

UNITARY PATENT AND THE UNIFIED PATENT COURT: ATTRACTIVE FOR SMEs?

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Abstract: The Unitary Patent Package (UPP) was conceived as a means of simplifying and centralising patent protection and enforcement across participating EU Member States. The introduction of a supranational patent jurisdiction and a unitary protection system was intended to reduce costs and enhance legal certainty for patent holders, particularly those belonging to the category of small and medium-sized enterprises (SMEs). Historically, these enterprises have faced challenges associated with the complexity and expense of fragmented national systems.

Two years after the entry into force of the UPP, the present paper examines early empirical data to assess the extent to which SMEs have engaged with the Unitary Patent (UP), and to evaluate the UPP's attractiveness as a solution for European SMEs, in light of existing patent protection options.

Keywords: Unitary Patent Package (UPP), Unified Patent Court (UPC), small and medium-sized enterprises (SMEs), patent enforcement

1 Introduction

In force since 1 June 2023, the Agreement on a Unified Patent Court (UPC Agreement)¹ established the Unified Patent Court (UPC), a supranational tribunal with exclusive jurisdiction over European patents with unitary effect (unitary patents, UPs), as well as, unless formally opted out, 'classic' European patents² (EPs) valid in the EU Member States that

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¹ Agreement on a Unified Patent Court [2013] OJ C175/1 (UPC Agreement) Arts 3–5.

² European patents (EPs) for which the application is dealt with by the European Patent Office (EPO) under the procedures laid down in the European Patent Convention (Convention on the Grant of European Patents (European Patent Convention, EPC) (signed 5 October 1973, as revised by the Act revising Art 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000) 1065 UNTS 199, (EPC)). The UPC Agreement does not permit parties to opt out of the UPC's jurisdiction for matters concerning Unitary Patents. See Annette Kur, Thomas Dreier and Stefan Luginbühl, *European Intellectual Property Law: Text, Cases and Materials* (2nd edn, Edward Elgar 2019) 155.

have ratified the agreement.³ Together with Regulation (EU) 1257/2012, which confers unitary effect on European patents,⁴ and Regulation (EU) 1260/2012, which establishes the necessary translation regime,⁵ the UPC Agreement forms the core of the Unitary Patent Package (UPP) and represents the most significant reform of the European patent framework in recent times.⁶

The UP/UPC system was originally promoted as a mechanism to significantly enhance the protection of innovation within the European single market. It was expected to deliver substantial cost reductions in relation to both the filing of patents with unitary effect and the enforcement of rights, which are now centralised before the UPC and are automatically effective across all participating Member States.⁷ The creation of a unitary and specialised patent jurisdiction was intended to promote greater legal certainty and system coherence by addressing former fragmentation, whereby a patent could be invalidated in one jurisdiction but remain enforceable in another due to divergent judicial outcomes.⁸ A

³ The UPC Agreement was signed by EU Member States on 19 February 2013, with the exception of Croatia, Poland and Spain. For a historical overview, see, for example, Kur, Dreier and Luginbühl (n 2) 150–151. On 1 June 2023, 17 Member States had ratified the UPC Agreement: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia and Sweden. Romania's subsequent ratification raised the total to 18. Thus, six EU Member States have not ratified the UPC Agreement (Cyprus, the Czech Republic, Greece, Hungary, Ireland, and Slovakia). Up-to-date ratification data are available at Council of the European Union, 'Agreement on a Unified Patent Court (UPC)' <www.consilium.europa.eu/en/documents/treaties-agreements/agreement/?id=2013001> accessed 14 June 2025. The fact that countries such as Croatia and Spain are not currently part of this system because they have not ratified the UPC Agreement does not prevent Croatian or Spanish legal or natural persons from applying for a UPC or being involved in related disputes.

⁴ Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L361/1.

⁵ Regulation (EU) No 1260/2012 of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements [2012] OJ L361/89.

⁶ Justine Pila and Paul L C Torremans, *European Intellectual Property Law* (2nd edn, OUP 2019) 599. For a critical analysis of the UPC Agreement constitutional design and an examination of the adverse economic effects of the unitary patent system, see Dimitris Xenos, 'European Patent System: Failures in Constitutional Design Crippling Essential Safeguards against Adverse Economic Effects' in Luc Desaunettes-Barbero, Fernand de Visscher, Alain Strowel, Vincent Cassiers (eds), *The Unitary Patent Package & Unified Patent Court: Problems, Possible Improvements and Alternatives* (Ledizioni 2023) 123–145. Art 20 UPC Agreement; Art 267 TFEU.

⁷ See, for example, Commission, 'A Single Market for Patents: The Unitary Patent System' <https://single-market-economy.ec.europa.eu/system/files/2023-06/Patent%20Package_Unitary%20Package%20System_V8.pdf> accessed 9 June 2025.

⁸ Emanuela Arezzo, 'Divisional Applications and Patent Portfolios in Europe: Will Patenting Strategies Change after the Introduction of the Unitary Patent and the UPC?' (2025) 74(3) GRUR International 205, 213 and the sources cited therein.

coherent body of UPC case law could also influence national judicial approaches, fostering greater interpretative convergence⁹ and potentially diminishing the quasi-normative role long held by the EPO's Technical Boards of Appeal. These boards have historically served as the primary supranational source of patent adjudication.¹⁰

The UPC is an international court¹¹ common to all EU Member States that have ratified the UPC Agreement.¹² Article 20 of the UPC Agreement affirms the primacy of Union law, and Article 267 TFEU obliges the court to seek preliminary rulings from the Court of Justice of the European Union where necessary.¹³ Article 31 of the UPC Agreement further provides that the international jurisdiction of the UPC shall be determined in accordance with Regulation (EU) No 1215/2012 (Bruxelles I *bis*),¹⁴ or under the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention).¹⁵ Thus, the UPC is not an EU institution; it operates in a manner comparable to a national court with supranational jurisdiction.¹⁶

During the UPP negotiations, policy-makers emphasised the structural needs of small and medium-sized enterprises (SMEs).¹⁷ For in-

⁹ cf Giorgia Galeotta, Tamar Khuchua and Martin Stierle, 'Public Access to the Register of the Unified Patent Court: Unprecedented Transparency with Unfounded Limitations' (2025) 20(1) *Journal of Intellectual Property Law & Practice* 23, 24 and 31.

¹⁰ Aurora Plomer, 'The EPO as Patent Law-Maker in Europe' (2019) 25(1) *European Law Journal* 57.

¹¹ Dimitris Xenos (n 6) 125 and 127.

¹² Art 1(2) UPC Agreement.

¹³ Art 20 UPC Agreement; Art 267 TFEU.

¹⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

¹⁵ Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) [2007] OJ L339/3, concluded between the EU, Norway, Iceland and Switzerland. See Pila and Torremans (n 6) 601.

¹⁶ Arezzo (n 8) 213. For a detailed study on the UPC's position within the judicial system of the EU, see Hanns Ullrich, 'The Unified Patent Court' (2023) 42 *Yearbook of European Law* 135. For a critical analysis of the distinction between an EU national court and the UPC when referring a question to the CJEU, see Dimitris Xenos (n 6) 126–127.

