposal only large industry is getting better conditions. On the other hand, if SMEs gain, big industry does not lose, since if the experienced national courts remain, this will insure higher quality of the new court due to competition with the existing ones.

5. As mentioned, compared with the German practice the new system can lead to a *three-fold increase* of revocation actions and a *four-fold increase* of the time needed for infringement cases, so that an overall *minimum cost increase* of at least *five times* over the German cost seems realistic. Only less than 20% of companies that regularly litigate in a number of countries in parallel or need protection in 25 and more countries will have a benefit, but these are not the SMEs¹⁶. This leads to the conclusion that the present proposal *severely discriminates* against this user group which is at the same time least able to carry an additional financial burden for defending its patents. It must therefore be feared that Europe will get a court system like in the US where small companies and individual inventors will no longer be able to enforce their patents if the exclusive jurisdic-

¹⁶ Why would a small or medium company which only needs protection in four or five countries pay for 13 in order to obtain protection in 25? In particular the additional annual fees would constitute a heavy burden.

tion of the UPC applies also to EP patents. This will in practice lead to a denial of justice for SMEs; again *the opposite of what the Commission had promised*¹⁷.

IV Opt - out

1. Since SMEs cannot afford the cost of the new court - and in fact do not need it -, they will certainly all make use of the opt-out for EP patents. This however will no longer be possible after a transitional period of *seven years*¹⁸ which all practitioners regard as much too short.

2. The reason for the short transitional period is that the Commission always feared that the new system might face a slow start, i.e. that users would prefer to wait and see and first test the functioning of the new court. But is this not normal? It is proof of a very limited insight into the needs of the users to believe that providing an unreasonably short transitional period will result in high case numbers right from the start. The opposite will happen, since one must expect that:

- the shorter the opt out period
- the greater the uncertainty, and
- the higher the number of opt-outs in favor of national litigation

3. Those who dream of *zero opt-outs* and *thousands of litigation cases* before the new court in the first years will be unpleasantly surprised, since they must expect that nearly *all EP patent owners* will opt out. If however one would adopt a much longer or even an unlimited opt-out period, i.e. a *co-existence* of the national courts and the UPC, there would be no need for patentees to opt out immediately. Thereby more than 600 000 granted EP patents would remain in the “pool” and patentees could decide to file test cases before the UPC at any time if this appears reasonable. Thus the UPC might

¹⁷ The *Commission* and the *Council* should be reminded of Recital (5) of the draft Agreement which stipulates: *WISHING to improve the enforcement of patents and the defence against unfounded claims...* Cf. also the papers of the British IP Federation of 22.9.2011, the Swedish Industry Federation *Svenskt Näringsliv* of 30.8. 2011, and the *UK IPO Committee* of 14.6. 2011; cf. Request of Confederation of British Industry of November 2009 submitted to the EU Commission: „We consider strongly that the Court should not have exclusive jurisdiction in relation to European patents”. All of the comments from industry warn against substantial cost disadvantages in particular for SMEs.

¹⁸ Art. 58 Draft Agreement st14750/12 of October 2012

not only catch the curious ones, but also those who have big cases and wait for a thorough and efficient procedure.

4. With an *unlimited coexistence* as it has been practiced in the case of the EPO for patent filing and the OHIM for the Community trademark, applicants can decide for each new application and each infringement case where to go - to their national offices and courts or to the European institutions. This explains the incredible success of EPO and OHMI over the last 30 and 15 years respectively. Both systems have succeeded – as regards filing as well as enforcement - not *in spite* of competition, but *because* of competition, since applicants can choose which suits best their marketing needs and their financial resources. If users are forced into a system, they must necessarily become suspicious and will hesitate for fear of being trapped. The Commission itself mentions in its *Study*¹⁹ the *critical skepticism towards the EPO*, but overlooks the additional important aspect of free choice which would result in more cases.

