

BY E-MAIL: [eileen.tottle@ipo.gov.uk](mailto:eileen.tottle@ipo.gov.uk)

Preparatory Committee  
for the Unified Patent Court

Attn.: Ms. Eileen Tottle  
Head of Secretariat

Budapest, 22 July 2015

Re: Proposed amendments and considerations to the draft Rules on Court fees and recoverable costs (Consultation Document, May 2015)

Dear Sirs,

We, the undersigned Presidents of Hungarian intellectual property associations hereby respectfully submit our proposed amendments and considerations to the draft in the above referenced Consultation Document.

1. Support for a fee system incorporating both Alternatives 1 and 2

A reduction of the level of the fees for legal entities listed in Art. 36 (3) of the UPC Agreement (small and medium-sized enterprises, micro-entities, natural persons, non-profit organisations, universities and public research organisations) is considered to be essential, so a fee policy based on Alternative 2 should have a priority over Alternative 1. However, reimbursements to reward procedural behaviours like an early settlement are considered to substantially contribute to a fair balance of interests of the parties and of the working of the UPC system, so we support a fee system incorporating a fee reduction based on Alternative 2 together with the reimbursements of Alternative 1 in a cumulative way.

It is also noted that personal fee reductions of Alternative 2 and procedural fee reductions of Alternative 1 have different roots and are based on different considerations, so those do not seem to be competing alternatives but rather representing complementary elements of a fair fee system.

2. Support for defining exact, straightforward and predictable criteria of fee reductions

The speedy UPC system requires that users make strategic decisions as quick as possible. Users of the system should be in the position to calculate scenarios at the earliest possible stage, taking into account all cost factors, including court fees and reductions/reimbursements. We are afraid that Rule 370 (7) of Alternative 2 as presently stands in the Consultation Document is unsuitable to support such strategic decisions, as the terms “*threatens economic existence*”, “*reasonably available and plausible*”, “*all circumstances of the case including the procedural behaviour*” are vague in the absence of any guidance and case law (additionally, it is not clear from the present wording whether the other party may appeal a positive decision, causing further uncertainties).

An exact, fair and foreseeable system is needed as stated in the Consultation Document (II. Explanatory Note A, paragraph 3 “*the fee system of the Court should be straightforward and predictable for the users*”).

3. Support for a differentiated fee reduction for legal entities listed in Article 36 (3) of the UPC Agreement

### 3.1. SMEs

#### 3.1.1. Coverage and terminology

Firstly it is noted that within the meaning of the SME abbreviation, sub-categories of “*micro, small and medium-sized enterprises*” are defined in Title I, Art. 2 of Annex of the Recommendation of the European Commission n° 2003/361 of 6 May 2003 (‘Recommendation’), so there is a separate sub-category for the microenterprises as well. In the following the SME abbreviation is used in the meaning as defined by the Recommendation also covering the sub-category of microenterprises.

The UPC Agreement (Art. 36 (3)) mentions “*small and medium-sized enterprises, micro-entities*”. There might be a possible confusion of terminology due to a discrepancy between the term ‘microenterprise’ of the Recommendation and the term ‘micro-entity’ of the UPC Agreement, as well as due to the coverage the SME abbreviation as used in the Recommendation. The Draft Proposal

- mentions the term ‘micro-entities’ in Alternative 2, Rule 370 (6), however
- ‘micro-entities’ seem to be lost in the subsequent definition in sub-paragraph (a) only indicating ‘small and medium-sized enterprise’ and referring to the Recommendation, while
- in sub-paragraph (b) the term ‘micro-entities’ reappears again.

This discrepancy should be avoided and it should be made clear that ‘micro-entities’ correspond to microenterprises as defined in the Recommendation. Accordingly, it is proposed to insert a further definition into the Scope (Definitions) part of Alternative 2, Rule 370 (6)(a) as follows:

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

#### 3.1.2. Broadness of the SME category with respect to the draft UPC fees

SME is a rather wide category within Europe. According to Art. 2 of the Annex of the Recommendation,

*“1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.*

*2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.*

*3. Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.”*

There is a large difference between microenterprises and medium-sized enterprises in the SME category, the latter being 25-times larger (in turnover-based comparison). Considering an industrial average 10% profit rate, it can be seen that microenterprises and small enterprises have generally less than sufficient assets for UPC litigation.