¹⁷ According to the European Commission's Recommendation of 2003, 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. Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36, Annex Art 2(1)–(3). The EU SME Definition is a 'structural tool to identify those enterprises that are confronted with market failures and particular challenges (eg access to finance) due to their size, and therefore are allowed to receive preferential treatment in public support'. The initial definition dates back to 1996 while the current one was issued in 2003 and confirmed in 2021. In fact, the later evaluation confirmed that 'the SME definition remains a relevant and fit for purpose tool

stance, the Commission's 2011 impact-assessment explicitly identified translation, validation and maintenance fees as 'so costly and complex that [EU-wide patent protection] is inaccessible to many inventors and companies; in particular, SMEs often prefer an informal protection of their innovations'.¹⁸ This diagnosis framed the drafting process: negotiators sought fee levels and procedural rules that would neutralise the cost barrier without eroding the system's financial viability.

Accordingly, the EPO later adopted a fee schedule in which (i) renewal fees for a UP are linked to the cumulative cost of renewal of 'classic' EPs in four MSs, and (ii) SMEs, universities and non-profits are entitled to compensation for post-grant translation expenses when they file in an EU language other than English, French or German.¹⁹ The Council of the EU has repeatedly presented these measures as a deliberate attempt to make the new regime 'attractive' to SME users.²⁰ By the eve of the system's launch, the Commission was still emphasising that the UPC/UP represented a 'powerful tool for European companies, and especially SMEs, [and]... a one-stop-shop for patent protection and enforcement in the EU'.²¹ Thus, the legislative history indicates that the UPP was designed with consideration for the distinctive characteristics and economic importance of SMEs.

At the same time, a contrasting perspective in the literature, endorsed by a number of academics and several Member States, asserts that the UPP will offer only modest tangible advantages to EU-based SMEs²² while introducing significant new risks. According to this per-

to identify the enterprises most confronted with disadvantages due to their size. It has also clearly been effective in limiting the proliferation of SME definitions at both the EU level and in the Member States and thus contributed to levelling the playing field for SMEs. No evidence was found that points to a need for revision'. Commission, 'Commission Staff Working Document: Evaluation of Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises' (2003/361/EC) SWD (2021) 279 final, 28 September 2021, 60.

¹⁸ Commission, 'Commission Staff Working Document: Summary of the Impact Assessment' SEC (2011) 483 final (13 April 2011) 3 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=swd:SEC_2011_0482> accessed 9 June 2025.

¹⁹ Council of the European Union, 'Progress Report on the Unitary Patent Package' 6070/23 (20 February 2023) 5–6 <<https://data.consilium.europa.eu/doc/document/ST-6070-2023-INIT/en/pdf>> accessed 9 June 2025.

²⁰ *ibid* 6.

²¹ Commission, 'Intellectual Property: Harmonised EU Patent Rules Boost Innovation, Investment and Competitiveness in the Single Market' IP/23/2454 (27 April 2023) <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_2454/IP_23_2454_EN.pdf> accessed 9 June 2025.

²² For instance, Xenos argued that empirically SMEs account for barely 10% of granted EPs, while large firms capture more than 80%, so any putative fee reductions or wider territorial reach will benefit those already dominant rather than the firms the EU claims to support. According to him, the real effect of the UPP is to shift bargaining power and

spective, the UPP is likely to shift bargaining power and market space towards large corporations, often from outside the EU, thereby exacerbating existing technological and economic disparities. It is argued that the result will be an increase in patent imports, litigation costs, and competitive barriers, leaving economies that rely heavily on SMEs particularly vulnerable to the system's adverse effects.²³

Drawing on empirical data from the first two years after the Unitary Patent Package (UPP) came into force, this paper examines the uptake of the Unitary Patent (UP) by SMEs and evaluates the UPP's attractiveness as a solution for European SMEs, in light of existing patent protection options.

It assesses the extent to which SMEs have engaged with the UP/UPC, considering whether the UPP has begun to deliver its stated objectives of enhanced accessibility and efficiency. However, it does not explicitly analyse the attractiveness of the UP/UPC framework for SMEs that rely on access to third-party technology to operate or grow.

2 Initial interest in UPs by SMEs

The UP was created to streamline the processes of validation, maintenance, and enforcement of patents, a goal welcomed by patentees across Europe, particularly SMEs.²⁴ Although the European Patent Convention (EPC) had previously centralised the grant procedure through

market space towards large, often non-EU corporations, amplifying existing technological and economic disparities both between and within Member States, resulting in an increase in patent imports, litigation costs, and competitive barriers, and leaving SME-dependent economies uniquely exposed to the new system's adverse consequences. Dimitris Xenos, 'The Impact of the European Patent System on SMEs and National States' (2020) 36(1) *Prometheus* 51; Dimitris Xenos, 'Unconstitutional Supranational Arrangements for Patent Law: Leaving out the Elected Legislators and the People's Participatory Rights' (2019) 28 *Information and Communications Technology Law* 131. Similarly, Plomer argues that the new UP package, including the UPC, will benefit large foreign multinationals and be much less valuable to small and medium-sized innovative European companies, which will risk becoming prey to infringement actions in a new and complex system. See Aurora Plomer, 'The Unified Patent Court and the Transformation of the European Patent System' (2020) 51 *IIC* 791. It is noteworthy that certain Member States that did not sign the UPC Agreement, such as Poland, or that chose not to ratify the UPC Agreement after signature, including Hungary and the Czech Republic, have expressed similar concerns. These Member States have based their position on national impact assessment studies on the UPC, which have indicated the potential for significant losses and negative effects on SMEs. For a detailed overview, see Xenos (n 6) 135–137.

²³ François Wéry, 'New IP Strategy for Businesses in Europe in the Light of the Unitary Patent and the Unified Patent Court' in Luc Desautettes-Barbero, Fernand de Visscher, Alain Strowel, Vincent Cassiers (eds), *The Unitary Patent Package & Unified Patent Court: Problems, Possible Improvements and Alternatives* (Ledizioni 2023) 405–407.

²⁴ Silvia Ellena, 'Unitary Patent System Key for European SMEs, But Not All Countries Ready to Join' (*Euractiv*, 5 July 2023) <www.euractiv.com/section/economy-jobs/news/

the EPO, the UP goes further by eliminating the need for national registration, translation, and validation²⁵. Following the granting of a patent, patentees may obtain and maintain UP protection in 18²⁶ and potentially up to 24 or more EU Member States through a single procedure, with the EPO functioning as a one-stop administrative body.²⁷

Applications for a UP – a European patent with unitary effect – must be submitted within one month of the EPO's decision to grant a European patent.²⁸ By that stage, applicants must evaluate whether the UP, either alone or in combination with conventional European or national patents, aligns with their strategic and financial objectives.²⁹

The territorial scope of the UP is a critical factor in determining its level of attractiveness. At present, nine EU states – including Spain, Poland and Ireland – are not part of the UP, and several key European economic partners, such as the United Kingdom, Switzerland, Turkey, and Norway, are permanently excluded because the mechanism is limited to EU members.³⁰

unitary-patent-system-key-for-european-smes-but-not-all-countries-ready-to-join/> accessed 31 May 2025.

²⁵ Xenos, 'Impact of the European Patent System' (n 22) 16.