5. The short *seven year* period of Art. 58 (1) does not offer a reasonable chance to patentees to gain sufficient experience with the new court system as to its *patent law quality, efficiency, predictability and cost* before the opt-out period expires. It does not need much imagination putting oneself into the shoes of a patentee: Which reasonable businessman would entrust his crown jewels, the assets of his company, to a newly founded bank which has no experience and of which he does not even know the names of the managing directors?

6. Even local and appellate divisions staffed with experienced judges will not be able to finish a significant number of cases within a seven year period²⁰ – already since nearly all patentees of EP patents will have opted out. How far from reality officials in Brussels are dealing with these time periods becomes apparent from a statement of the Commission²¹:

During the first years of operations (!!), all aspects of the new court – including the ... judges, procedures, language regime, practices, fees, efficiency, speed – will be.. assessed.

¹⁹ *Study* of the Commission of 7 November 2011 p.9

²⁰ In case of referrals to the CJEU not even one

²¹ *Study* 7 November 2011 p. 8

In reality nothing of relevance can be assessed “during the first years of operation”, even if not 99% of the patentees will have opted out, but only half of them. A transitional period of seven years is not even sufficient to test the UPC with *one single* legal issue, let alone its general experience, the case management and the efficiency of the different divisions. Following the introduction of the EPC, it took precisely 10 years after the opening of the EPO for the *first infringement case* to reach the Federal Supreme Court in Germany. The Commission and the Council must know this by now.

When realistically looking at the different stages of procedure during the first years and assuming cases of different sizes, one comes to the following estimates for the judges of the UPC who

- will have no experience working in an international environment,
 - do not know their foreign colleague on the panel
 - nor the staff of their registry and their secretary
 - have never worked with the over 500 articles of the Rules of Procedure, and
 - have no practice with an electronic filing system
-
- *first instance*: two years (evtl. plus one year in case of revocation action²²)
 - *appeal* : two years (eventually plus one year in case of revocation action)
 - *referral to the CJEU*: two to three years at the beginning (increasing with more cases filed under the UPC system)

One must add to the above figures two to three years before infringement cases even occur, so that a period of *eight to ten years* for a small number of cases (!) is perhaps realistic. Taking into account the high numbers of opt-outs, users are virtually unable within the seven-year period to get a picture of what the new court stands for. It therefore also does not make sense to provide an even shorter and entirely unreasonable period²³ of *five years* in Art. 58 (5) to conduct a “broad consultation with the users” in order to examine whether the transitional period should be prolonged by another seven years, since it will equally be difficult to decide this question on the basis of a few court cases. And: if the UPC turns out to be a failure, it makes no difference if it is prolonged by seven

²² Also in the Commission’s *Study* p. 46 it is admitted: *However, it should be kept in mind that a counterclaim for revocation will **always** slow down proceedings (!)*

²³ *Needle*, WIPR January/February 2012 p. 32 calls it a “miserly seven year period”.

years; therefore a procedural alternative *must be offered*, otherwise patent litigation in Europe may end in a deadlock.

7. Since nobody can predict how an international court system will function with more than 20 languages - and with ca. 10 countries without long-time experience in patent litigation -, it is entirely unbelievable that neither the *Commission* nor the members of the *Council* seem to be willing to give the new system and its users (patent owners, judges and attorneys) a sufficient and reasonable period to familiarize with the new environment, the new court structure and in particular the new rules of procedure²⁴. In its already cited *Study* the EU Commission admits that

*It cannot be predicted at this stage which divisions will be quick, efficient and competent (!!)*²⁵

This is exactly the reason for the uncertainty among users. But had this not been promised nevertheless all the time for the entire court? And is it really true that in spite of this admission of *unpredictability of efficiency and competence* the experienced patent courts in the different countries will be forced to go out of business and lose their jurisdiction after seven years, even if the new system proves to become a drastic failure which even the Commission does not exclude? The problem is that a *drastic failure* will not already become visible when only a few cases reach the new court, but only when finally all cases have to go there and the system collapses.

8. At this point all stakeholders should ask the responsible people in Brussels why they still insist in keeping the exclusivity clause in the draft Court Agreement which nobody had ever requested.