In the light of the fees listed in the Consultation Document, the UPC system is clearly not accessible for a microenterprise. Taking an average microenterprise from the middle of the range (EUR 0 to 2 million) having an annual turnover of EUR 1 million and a corresponding annual profit of around EUR 100,000 it can be seen that a single instance of a single patent litigation case

would consume more than the total annual profit of the company (reference is made to WIPO statistics<sup>1</sup>, a study for the European Commission<sup>2</sup>, as well as to a statement on the UPC homepage<sup>3</sup>, according to which one instance UPC proceedings would cost far more than EUR 150,000, and in the case of the usual two instances incl. revocation, the procedural costs may start from EUR 600,000). Indeed, a microenterprise would not even have the option to file a mere counterclaim for revocation, the official fee alone reaching up to 20% of its yearly profit. The court fee alone would not threatening its economic existence, so Rule 370 (7) of Alternative 2 as presently stands in the Consultation Document would not apply, but filing a counterclaim for revocation would be clearly impossible for the company in the light of the additional procedural costs. So, not even a defence against an unjust attack would be an available option for an average microenterprise.

If considering an average small enterprise from the middle of the range (EUR 2 to 10 million) having an annual turnover of EUR 6 million and a profit of around EUR 600,000, procedural costs of a single UPC litigation case would consume the total annual profit of the company, thereby blocking investments and growth.

On the above basis the UPC system could be misused by starting unfounded litigation procedures e.g. against start-ups and new competitors and blocking their growth and investments, i.e. practically excluding the defendant from the development for years. In the field of fast developing technologies the balance of such an abusive use of the UPC system may be positive for a plaintiff even if all costs of the defendant are recovered at the end.

Thus, the present fee structure makes the system practically inaccessible for European microenterprises and small enterprises. It is noted that according to the latest European statistics<sup>4</sup>,

<sup>1</sup> WIPO Magazine, February 2010, No. 1

([http://www.wipo.int/export/sites/www/wipo\\_magazine/en/pdf/2010/wipo\\_pub\\_121\\_2010\\_01.pdf](http://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2010/wipo_pub_121_2010_01.pdf))

<sup>2</sup> PATENT LITIGATION INSURANCE, A study for the European Commission on the feasibility of possible insurance schemes against patent litigation risks, APPENDICES TO THE FINAL REPORT, June 2006 CJA Consultants Ltd, European Policy Advisers, Britain and Brussels

([http://ec.europa.eu/internal\\_market/indprop/docs/patent/studies/pli\\_appendices\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/patent/studies/pli_appendices_en.pdf))

<sup>3</sup> "The costs of litigation in the UPC may, not necessarily always, but on some occasions supersede the costs incurred today for litigating in one single Contracting Member State." <http://www.unified-patent-court.org/about-the-upc/27-category-n>

<sup>4</sup> [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2014/annual-report-smes-2014\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2014/annual-report-smes-2014_en.pdf)

Table 2: SMEs and large enterprises: number of enterprises, value added and employment in the EU28 in 2013

	Micro	Small	Medium	SMEs	Large	Total
<b>Number of enterprises</b>						
Number	19,969,338	1,378,374	223,648	21,571,360	43,517	21,614,908
%	92.4%	6.4%	1.0%	99.8%	0.2%	100%
<b>Employment</b>						
Number	38,629,012	27,353,660	22,860,792	88,843,464	44,053,576	132,897,040
%	29.1%	20.6%	17.2%	66.9%	33.1%	100%
<b>Value added at factor costs</b>						
Million Euros	1,362,336	1,147,885	1,156,558	3,666,779	2,643,795	6,310,557
%	21.6%	18.2%	18.3%	58.1%	41.9%	100%

Source: Eurostat, National Statistical Offices and DIW Econ

among the total number of 21,614,908 of European companies, there were 19,969,338 microenterprises, 1,378,374 small enterprises and only 223,648 medium-sized enterprises in 2013. Thus, the UPC system would be inaccessible for more than 98% (!) of all European companies.

Accordingly, a single SME category cannot accommodate accessibility for all companies to be supported. It is also noted that according to the above referenced European statistics there are also large geographical differences in the distribution of SMEs (with respect to the medium – small – micro sub-categories) and SME profits in Europe. Thus a differentiated fee reduction for SMEs would also solve the problem of geographical differences.

It is also considered that court fees are only a portion of all procedural costs, however, facilitating access to the UPC system at least from the aspect of court fees is essential in the light of the above figures.

