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### 2A Patent Law Session. Unified Patent Court

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Session 2A

**Emily C. & John E. Hansen Intellectual Property Institute**

**TWENTY-NINTH ANNUAL CONFERENCE  
INTERNATIONAL INTELLECTUAL PROPERTY  
LAW & POLICY**

*Thursday, April 21, 2022 – 11:25 a.m.*

**SESSION 2: Patent Law  
2A. Unified Patent Court**

*Moderator:*

**Anne-Charlotte Le Bihan**  
*Bird & Bird, Paris*

*Speakers:*

**Klaus Grabinski**  
Federal Court of Justice, Karlsruhe  
*Update on Unified Patent Court*

**Aloys Hüttermann**  
Michalski, Hüttermann & Partner, Düsseldorf  
*Keeping the Cake and Eating It When Opting out at the UPC? – The  
Hüttermann-Gambit*

*Panelists:*

**Myles Jelf**  
Bristows LLP, London

**Miquel Montaña**  
Clifford Chance LLP, Barcelona

**Edger F. Brinkman**  
Court of the Hague

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KLAUS GRABINSKI: It's a pleasure again being here with Fordham, and the topic of today is The UPC is Coming, but what the heck is the UPC? Well, the UPC is a court common to the Contracting EU Member States. That's going to be at the entry into force of the UPC Agreement, at least 17 Contracting Member States, 16 that have already ratified the agreement, and Germany, which still has to ratify and which ratification is necessary for the agreement to come into force.

As such, the UPC is subject to the same obligations under EU law as any national court of the Contracting Member State. In particular, the UPC has to base its decision on EU law, where it applies, and to make referrals to the European Court of Justice to ensure the correct and uniform application of the EU law. Within the EU court system, the role of the UPC is exactly that of a national court, the only difference is that it is not the court of one member state, but the court of a number of member states.

What falls under the jurisdiction of the UPC? Actions for infringement and counterclaims for revocation, preliminary measures, declaration of non-infringement, revocations, and some other actions concerning European patents, the good old bundle patents, provided they have not been opted out. If they have been opted out they fall under the jurisdiction of national courts as we are used to have it right now. Secondly, also European patents with unitary effects which is the so-called unitary patents. Thirdly, supplementary protection certificates.

The UPC has exclusive jurisdiction on all these matters, but there's one exception during the transitional period, which will take at least seven years after the date of the entry into force of the UPCA, actions concerning European patents, so the bundle patents, and follow up SPCs that have not been opted out can be brought alternatively to a national court of a Contracting Member State. To make it clear, unitary patents always fall exclusively under the jurisdiction of the UPC, so you never can bring a unitary patent case before a national court.

What are European patents with unitary effect? Unitary patents, they confer on its proprietor the right to prevent any third party from infringing the patents throughout the territories of all Contracting Member States at the date of the registration of unitary protection, so what matters is the date of the registration.

When at the date, it is 17 member states that are Contracting Member States, so this territorial scope of that unitary patent will cover these 17 states, and if at a later point of time, an 18th state ratifies the agreement, it will still only be given unitary protection with regard to the 17 states.

The scope of the unitary patent and its limitations are uniform in all Contracting Member States, a unitary patent will be less expensive as to renewal fees than a European patent validated and maintained in four Contracting Member States.

The request for a unitary patent must be filed no later than one month after the date of publication of the mention of the grant in the European Patent Bulletin, which means after the publication of the European patent, the applicant or the patent owner has one month's time to ask for unitary protection. If they do not ask for it, then they will have a bundle patent as we already have it for many years.

Why did it take so long for the UPC to come? Well, there are two main reasons for it. The one is the back and forth of the UK. You remember we had the Brexit referendum in 2016? Two years later, the UK ratified the UPC agreement, and again two years later they withdrew the ratification, and the second reason for it is the long duration of the constitutional complaint before the German Federal Constitutional Court against the first German Approval Act for the ratification of the UPC.