The surprising fact in this context is that not only did nobody request this exclusivity for EP patents, but the *Advocates General* and the *CJEU* even expressed clearly that *unitary patents and EP patents have nothing to do with each other* and should not be put into the same basket.

The *Advocates General* clarified in their *Statement of Position* of July 2, 2010:

²⁴ They count more than 500 articles and have not yet been examined by the stakeholders

²⁵ Study of 7 November 2011 p. 41

60. We should first point out that it is not the competences of the future P[atent] C[ourt] concerning the *European patent* that pose a problem here: in fact, judicial competences concerning the *European patent* have always been exercised by the national courts

And the CJEU confirmed this in its Opinion of 8 March 2011:

59. *It should ...be made clear that the question at the heart of this request for an Opinion concerns not the powers of the PC in the field of the European patent, but its powers relating to the future Community patent.*

Thus the CJEU did not even decide on EP patents but on *Community patents* which are today called *Unitary Patents*. So the members of the Council are totally free how they wish to deal with the litigation of EP patents, and also the Parliament is not concerned with them. The request for the co-existence of national patent courts and the UPC has been raised by users in all member states with established patent courts, and not only by small enterprises, judges and practitioners, but also by international trade associations and representatives of large entities. All of them agree that the different needs and different financial resources of the users as well as the advantage of *quality competition* between the courts make this essential. An example is the CEO of a particularly research-dependent albeit larger German company²⁶ who expressed this in unambiguous words:

We, the industry, want the community patent as well as European patent jurisdiction alongside national patent jurisdiction. But we do not want this at all costs. A European patent court should strengthen our industry's innovative power and not weaken it. It must be effective, provide legal security and be cost-effective.

*Irrespective of this, we need strong domestic patent jurisdiction going forward as well. On the one hand because Germany is a country characterized by its medium-sized enterprises. And not every medium-sized company wants to have its inventions patented throughout Europe*²⁷.

Why would the Commission or the Council refuse to comply with the wishes of stakeholders if all want this? The resulting financial risks of a wrong political decision for an economic area in which both small and large enterprises depend on a reliable protection

²⁶ Kley, cited (above footnote 9), at p. 34/35, http://www.bundespatentgericht.de/cms/media/Das_Gericht/Veranstaltungen/Symposien/bpatg_tagungsband_2011.pdf, who also only recently warned against the trend in Europe towards innovation-hostile legislation, cf. his interview in the *Süddeutsche Zeitung* of 12 November 2012

²⁷ Likewise the English *IP Federation* (UK) of 14.6. 2011, the *Swedish Industry Federation*, loc. cit., the *UK IPO Committee* loc. cit., *FICPI* on 22.9.2011, *CIPA* on 30.11. 2011 and many others.

of their research in view of worldwide competition have been apparently disregarded by decision makers.

And the modification is extremely easy, as will be demonstrated hereafter (the underlined words are to be added):

Art. 15(1) Competence of the Court

(1)The Court shall have exclusive competence for unitary patents in respect of:

.....

(2) The national courts of the Contracting Member States shall remain competent for actions relating to patents which do not come within the exclusive competence of the Court. The patentee may bring actions mentioned in (1) concerning European patents before the Unified Patent Court or the competent national courts.

V The Court will not be ready

As announced by the EU legislators the patent package shall be adopted by the end of the year 2012. Until then nothing will be ready for the establishment of the court system which nevertheless is expected to start receiving actions by April 2014.

1. By the end of November the special working group will have terminated its tenth draft of the Rules of Procedure for the court, which however will be far from complete. This text will then for the first time be published for discussion by stakeholders²⁸. As an addendum to the court rules, the committee will publish a list of recommendations for amendments of the draft Agreement which does not match so far with a number of rules proposed by the working group.

2. But there is much more which must be completed within the very short time period of one year. Those who have been involved in this project in the past have predicted that it is highly unlikely that this work can be terminated in order to bring the system to function. If one takes only some of the most obvious elements one can predict that nothing will be ready within the time frame announced by the Commission.