### 3.1.3. Unsuitability of draft Rule 370 (7) of Alternative 2 to provide wide accessibility for SMEs

Apart from the vague terms referred to above, Rule 370 (7) provides for a reimbursement of the fixed fee, while it has been shown that a considerable part of the European SMEs (below than average microenterprises) are not even in a position to pay the fixed fee and wait for a possible reimbursement. A reduction of the value-based fee as stipulated in Rule 370 (7) will not likely play any role for SMEs if exempt of such fees according to Alternative 2.

### 3.1.4. Differentiated fee reduction for SMEs

In our view, a straightforward, predictable and accessible system can only be achieved if an exact and differentiated fee reduction system is established within the SME category. The annual turnover limits defined in the Recommendation are objective and suitable proportional reference values (EUR 50 – 10 – 2 million; 100% – 20% – 4%) for such reductions.

Accordingly, in line with the annual turnover limits in the Recommendation we propose to apply 20% of all fees for small enterprises (80% fee reduction) and 4% of all fees for microenterprises (96% fee reduction).

It is believed that the above reductions would be in line with the objectives set in the Consultation Document and would serve the widest accessibility of the system for the European users.

### 3.2. Support for a corresponding fee reduction for the remaining legal entities listed in Article 36 (3) of the UPC Agreement

All further legal entities (non-profit organisations, universities and public research organisations) are essentially non-profitable entities, so those are closer to microenterprises than to any other category or sub-category.

Accordingly, we propose to apply 4% of all fees for non-profit organisations, universities and public research organisations (96% fee reduction).

### 4. Support for differentiated ceilings of recoverable costs for legal entities listed in Article 36 (3) of the UPC Agreement

The Consultation Document states that *“The aim of a cost-ceiling is to safeguard the losing party against excessive cost burdens.”* In line with the considerations of point 3 above, the ceilings of recoverable costs are also to be applied in a differentiated system. Namely, the court fees (and other costs) of the successful party will be ‘charged’ to the losing party, and if the losing party is a

legal entity listed in Article 36 (3) of the UPC Agreement, excessive cost burdens could be avoided by means of ceilings of recoverable costs lowered proportionally with the annual turnover limits given in the Recommendation.

Accordingly, in line with the annual turnover limits in the Recommendation we propose to apply 20% of all ceilings for small enterprises (80% fee reduction), and 4% of all ceilings for microenterprises (96% fee reduction), as well as 4% of all ceilings for non-profit organisations, universities and public research organisations (96% fee reduction).

5. A further remark to Alternative 2, Rule 370 (6)(b)(i), third paragraph

The paragraph necessitates filing copies of particular documents

- which shall be dated less than three months from the date of the application or
- relating to the latest approved accounting period.

The list of documents to be filed in copies contains e.g. status documents of universities and other organizations. It is noted that such status documents are usually rather old, so those are not dated within three months from the date of application, and it is a question whether those are considered as to relate to the latest approved accounting period. The same problems arise for official documents justifying legal form also listed in the draft provision. We propose to amend the wording of this paragraph stating that the above conditions only relate to commercial/financial evidences.

\*\*\*

Understanding that financial basis of the UPC system is also to be established by the fees, we think that providing accessibility for more than 20 million European companies (microenterprises and small enterprises) to the UPC system outweighs the inconvenience of additional start-up contributions of the Contracting Member States.

Please do not hesitate to contact us if questions or a need for further consultation arises.

Yours faithfully




Dr. Marcell Kereszty  
President

Hungarian Group of AIPPI  
Dalszínház u. 10. I. 3  
H-1061 Budapest, Hungary

<http://www.aippi.hu/>

[kereszty@godollepat.hu](mailto:kereszty@godollepat.hu)  
Phone: +36 1 438 50 40  
Fax: +36 1 438 50 41




Dr. Ferenc Török  
President

Hungarian Chamber  
of Patent Attorneys  
Kálmán Imre u. 14. III. 1.  
H- 1054 Budapest, Hungary

<http://www.szabadalmikamara.hu>

[ugyvivo@szabadalmikamara.hu](mailto:ugyvivo@szabadalmikamara.hu)  
Phone: +36 1 411 87 77  
Fax: +36 1 266 57 70



Dr. András Szeeskay  
President

Hungarian Association for the  
Protection of Industrial  
Property and Copyright  
Dalszínház u. 10. I. 3  
H-1061 Budapest, Hungary

<http://www.mie.org.hu/>

[mie@t-online.hu](mailto:mie@t-online.hu)  
Phone: +36 1 472 30 00  
Fax: +36 1 472 30 01