²⁶ According to section 1.5.1 of the Unitary Patent Guidelines, the territorial scope of a UP covers the territories of those EU Member States participating in enhanced cooperation on UP protection and in which the UPC Agreement is in force at the time of registration of the unitary effect. The scope remains the same for the entire lifetime of the Unitary Patent and is not extendable to the participating Member States that ratify the UPC Agreement after its unitary effect has been registered. The territorial scope of each individual Unitary Patent is shown in the Register for unitary patent protection. Details on the territorial scope of the UP in the participating Member States with overseas territories (ie Denmark, France, Netherlands) may be found in the EPO publication entitled 'National measures relating to the Unitary Patent', which is available on the EPO website. See European Patent Office, 'Unitary Patent Guidelines' (in force on 1 April 2025, Notice from the EPO dated 3 December 2024, OJ EPO 2025, A6, 31 January 2025) <www.epo.org/en/legal/guidelines-up/2025/index.html> accessed 15 June 2025.

²⁷ European Patent Office, 'Costs of a Unitary Patent and Reductions for Small Entities' <www.epo.org/en/service-support/faq/law-practice/unitary-patent/costs-unitary-patent-and-reductions-small-entities> accessed 31 May 2025.

²⁸ According to Art 9(1)(g) of Regulation (EU) No 1257/2012 'a request for unitary effect ... is submitted ... no later than one month after the mention of the grant is published in the European Patent Bulletin'.

²⁹ For a detailed analysis of the costs impact of the UP/UPC system, see Wéry (n 23).

³⁰ *ibid* 394. As Wéry observes, this limited participation has two principal implications. From a business perspective, major markets outside the UK and Spain still require separate EP validations and annual fees. From a legal perspective, the number of patent types within the EU actually increases from two (national and validated EPs) to three (including UPs). During the transitional period, EPs are further divided between those subject to the UPC's jurisdiction and those which have opted out of it. Consequently, the European patent landscape may initially become even more fragmented (*ibid*, 394–395).

Given that the territorial scope of a UP remains limited to 18 of the 39 EPC contracting States, applicants targeting markets beyond this zone – such as the UK, Spain, Switzerland, or Turkey – must consider additional national validations and pay annual fees to national offices for their maintenance.³¹

Historically, EPs, including those held by SMEs, were not validated in more than a few participating States.³² In such instances, the UP may not represent a financially optimal solution.³³ Furthermore, once unitary effect is granted it can only be limited, transferred, or revoked in respect of *all* participating Member States, and cannot be narrowed to a smaller territory.³⁴ This provision creates the inherent ‘geographical and hence, financial rigidity’: once granted, its territorial scope cannot be subsequently reduced.³⁵ In contrast, an EP allows the patentee to discontinue renewals in selected countries over time, thereby adjusting costs to market relevance.³⁶

Nevertheless, ownership of a UP, with broad coverage across a majority of EU Member States, may constitute a strategic asset for SMEs. Such territorial breadth can enhance the investment appeal, support licensing strategies, and generate revenue from jurisdictions where the

³¹ *ibid* 394. See also Domien Op de Beeck and Henri Kaikkonen, ‘UPC Blog Series: Part 4: The UPC and UP: Considerations for SMEs’ (*Bird & Bird*, 6 June 2023) <www.twobirds.com/en/patenthub/shared/insights/2023/global/upc-blog-series-part-4-the-upc-and-up-considerations-for-smes> accessed 31 May 2025.

³² The importance of national patents for SMEs was highlighted by the participants to the Workshops on the Economic Effects of the Unitary Patent and the Unified Patent Court, underscoring that national patents remain vital for SMEs and that their removal would undermine these firms’ commercial prospects: applicants typically file first at national level before pursuing a European patent and later drop the national application, as dual protection is not possible in most Member States. Whether an SME ultimately needs a pan-European right depends on its business model; national patents would lose salience only if the Unitary Patent were paired with SME-specific fee reductions and an effective small-claims track before the UPC. Even so, the workshop’s prevailing view was that national patents constitute an indispensable instrument for SMEs and should be retained. EPO Economic and Scientific Advisory Board, *Workshops on the Economic Effects of the Unitary Patent and the Unified Patent Court: Report* (Munich, 3–4 December 2013) 13.

³³ The primary justification for the UP was cost reduction. Proponents of the new system advanced the argument that it would result in a reduction of expenses through a reduction of annual fees, a simplification of translation requirements, and the elimination of national validation fees. Wéry evaluates this claim quantitatively and concludes that for patents covering only a few key markets, savings under the UP are minimal, and that the new system becomes financially advantageous only for patentees seeking protection in many countries and maintaining patents for more than a decade. Wéry (n 23) 397–398.

³⁴ Art 3(2) (third sub-paragraph) of Regulation (EU) No 1257/2012 provides that: ‘A European patent with unitary effect shall have a unitary character. ... It may only be limited, transferred or revoked, or lapse, in respect of all the participating Member States’.

³⁵ Op de Beeck and Kaikkonen (n 31).

³⁶ *ibid*.

patentee lacks a direct commercial presence.³⁷ Moreover, SMEs may benefit from financial incentives specifically associated with UP protection. For instance, translation costs³⁸ may be compensated, and SMEs can opt to submit a 'licence of right' declaration to the EPO.³⁹ This statement signals the patentee's willingness to license the invention in return for equitable remuneration. Beyond facilitating commercial partnerships, the declaration confers a 15% reduction in UP renewal fees, thus enhancing the cost-effectiveness of UP ownership.⁴⁰

According to the joint EPO–EUIPO study of January 2025, firms that hold formal intellectual property rights (IPR) demonstrate higher revenue per employee, generate greater employment, and offer superior wage levels than their counterparts lacking an IP portfolio. The study found that these positive associations between IPR ownership and economic performance were especially pronounced for SMEs. However, fewer than 10% of European SMEs currently hold any formal IPR.⁴¹

³⁷ See, for example, European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 'Annual Report on European SMEs 2024/2025 – SME Performance Review 2024/2025' (Publications Office of the EU 2025) <<https://data.europa.eu/doi/10.2760/7714438>> accessed 14 June 2025; and European Patent Office and EU Intellectual Property Office, 'Intellectual Property Rights and Firm Performance in the EU' (Firm-Level Analysis Report, January 2025) <<https://link.epo.org/web/publications/studies/en-ipr-performance-study.pdf>> accessed 15 June 2025.

³⁸ According to recital 5 of Regulation 1260/2012 (n 5) '[s]uch translation arrangements should ensure legal certainty and stimulate innovation and should, in particular, benefit small and medium-sized enterprises (SMEs). They should make access to the European patent with unitary effect and to the patent system as a whole easier, less costly and legally secure'.

³⁹ Small entities, including SMEs, individuals, universities, non-profit organisations and public research institutions, may claim a 500 translation-cost compensation when their application is filed in an EU language other than English, French or German. To qualify, the proprietor must submit, together with the unitary-effect request, a declaration confirming their status as a natural person, SME, non-profit, university, or public research body. This compensation complements the reductions in filing and examination fees available under Rule 8(1) of the Rules relating to Unitary Patent Protection (UPR) for applications and examination requests filed in designated EU languages. Furthermore, any proprietor who lodges a licence-of-right statement – which permits third-party use of the invention – receives an additional 15% reduction in renewal fees falling due after the statement's registration. European Patent Office, 'Rules Relating to Unitary Patent Protection' (Decision of the Select Committee of the Administrative Council of the European Patent Organisation, 15 December 2015, last amended 13 November 2024) <www.epo.org/en/legal/up-upc/2022/upr.html> accessed 15 June 2025.