- The Agreement needs ratification by the national parliaments. So far, there exist not even translations of the legal texts in the different languages of the member states which could be presented to the national parliaments and discussed with the users. How

²⁸ The AIPPI has requested in a Resolution passed at its World Congress in Seoul in October: *AIPPI resolves that a public consultation period of at least 3 months should be allowed following the publication of this draft before any further steps are taken to adopt any text.*

long the discussions in the national parliaments may last cannot be predicted. Some governments have already announced that they will not ratify the Agreement since its industry regards it as harmful for the promotion of research. It would therefore be wise that all governments, even if their parliaments have passed the pertinent laws, *withhold* their ratification documents until the number of ratifications has become known. Otherwise there will be a divided market resulting in competition discrepancies if an important number of countries refuse ratification.

- *Electronic filing requires a functioning computer system.* Presuming that the Agreement can be declared ratified the preparation of the court system requires a great number of important structural preparations. Since the Agreement and the Rules presuppose an electronic filing system interconnecting all local, central and regional divisions with a court website which must be accessible by the users. It must be obvious even for those less experienced with software design that the development and elaboration of such an international, trans-border, and multilingual computer system poses a major challenge. In the *Study* of the Commission this is recognized:

IT-systems must be ready and fully operational at the latest when the UPC starts its activities....

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 place²⁹

- So far there is not even a computer manager in place who could prepare a tender or start designing a network and appoint and organize a team for the start. Those who know how long it has taken to prepare the software programs of the EPO from their design, contract negotiation, elaboration, testing and final implementation will agree that this will take years for a work of this magnitude until it will finally be implemented and ready for use. Announcing April 2014 as the starting date of the court is therefore unlikely already for this reason.
- *There exists no infrastructure* so far for the local or regional divisions of the court in the different countries, because there is no final decision as to where local and regional divisions will be established.

²⁹ *Study* p. 95

- *Nobody knows the judges of this court* so far, and apparently none of the experienced national patent judges has been asked whether he would be willing to apply for a position in this court. What the appointment of the judges requires will be examined in a separate paper of this author.

VI. Uncertainty about extent of use of the System – The question of Trust and Confidence

1. The highest level of uncertainty exists - as also the Commission admits in its *Study* - with respect to the number of cases which the UPC can expect during the transitional period and thereafter. As briefly discussed before, this will depend on a number of factors which are decisive for the quality of the court system and the attraction which it may have for the users.

2. It is therefore surprising that the *Council*, the *Commission* and also the *Parliament* have not been very interested in keeping contact with the stakeholders who are the only ones who could tell them what their views are. Instead all opinions, studies and reports are full of speculations which to the greater part have little to do with reality. The decisive discussions and the drafting of all texts have taken place *in secrecy* without any contact with the outside world³⁰. Had they kept contact with the users and perhaps even organized a survey like in 2006 when industry and the Commission discussed the EPLA proposal³¹ they might have found answers to a number of their questions.

In its before-cited *Study* the Commission discusses two alternatives of the degree of acceptance. From what one can hear from industry representatives, judges and litigators it

³⁰ Already on November 22, 2011 the IPKat Blog predicted the reaction of users:

“Potential outcomes -

- SMEs, and some others, may avoid the EPO and file national applications [this is already starting due to perceived performance problems at the EPO];
- An increase in national filings in parallel to European;
- Inundation of the Registry of the unitary court with requests for “opting out” leading to high launch costs [I wonder what the Registry will charge for filing an opt-out – perhaps that is a way they can top up their non-existent budget - call it an SME tax];
- More SMEs being steamrolled because they cannot afford to litigate their patents;
- More trolls marching into Europe [do they march or do they lurk – I get them mixed up with orcs];
- Chaos and bickering – somewhat like the euro really”.

³¹ With an approval rate by industry and other stakeholder of about 95% (!)

can be expected that the *worst case scenario* described by the Commission in its *Study* will be the most likely one, namely an opt-out of all patents and patent applications which according to the prediction of the Commission would have the result that the UPC “will be deprived of work in the first 10 to 15 years”.