⁴⁰ Rule 12 UPR. See also European Patent Office, 'Are There Any Reductions for Small Entities, Such as SMEs, Start-ups and Universities?' <www.epo.org/en/service-support/faq/law-practice/unitary-patent/costs-unitary-patent-and-reductions-small-0> accessed 31 May 2025.

⁴¹ European Patent Office and EU Intellectual Property Office (n 37) 12, 14. The report was based on an analysis of over 119,000 European firms from all 27 EU Member States, over a ten-year period (2013-2022), and covers patents, trademarks and designs registered at the EPO, EUIPO, and at national and regional IP offices. Compare also the EPO press release

The first-year data published by EPO in an anniversary release on 1 June 2024 showed that SMEs (including individual inventors) accounted for 35.5% of all UP requests filed by European proprietors.⁴² Thus, more than a third of all EU-based owners choosing unitary effect were SMEs, surpassing initial expectations.⁴³

A following operational report to the EPO's Select Committee, providing an overview of UPs on 31 August 2024, noted that in the first half of 2024 SMEs 'continued to represent a very large share of UP owners ... accounting for 32.2% of the total'.⁴⁴ The same document shows a 35.8% uptake rate among *all* EU patentees in 2024, with several smaller economies above 50% (eg Latvia 83%, Slovakia 76.5%, Malta 72.7%).⁴⁵

The latest statistics from the EPO's Patent index 2024 indicate that unitary protection was requested for 25.6% of all EPs granted by the EPO in 2024. Furthermore, patentees from Europe had the highest uptake rate, with 36.5% of their EPs transformed into UPs.⁴⁶ According to the accompanying press release, the requests for unitary protection in 2024 increased by 53% compared to 2023, while smaller entities showed even greater interest in the system, with European SMEs and universities having an uptake rate of 57.5%.⁴⁷

Thus, contrary to some earlier predictions based on historical patent protection data,⁴⁸ recent EPO communications indicate that SMEs constitute approximately 35% of all UP requests and convert nearly 60%

of 19 September 2024, where the EPO President observed that only 9% of SMEs in the EU own formal IP rights, such as patents: European Patent Office, 'EPO President Sets Out priorities for SME Support' <www.epo.org/en/news-events/news/epo-president-sets-out-priorities-sme-support> accessed 31 May 2025.

⁴² European Patent Office, 'Unitary Patent Exceeds Projections in Its Inaugural Year: SME Uptake Highlights Key Benefits' (Press release, 1 June 2024) <www.epo.org/en/news-events/press-centre/press-release/2024/1158768> accessed 15 June 2025.

⁴³ cf Xenos, 'Impact of the European Patent System' (n 22) 27.

⁴⁴ European Patent Office, 'Unitary Patent Operational Report' SC/14/24 (September 2024) 7 <<https://link.epo.org/web/documentation/documentation/en-sc-24-14.pdf>> accessed 15 June 2025.

⁴⁵ *ibid* 3.

⁴⁶ According to data on the EPO website, on 3 February 2025, a breakdown of patent applications originating from European countries shows that 71% of them were filed by large companies, 22% by individual inventors and SMEs, and 7% by universities and public research organisations. This indicates a significant proportion of applicants at the EPO are smaller entities. There are no recent data specifically on UP uptake by EU SMEs <www.epo.org/en/about-us/statistics/patent-index-2024> accessed 15 June 2025.

⁴⁷ European Patent Office, 'European Innovation Remains Robust, with Demand for Patents Sustained at a High Level' <www.epo.org/en/news-events/news/european-innovation-remains-robust-demand-patents-sustained-high-level> accessed 15 June 2025.

⁴⁸ See Xenos, 'Impact of the European Patent System' (n 22) 27; and Plomer (n 22) 795.

of their granted EPs into UPs, highlighting the system's early appeal to smaller enterprises.⁴⁹

However, these figures should be interpreted with caution. As indicated by both scholarly commentary⁵⁰ and the joint EPO–EUIPO study published in January 2025,⁵¹ the overall level of patenting activity among EU-based SMEs remains comparatively low. Moreover, an increase in UP requests cannot be taken as evidence of the system's effectiveness, particularly since the practical and jurisprudential contours of the UP/UPC framework are still emerging. These considerations will be examined in greater detail in the following section.

3 UPC litigation dynamics and implications for SMEs

The Unified Patent Court (UPC) is the second pillar of the UPP. It was intended to become the single court for all patent litigations involving UPs and eventually – after the 'opt-out' period⁵² – all EPs. The UPC was created to remedy the fragmentation of patent enforcement under the EPC, whereby EPs must be validated, litigated, and enforced separately in each contracting State, with attendant translation requirements, fees, and parallel proceedings. Recital 2 of the UPC Agreement expressly states how:

the fragmented market for patents and the significant variations between national court systems are detrimental for innovation, in particular for small and medium-sized enterprises which have difficulties

⁴⁹ See Antonio Campinos, 'European Patent Office to Help Secure Europe's Competitive Edge' (sponsored opinion article, *Euractiv*, 13 May 2025) <www.euractiv.com/section/tech/opinion/european-patent-office-to-help-secure-europes-competitive-edge/> accessed 15 June 2025.

⁵⁰ Krista Rantasaari, 'Panorama of the Issues for SMEs and Possible Solutions' in Luc Desaunettes-Barbero, Fernand de Visscher, Alain Strowel, Vincent Cassiers (eds), *The Unitary Patent Package & Unified Patent Court. Problems, Possible Improvements and Alternatives* (Ledizioni 2023) 441-441. Compare also Xenos, 'Impact of the European Patent System' (n 22) 27; Plomer (n 22) 795; Wéry (n 23) 402-404.

⁵¹ European Patent Office and EU Intellectual Property Office (n 37) 12, 14.

⁵² Article 83 UPC Agreement - Transitional regime. During a transitional period that will end on 1 June 2030, patentees who opt for the conventional route of obtaining an EP and validating it as a bundle of national rights may file an opt-out request if they do not wish their granted EP to fall under the jurisdiction of the UPC. It is important to note that this transitional period may be extended by a period of up to seven years. Furthermore, the option to opt-out is not available in circumstances where a UP is requested; rather, it is only possible where the patentee pursues classical national validations of the EP. Following the expiry of the transitional period, existing opt-outs will remain effective; however, it will no longer be possible to file any new opt-outs. All EPs granted thereafter will fall within the jurisdiction of the UPC for those EU Member States that have ratified the UPC Agreement. For those states, direct national filings will be the only means of avoiding the UPC. See eg Wéry (n 23) 404-405.

to enforce their patents and to defend themselves against unfounded claims and claims relating to patents which should be revoked.⁵³

The Agreement goes on to say that:

The Unified Patent Court should be devised to ensure expeditious and high quality decisions, striking a fair balance between the interests of right holders and other parties and taking into account the need for proportionality and flexibility.⁵⁴

The UPC thus introduces a centralised forum, expected to deliver swift enforcement of infringement claims or the central revocation of invalid patents before a specialised judiciary with expertise in patent law.⁵⁵ Whether SMEs will truly benefit from such streamlined litigation mechanism, however, remains a complex question.⁵⁶

At present, the UPC's jurisdiction is confined to UPs and to EPs that have not been opted out. Opted-out EPs, and those validated in non-participating countries, remain under the exclusive jurisdiction of national courts. As a result, the UPC cannot (yet) create full uniformity across the EU, since the validity and infringement of opted-out or external patents must still be litigated nationally, further fragmenting the litigation landscape.⁵⁷

In a nascent tribunal such as the UPC, trust-building is essential.⁵⁸ The very prospect of a single action voiding a patent across all participat-

⁵³ See also Esther van Zimmeren and Federica Baldan, 'The Future Role of the Unified Patent Court in Safeguarding Coherence in the European Patent System' (2015) 52(6) *Common Market Law Review* 1529, 1575.

⁵⁴ Recital 5 of the UPC Agreement.

⁵⁵ See eg Katrin Cremers, Michael Ernicke, Frank Gaessler and others, 'Patent Litigation in Europe' (2017) 44 *European Journal of Law & Economics* 1, 38 and the UPC first annual report: *UPC Annual Report 2024* (PDF, 2025) <www.unified-patent-court.org/sites/default/files/upc_documents/UPC_AR_2024_HD_digital_version_double_page_compressed.pdf> accessed 8 June 2025.

⁵⁶ cf Martin Stierle, 'The Rise of the Unified Patent Court: A New Era' (2023) 54(5) *IIC – International Review of Intellectual Property and Competition Law* 631.

⁵⁷ Wéry observes that true harmonisation depends on two variables: the number of participating countries and the duration of the transitional period. With only 18 Member States in the system, achieving full harmonisation of case law remains unattainable. Even if more States join, patents that have opted out will remain valid for years, which will delay the establishment of a coherent body of UPC jurisprudence — potentially until the 2050s if the transitional period is extended (Wéry (n 23) 407-408). He describes patentees based in non-participating Member States as potential 'free riders', as they can benefit from the advantages of the UP – for instance, by obtaining unitary protection if they wish – while remaining shielded from competitors' UPs within their domestic markets. He argues that this configuration allows such companies to gain market advantages without facing the same patent constraints (*ibid* 405).

⁵⁸ Van Zimmeren and others identify three key challenges to trust: the politicised genesis of the UPC; the opt-out mechanism for 'classic' EPs during the transitional period under

ing States further fuels uncertainty, potentially motivating patentees to adopt a prudent approach and remain within national systems.⁵⁹ Recent commentary has also suggested that the UPC Agreement's procedural framework may structurally favour patentees, yet centralised revocation exposes even rights-holders to comprehensive attack.⁶⁰

According to Article 49 of the UPC Agreement, proceedings before the Central Division (CD) are to be conducted in the language of the patent.⁶¹ In contrast, in actions before a local or regional division (LD or RD), the language of the proceedings may be any of the official languages of the contracting Member State in which the relevant division is hosted, or alternatively, any other language designated by the relevant contracting Member State pursuant to Article 49(2). Furthermore, the parties may agree to use the language in which the patent was granted as the language of the proceedings (Article 49(3)). However, under Article 49(5) of the UPC Agreement, upon a request by one of the parties, and after hearing the other parties and the relevant panel, the President of the Court of First Instance may, 'on grounds of fairness and taking into account all relevant circumstances, including the position of the parties, in particular the position of the defendant', decide to designate the language in which the patent was granted as the language of proceedings.⁶²

The available statistical data indicate a marked trend towards the use of English as the predominant procedural language before the UPC.⁶³

Article 83(3) of the UPC Agreement might be interpreted as a lack of trust in the system; and the complexity of the Court's institutional design, which may raise doubts as to its impartiality and independence. Indeed, under the Rules of Procedure, parties may both opt out of the UPC and choose among divisions of the Court of First Instance, an unusual degree of procedural flexibility liable to encourage forum shopping. While such flexibility benefits individual litigants, widespread reliance on the opt-out – available since 1 March 2023 – may slow the UPC's caseload growth and impede its consolidation as a central forum. Esther van Zimmeren, Bjorn Kleizen and Patricia Popelier, 'Trust in Specialised Courts: The Unified Patent Court (UPC) as a Case Study to Disentangle Trust Dynamics and Trust-Building Mechanisms' (2024) 17(1) *Erasmus Law Review* 93, 97. The authors differentiate trust from legitimacy, while noting their interdependence. They argue that trust precedes legitimacy, particularly in newly established courts. Therefore, trust-building is essential to secure broader legitimacy for the UPC. *ibid.*, 95.

⁵⁹ Arezzo (n 8) 214

⁶⁰ Martina Dani, 'The Bifurcation Challenge at the Unified Patent Court' (2025) 20(1) *Journal of Intellectual Property Law & Practice* 16, 17; Arezzo (n 8) 214.

⁶¹ Article 49(6) of the UPC Agreement.

⁶² According to Article 49(4) of the UPC Agreement, the competent panel may also decide on the use of the language in which the patent was granted as the language of proceedings with the agreement of the parties, on grounds of convenience and fairness.

⁶³ Statistical reports ('Case Load of the Court Since Start of Operation in June 2023') were regularly updated on the UPC website until the end of June 2025, allowing insights in the data concerning languages used in front of the CFI. See eg Unified Patent Court, 'Case Load of the Court Since Start of Operation in June 2023 – Update End March 2024' <www.uni-

Concerning the proceedings in front of the CFI, as of June 2025, English was employed in 54% of cases before the CFI while German was used in 39% of cases.⁶⁴ This is in contrast to the figures reported in March 2024, when German was still the predominant language of proceedings at 47%, while 45% of proceedings were conducted in English.⁶⁵ Given the prevalence of English-language patents at the EPO,⁶⁶ the overwhelming majority of revocation actions filed before the CD are conducted in English (88% in 2024). At present, both German- and English-language proceedings are widely used: according to the 2024 UPC Annual Report, 51% of infringement proceedings are conducted in German, while 41% are conducted in English. It is evident that a significant proportion of the proceedings before the UPC are now conducted in English, with 52% of all cases falling into this category.⁶⁷

A recent decision of the UPC Court of Appeal (UPC CoA) concerning the application of Article 49(5) of the UPC Agreement, and involving an SME, has attracted the attention of practitioners and scholars.⁶⁸ In fact, on 17 April 2024, the UPC CoA issued an order concerning the change of language of proceedings in *Curio Bioscience Inc v 10x Genomics Inc* (Case UPC_CoA_101/2024 ApL_12116/2024).⁶⁹ The UPC CoA found that a 'rel-

unifiedpatentcourt.org/sites/default/files/upc_documents/Case%20load%20of%20the%20Court_end%20March%202024.pdf and www.unifiedpatentcourt.org/sites/default/files/upc_documents/Case%20load%20of%20the%20Court_30%20June%202025.pdf accessed 19 July 2025. Information on the overall use of languages in court proceedings in front of the UPC are available in the UPC Annual Report 2024 (n 55) 80.

⁶⁴ Unified Patent Court, 'Case Load of the Court – Update 29 March 2024' <www.unifiedpatentcourt.org/en/news/case-load-court-update-29-march-2024> accessed 19 July 2025.