Large corporations will opt out because they do not trust the quality of the new court which consists of nothing else so far than a virtual scheme. SMEs will have to opt out because they cannot afford the possibly extremely expensive court, and they do not trust its quality either. Nearly all users say today that they would rather keep the present court system than replacing it by the new one. The IPKat reported on November 20

“At a recent conference held at UCL [University College London] an impromptu vote among industry representatives revealed that none of those present wanted the new system in its present form.”

3. The reasons for the negative attitude of industry comprise all "shades of grey": from uncertainty over uneasiness to worries and outspoken lack of trust. One must therefore come to the conclusion that patentees and patent applicants during the first seven years of the transitional period will bring their patents into a safe haven by opting out of the system. It may be assumed that those in charge of the project must know by now that the draft Agreement will not be accepted with open arms. They cannot be very proud of this. In the mentioned draft *Study* the reasons for an opt-out have been clearly predicted:

Crucial will be whether the new court system can foster trust and confidence. First and foremost, the ongoing work on the preparation of the Rules of Procedure of the UPC must be intensified with close involvement of all interested stakeholders³²,

and

The state of preparation and concrete steps taken in the run-up phase will be of paramount importance in this regard³³.

User groups have not seen any “close involvement of all interested stakeholders” during the last 12 months, rather, as already mentioned before, Brussels has been working at a level of secrecy and lack of transparency unheard of in a project of this importance. It

³² Study p. 8

³³ Study p. 20

will be interesting to see how much time the users will have to study the text of the Procedural Rules and how their contributions and proposals will be handled³⁴.

3. The Commission and/or the Council, and/or the Presidencies have obviously acted over the last 12 months against their own evaluation and conviction. Practitioners cannot see how secrecy and the reasons given for it (“.. *Divulgation to the public could ... affect the ratification process in the Member States*”) could promote or encourage *trust* and *confidence* and thereby contribute to the acceptance of the UPC. The many political compromises which have found their way into the text - against repeated warnings of users -, clearly contradict all promises of *easy access, affordability for SMEs, predictability and legal certainty*, so how could this build up trust?

The drafters should have followed the recommendation of the Commission’s *Study* by offering an open discussion during the drafting period³⁵ and by providing in the text of the Agreement a reasonable period of time for testing and analyzing the system after its entry into force. “Reasonable” means a period with open end until *all* users, in particular SMEs, are able to get acquainted with the new court in *all respects* in order to make a balanced decision whether the court meets their expectations; a seven year period is *highly unreasonable* and shows at best how unsecure the drafters feel about the quality of their work. But if the goal is to force the users into the new system and on purpose prevent any chance of comparison, the mentioned *worst case* is very likely. Uncertainty has become so widespread that large parts of users, including those from outside the EU, are already preparing a change of their patent filing policy: they will go back to the national patent offices and to the national courts. Quite a number start already now, since this will give them more time for testing what they get there. Those who need only protection in four or five countries will compare cost and time and leave the new system aside.

³⁴ AIPPI requested in its Resolution of October 23, 2012 during its World Congress in Seoul a minimum of three months for the studying and commenting of the 500 Rules

³⁵ The Expert Group of the Commission consisting of five judges and five attorneys from seven member states and several representatives of industry had successfully worked with the Commission from February 2008 to April 2011. After the publication of the Opinion of the CJEU on 8 March 2011 the Commission drastically changed direction, disregarded the recommendations of the experts and began the period of secret negotiations during a period of nearly 12 months.

4. This was certainly not the aim which those involved in the work for a long time had in mind. How could it happen that a widespread lack of trust has taken over the mood of cooperation which had existed for so long? Did nobody want to notice that nearly 80% of the users, among them the SMEs, are bearing all the disadvantages, while those who need protection in 25 countries - not even 30% of the users - got everything they wanted? It will now be for the national parliaments to assess these facts, if there is not a last minute change to save the project. Summarizing the above I am quoting *Sir Robin Jacob* who recommended

"We should not change from the current system until we are confident that the new system will work better".

I could not agree more.