⁶⁵ Unified Patent Court, 'Case Load of the Court Since Start of Operation in June 2023 – Update 30 June 2025' <www.unifiedpatentcourt.org/sites/default/files/upc_documents/Case%20load%20of%20the%20Court_30%20June%202025.pdf> accessed 19 July 2025.

⁶⁶ The EPO has made available an online dashboard that provides, inter alia, information on the languages used for UP requests and their corresponding translations. In 2024, English was the procedural language of 75% and language of translation for 25% of the requests: European Patent Office, 'Statistics & Trends Centre' <www.epo.org/en/about-us/statistics/statistics-centre#/unitary-patent> accessed 15 June 2025.

⁶⁷ UPC Annual Report 2024 (n 55) 80.

⁶⁸ See eg Laura Jennings, 'UPC Favours SMEs for Language Change: Claimants Ordered to Sue in the Language of the Granted Patent' (*D Young & Co*, 18 April 2024) <www.dyoung.com/en/knowledgebank/articles/upc-smes-language-change> accessed 14 June 2025; and Pfrang T, 'Court of Appeal Rules on Language of Proceedings: Considering the Challenges Faced by Small and Medium-sized Enterprises (SMEs)' (*Meissner Bolte UPC Blog*, 23 April 2024) <www.meissnerbolte.com/de/upc/upc-blog/court-of-appeal-rules-on-language-of-proceedings/> accessed 14 June 2025.

⁶⁹ The case concerned a request for provisional measures initiated before the Düsseldorf Local Division, where the language of proceedings was German. The patent in question was granted in English. The defendant submitted a request to change the language of the proceedings from German to English, which was subsequently forwarded to the President

evant circumstance related to parties is their size relative to each other' and that '[a] multinational company with a substantial legal department has more resources to deal with and coordinate international disputes in different languages than a small company with limited resources that is only active on a limited number of markets'.⁷⁰ Nevertheless, it stressed that Article 49(5) of the UPC Agreement 'provides that in particular the position of the defendant is to be taken into account. If the outcome of balancing of interests is equal, the position of the defendant is the decisive factor'.⁷¹ Thus, the CoA did observe that it is evident that the defendant is a smaller company than the plaintiff and that the disadvantage of the language of the proceedings being different from their company language would be a heavier burden for the former. The UPC CoA subsequently held that, when assessing a request to change the language of proceedings to that of the patent on grounds of fairness, all relevant circumstances must be considered – primarily those related to the specifics of the case and the parties' respective positions, with particular emphasis on the defendant's situation. If the outcome of the balancing of interests is equal, the position of the defendant is the decisive factor. In particular, the CoA indicated that the language of the patent as the language of proceedings cannot be unfair for the claimant.⁷² Thus, although the CoA did not base its decision on the defendant's status as an SME, it expressly stated that the parties' relative size is a relevant circumstance that should be taken into account when deciding on the change of the language of the proceedings.

The clarifications provided by the CoA of the UPC in the aforementioned order are to be welcomed, namely when it comes to SMEs. The list of criteria to be taken into account when changing the language to that of the patent provides necessary clarity and explicitly refers to the issue of the effects of potential forum shopping on a defendant taken by surprise by an action brought before a division that is remote and in a language they do not master.⁷³

of the Court of First Instance. This request was denied on 26 February 2024. Curio Bioscience lodged an appeal against that decision, which was upheld by the CoA. In its decision, the CoA provided clarification on the interpretation of Article 49(5) UPCA, emphasising that the relevant circumstances must be primarily related to the specific case and the positions of the parties involved. Furthermore, the CoA elucidated what specific considerations are generally not pertinent.

⁷⁰ Para 24.

⁷¹ Para 28.

⁷² Namely, the CoA observed that both companies are based in the United States, that English is the predominant language in the relevant technological field, and that the evidence presented by both parties, particularly the infringement evidence submitted by 10x Genomics and the defensive materials submitted by Curio Bioscience, is primarily in English. These were identified as being of significant importance.

⁷³ Anna Lawrynowicz-Drewek, 'Le droit processuel appliqué au contentieux des brevets à l'aune de la Juridiction unifiée du brevet: quel rôle pour la Cour de justice de l'Union européenne?' (PhD thesis, Université de Strasbourg 2024) 332.

Indeed, the new system's structure may paradoxically create extensive opportunities for forum shopping when initiating legal proceedings against an alleged infringer.⁷⁴ Article 33(1) of the UPC Agreement is particularly flexible from the patentee's perspective. In practice, this broad range of options can be detrimental to alleged infringers, who may, at the patentee's discretion, be sued before any one of several local, regional, or central divisions.⁷⁵ Consequently, should the claimant opt to initiate an infringement action in a division situated geographically distant from the alleged infringer's place of residence or business, the defendant may be obliged to undertake their defence in an unfamiliar country and language, potentially within a remarkably brief procedural timeframe.⁷⁶

By contrast, potential infringers do not enjoy a comparable degree of choice. A revocation action or an action for a declaration of non-infringement must generally be brought before the central division (except where revocation is sought by way of counterclaim). For parties seeking to challenge validity and located outside the two contracting Member States hosting sections of the central division, this requirement may constitute a significant procedural barrier. It seems clear that both claimants and defendants will seek to select a forum that maximises their chances of a favourable outcome, and the choice of division will depend on various factors aligned with the parties' strategic objectives.⁷⁷

Against this backdrop, the CoA's stance on relative party size and the defendant's burden in the *Curio Bioscience* case is particularly relevant for SMEs dealing with a claimant-driven forum and language choices.

Another of the key reform objectives is the UPC's procedural efficiency. The Rules of Procedure aim to ensure that first-instance decisions are made within twelve months of the claim being filed. Although this might compare favourably with the slower pace of national proceedings, such an accelerated timeline could hinder defendants' capacity to prepare ef-

⁷⁴ *ibid.* See also: Rantasaari (50) 455; Marie Liens, Thomas Leconte and Stéphanie Rollin de Chambonas, 'Practitioners' Views on the UPC and the Opt-out' in Luc Desautettes-Barbero, Fernand de Visscher, Alain Strowel, Vincent Cassiers (eds), *The Unitary Patent Package & Unified Patent Court: Problems, Possible Improvements and Alternatives* (Ledizioni 2023) 431.

⁷⁵ According to Article 33(1) of the UPC Agreement, a patent holder may choose to initiate infringement proceedings before: (i) the local or regional division of the contracting Member State where the actual or threatened infringement has occurred or may occur; (ii) the local or regional division of the contracting Member State where the alleged infringer has their residence or principal place of business; or (iii) the central division, if the defendant has no place of business in a contracting Member State or if the relevant contracting Member State has no local division and does not participate in a regional division.

⁷⁶ Liens, Leconte and Rollin de Chambonas (n 74) 432.

⁷⁷ cf Zimmerman and others (n 58) on the impact of such practices on the UPC's consolidation as a central forum.

fective defences.⁷⁸ Representation before the UPC is, in principle, mandatory⁷⁹ and it can be provided either by a lawyer authorised to practise before a court of a contracting Member State,⁸⁰ or by 'European patent attorneys who are entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the EPC and who possess the appropriate qualifications'.⁸¹ In *Suinno Mobile & AI Technologies Licensing Oy v Microsoft Corporation* (UPC_CoA_563/2024), the CoA clarified that in-house attorneys may act as representatives before the UPC. However, a corporate representative with significant administrative or financial authority within the party cannot serve as that party's representative.⁸² This interpretation may (still) have a more adverse effect on SMEs than on larger enterprises.⁸³

While rapid adjudication enhances legal certainty, it may undermine fairness and access to justice, particularly for SMEs and defendants without substantial in-house patent departments.⁸⁴ The UPC's rigorous

⁷⁸ Wéry (n 23) provides a detailed comparison with EPO opposition proceedings, in which parties have longer time limits: nine months to oppose a patent after it has been granted and four to six months to respond. By contrast, a UPC defendant has just three months from receiving the statement of claim to file a counterclaim for revocation, supported by full evidence and argumentation. The patentee then has two months to reply, after which further procedural steps follow at one-month intervals. Given the complexity of claim construction, prior-art searches across multiple jurisdictions, expert analyses and laboratory testing, Wéry deems these deadlines to be extremely tight and resource-intensive (ibid, 409–412).

⁷⁹ The three exceptions to this rule concern appeals against decisions taken by the EPO in the exercise of its administrative tasks, the filing or withdrawal of an 'opt-out' declaration, or applications for legal aid. See Lawryniewicz-Drewek (n 73) 71.

⁸⁰ Art 48(1) of the UPC Agreement.

⁸¹ Art 48(2) of the UPC Agreement. The list of qualified representatives is available on the UPC website: <www.unifiedpatentcourt.org/en/registry/representation/results> accessed 14 June 2025.

⁸² According to para 22 of the UPC CoA order issued on 11 February 2025, 'no corporate representative of a legal person, or any other natural person who has extensive administrative and financial powers within the legal person, – whether as a result of holding a high-level management or administrative position or holding a significant amount of shares in the legal person – may serve as a representative of that legal person, regardless of whether said corporate representative of the legal person or natural person is qualified to act as a UPC representative in accordance with Art 48(1) or (2) UPCA'.

⁸³ In the initial ruling, the court determined that UPC representatives cannot be independent if 'employed or financially dependent on their client or who has, within the represented body, extensive administrative and financial powers'. The case has caused concern among in-house representatives within the patent community, raising also the issue of the particularly harmful impact of such a decision on SMEs, 'who may struggle to afford the costs of outside counsel'. See eg Maura O'Malley, 'IP Bodies Urge UPC to Reconsider Ban on In-house Lawyers Appearing Before It' (*Global Legal Post*, 27 January 2025) <www.globallegalpost.com/news/ip-bodies-urge-upc-to-reconsider-ban-on-in-house-lawyers-appearing-before-it-1488271907> accessed 15 June 2025.

⁸⁴ Wéry (n 23) 412–413.

procedures and demanding qualification criteria for representatives may unintentionally favour large multinational firms, thereby undermining one of its founding objectives: to make patent protection more accessible and efficient for all market participants.

Importantly, SMEs are statistically more likely to be defendants than claimants in patent disputes.⁸⁵ Many SMEs are litigation-averse, yet the jurisdiction of the UPC will increase their exposure to enforcement actions, given that the UPC's procedural features, such as accelerated timelines, flexible language regimes, forum shopping, and the broad scope of its rulings – may encourage claimants, including non-European entities, to pursue litigation.⁸⁶ Arguably, the claimant-friendly nature of proceedings could strain SMEs lacking dedicated legal teams.⁸⁷ Moreover, unlike some national systems, the UPC may require an SME defendant to bear not only its own legal and court costs but also those of the prevailing party.⁸⁸ Meanwhile, legal aid under the UPC is limited to natural persons.⁸⁹ Thus, SMEs that are legal persons cannot obtain legal aid under the UPC framework, and those that lose an infringement action may indeed be liable not only for their own fees but also for a substantial share of their opponent's costs.⁹⁰

For SMEs operating in only one or two jurisdictions, existing national courts may suffice for resolving disputes. Similarly, the EPO opposition procedure may remain a preferred route for challenging patents, as

⁸⁵ See Katrin Cremers and others, 'Patent Litigation in Europe' (2013) ZEW – Centre for European Economic Research Discussion Paper No 13-072, 9–11; Op de Beek and Kaikkonen (n 31).

⁸⁶ Plomer (n 22) 795. Wéry further contends that the predominance of English is likely to enhance accessibility for foreign entities, while at the same time potentially disadvantaging companies originating from smaller European jurisdictions (n 23) 405–406.

⁸⁷ Op de Beek and Kaikkonen (n 31).

⁸⁸ Up to 2,000,000 for cases above 50,000,000. See Decision of the Administrative Committee of 24 April 2023 on the scale of ceilings for recoverable costs (D-AC/10/24042023-E) adopted pursuant to Rule 152(2) UPC Rules of Procedure <www.unified-patent-court.org/sites/default/files/upc_documents/d-ac_10_24042023_ceiling_e_for-publication.pdf> accessed 8 June 2025.

⁸⁹ Rule 71(1) of the UPC Agreement states: 'A party who is a natural person ... may at any time apply for legal aid'. See also the UCP Court of First Instance - Munich Local Division order ORD_4250/2025 of 27 January 2025 (Case UPC_CFI_244/2024 and UPC_CFI_786/2024, Snowpixie Co, Ltd v Golf Tech Golfartikel Vertriebs GmbH).

⁹⁰ Ghidini observes that '[t]he problem of costs is even more relevant as the early experience of litigations before the UPC apparently contradicts the Commission's optimistic assumption with respect to benefits for SMEs (however shielded, by the "protective letter" ex Rule of Procedure 207 of the Agreement, against the risk of issuance of injunctions *inaudita altera parte*). Indeed, the early experience seemingly evidences the UPC as a preferred forum of "multinational" plaintiffs". Gustavo Ghidini, 'Review of European Patent Law: The Unified Patent Court and the European Patent Convention' [Book review] (2025) 74 GRUR Int 302, 303.

it typically incurs lower costs than UPC litigation.⁹¹ Although SMEs are eligible for a 60% reduction in UPC court fees for infringement actions,⁹² litigation before the UPC is nonetheless likely to be costlier than in some national courts.⁹³

It is important to reiterate that the UPC has jurisdiction over EPs as well, unless an opt-out has been filed in due time.⁹⁴ In this context, maintaining an invalid patent risks substantial liability: loss in revocation proceedings entails court and adverse party costs, while the revocation itself may simultaneously affect up to 18 States: competitors – whether or not they hold patents – can, by a single action, challenge a substantial part of a patent portfolio. Consequently, it may be preferable for the patent holder to defer participation in the new system and instead rely on the opt-out safeguard provided by the UPC Agreement.⁹⁵ Larger corporations may mitigate this risk by combining UPs with divisional EPs according to the strength of the underlying inventions,⁹⁶ but such strategies are often financially inaccessible to SMEs.⁹⁷

As observed by some authors, the UP/UPC framework is likely to deliver its greatest value to large (foreign) multinationals – entities capable of internalising multi-jurisdictional litigation risks and deploying sophisticated portfolio-management tactics – while offering comparatively limited benefit to innovative European SMEs, which may face increased exposure to infringement and revocation actions under a novel and com-

⁹¹ Op de Beeck and Kaikkonen (n 31).

⁹² Rule 370(8) of the Rules of Procedure of the Unified Patent Court (Decision of the Administrative Committee of the UPC, 8 July 2022, entered into force 1 September 2022) (UPC Rules of Procedure) <[rop_en_25_july_2022_final_consolidated_published_on_website.pdf](#)> accessed 15 June 2025. According to Art 63 para 3 of the UPC Agreement ‘...The Court fees shall be fixed at such a level as to ensure a right balance between the principle of fair access to justice, in particular for small and medium-sized enterprises, micro-entities, natural persons, non-profit organisations, universities and public research organisations and an adequate contribution of the parties for the costs incurred by the Court, recognising the economic benefits to the parties involved, and the objective of a self-financing Court with balanced finances. The level of the Court fees shall be reviewed periodically by the Administrative Committee. Targeted support measures for small and medium-sized enterprises and micro entities may be considered’.

⁹³ Wéry (n 23); Op de Beeck and Kaikkonen (n 31). See also, for example, Barker Brettell, ‘How Do I Decide Whether to Opt Out of the Unified Patent Court’ <[www.barkerbrettell.co.uk/how-do-i-decide-whether-to-opt-out-of-the-unified-patent-court/](#)> and Mewburn Ellis, ‘The Unitary Patent and the Unified Patent Court Explained’ <[www.mewburn.com/law-practice-library/the-eu-unitary-patent-and-the-unified-patent-court-explained](#)> accessed 8 June 2025.

⁹⁴ cf (n 52).

⁹⁵ Arezzo (n 8) 214.

⁹⁶ cf Arezzo (n 8) 216.

⁹⁷ Op de Beeck and Kaikkonen (n 31).

plex judicial architecture.⁹⁸ The UP's extensive geographical reach increases the likelihood of conflicts that had previously not existed, and a patentee's decision to secure a UP may affect competitors in markets previously deemed irrelevant, prompting revocation actions or oppositions that would not otherwise have arisen.⁹⁹

Finally, as a multinational judicial body, the UPC necessarily synthesises diverse national legal traditions. A case in point is the UPC CoA's recent decision on public access to documents – interpreting Rule 262(1)(b) of the Rules of Procedure more broadly than earlier orders of the Munich Section and departing from established national practices.¹⁰⁰ This ruling marks a significant development in patent-law transparency and may shape future litigant behaviour as the UPC's jurisprudence and institutional credibility continue to evolve.¹⁰¹

The UPC's early caseload vividly illustrates its rapid operationalisation:¹⁰² since the Court of First Instance began work on 1 June 2023, it had registered 883 cases by 31 May 2025, underscoring both its immediate relevance and the volume of disputes directed into the new system.¹⁰³ However, the data published in the UPC's annual report and on its website do not permit the identification of SMEs as parties,¹⁰⁴ nor do they support full-text searching of the case law or provide timely English translations that would allow insights into SME involvement in UPC litigation. Consequently, structural and doctrinal analysis must, for the time being, substitute for robust empirical assessments of SME participation.

⁹⁸ Plomer (n 22) 795. See also Xenos, 'Impact of the European Patent System' (n 22) 27 and Ghidini (90). Furthermore, recent EPO statistics show that large multinationals indeed are among the UP top users (n 46).

⁹⁹ Wéry (n 23); Op de Beeck and Kaikkonen (n 31).

¹⁰⁰ Galeotta, Khuchua and Stierle (n 9) 31.

¹⁰¹ *ibid.*

¹⁰² cf van Zimmeren, Kleizen and Popelier (n 58) 93. See also Mathieu Klos, 'EPO Statistics Show Surge in Unitary Patents' (JUVE Patent, 20 February 2025) <www.juve-patent.com/people-and-business/epo-statistics-show-surge-in-unitary-patents/> accessed 14 June 2025.

¹⁰³ See Unified Patent Court, 'Case Load of the Court Since the Start of Operation in June 2023: Update 31 May 2025' <www.unifiedpatentcourt.org/sites/default/files/upc_documents/Case%20load%20of%20the%20Court_31%20May%202025.pdf> accessed 15 June 2025.

¹⁰⁴ cf Unified Patent Court, Annual Report 2024 <www.unified-patent-court.org/sites/default/files/upc_documents/UPC_AR_2024_HD_digital_version_double_page_compressed.pdf> accessed 8 June 2025. On 12 May 2025, we submitted to the UPC Registry a request for information regarding litigant profiles and the identification of SMEs (or confirmation of the absence thereof). As of the date of submission of this paper, no response has been received.

When considered as a whole, these features indicate that while the UPC's objective is to reduce fragmentation and enhance access to high-quality patent adjudication, its practical implementation is likely to be most beneficial to large corporations that possess the capacity to absorb litigation risk and invest in advanced procedural and portfolio strategies. Conversely, SMEs may encounter heightened exposure to infringement and revocation actions, linguistic and forum-related disadvantages, and shoulder elevated relative costs and risks within the new system.

In light of these heightened risks, SMEs need to strategically evaluate all available alternatives, including the continued filing of national patents.¹⁰⁵ Although national rights may lack the pan-European coverage of a UP, they remain outside the UPC's jurisdiction and afford greater flexibility in tailoring costs and risks to an enterprise's specific market priorities.¹⁰⁶

4 Conclusion

Given the current transitional landscape, the future trajectory of patent strategies in Europe remains uncertain. Organisations are likely to construct layered portfolios, judiciously combining traditional EPs, which result in bundles of national rights, with patents granting unitary effect under the UPP regime. Moreover, a multi-national judicial body like the UPC will inevitably reflect a range of legal and cultural perspectives. Consequently, the institutional novelty of the UPC and the evolving nature of its jurisprudence are expected to give rise to divergent approaches. Risk-averse patentees may thus prefer to opt out of UPC jurisdiction where allowed, thereby avoiding centralised revocation exposure. Conversely, firms possessing robust legal infrastructures and greater financial flexibility might tailor their strategies, leveraging both UPC and EP routes according to invention strength, desired territorial scope, and risk tolerance.

The increasing adoption of unitary patents by SMEs, as evidenced by recent EPO statistics, will almost certainly be accompanied by a corresponding increase in infringement and revocation proceedings before the UPC in the future. While the UP/UPC framework presents considerable strategic opportunities for innovative SMEs, it also brings a series of unprecedented procedural, financial, and legal challenges. SMEs should

¹⁰⁵ See Daniel Borgogni, 'The Doctrine of Equivalents at the Unified Patent Court: A Comparative Analysis of the Main EPC Jurisdictions and a Shot at Harmonization' (2025) 74(4) GRUR International 331, 339; Arezzo (n 8) 216.

¹⁰⁶ Arezzo (n 8) 216.

therefore undertake a thorough appraisal of all available options and adjust both their IP-filing strategies and their dispute-readiness to thrive in this transformed European patent landscape.

Ultimately, the attractiveness of the UPC/UPP system for any given SME will depend on a number of factors, most notably the composition and maturity of its patent portfolio, its risk tolerance and resource base, and the extent to which future case law and trust in this nascent judicial system solidify. At present, with jurisprudence still in its emerging phase, it remains too early to draw definitive conclusions.



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