It took the court almost three years to find that it would have taken a majority of 2/3 of the Members of the Bundestag, one of the two houses of parliament in Germany, to adopt the legislation because it is conferring sovereign power on the UPC and it was just a simple majority. German legislator had to make a second attempt, but on the second run, it was successful. The second Approval Act passed in both houses of parliament, and there again, a constitutional complaint was filed, but at least with regard to the preliminary proceeding, it was without success, so the president signed the act, and it is now ready for being posted for ratification.

Are the UPC and the unitary patent now bulletproof? Well, we had the opinion, one of 2009, in which the European Court of Justice had a look at the UPC agreement, the draft agreement of those days, and it raised objections only with regard to the question of the binding authority of the European Court of Justice in the interpretation of EU law, but this has now been addressed in the agreement.

We had two complaints from Spain and one from Italy that were raising issues with regard to the unitary patent, but these two actions were dismissed by the European Court of Justice. We had as mentioned, the constitutional complaints, or two constitutional complaints before the German Federal Court of Justice, but with regard to the last complaint, the court found that the constitutional complaint did not sufficiently substantiate that ratifying the UPC could result in a violation of the German Constitution. At least to that extent the agreement is bulletproof.

How far have the preparation progressed and when is the UPC expected to become operational?

Well, early this year, exactly on the 19th January of 2022, the Protocol on the Provisional Application of some institutional, organizational and financial provisions of the UPCA came into force. So that means that the UPC as an institution, is already existing, it's there. It's not a court yet, but it's there as an institution, and the governing body of this institution is the Administrative Committee, and in its first meeting they confirmed that there are going to be 13 local divisions and one regional division apart from the central division.

We already had the first meeting of the Budget Committee, so they adopted the court's budget for the purpose of the preparatory application period, and that's currently work going on with regards to the IT system and the Case Management System, and the new website, but this is likely to be finalized in two months. Depending on the progress of the preparatory work, the UPC is expected to become operational end of this year or early of next year.

So here, you see a map, where you see in the black countries that-- These are the countries that already ratified the agreement, and the blue

countries, these are the member states that signed the agreement but did not yet ratify the agreement.

Who are going to be the judges? Well, let me remember, the judges will be either legally or technically qualified, which technically qualified judges is a rare thing to be found around the world, but the UPC will have also technically qualified judges. Well, the Advisory Committee which is a committee of judges and practitioners, independent from the Contracting Member States that send them, they are currently having interviews with candidate judges, and when they are finished for the interviews, they will establish a list of the most suitable candidates to be appointed as judges for the court.

That list then will go to the Administrative Committee, which are the representatives of the Contracting Member States. They will appoint the judges on the basis of the list and they will take into consideration essentially two criteria. The one is the best legal and technical expertise and the second one is the balanced composition of the court on as broad a geographical basis as possible among nationals of the Contracting Member States.

My expectation is that most of the judges will be experienced in patent matters, but there will also be some concerning this geographical criteria that will be rather new in the field of patent matters. So you will see some well-known faces, but you will also see some new faces.

Who is entitled to represent parties? Of course, lawyers authorized to practice before a court of a Contracting Member State, but also patent attorneys who on the one hand are entitled to act as professional representatives before the EPO, and also have appropriate qualification such as the European Patent Litigation Certificate.

What will the procedure be? I could spend probably a day explaining all the details of the procedure, but to make it short, the proceeding will essentially be a front-loading written procedure, in which all facts and evidence relied on, have to be submitted. It will not be good enough to have skeleton arguments.

That written procedure will most of the time be followed by an interim procedure and the main purpose of the interim procedure is to prepare the oral procedure. For example, arranging for taking evidence, or already taking evidence, with the aim that the oral procedure should at least in a standard case take no longer than one day. The oral procedure will take place before the whole panel which will be two or three legally qualified judges and one technically qualified judge in first instance.

If you have any questions on this, please ask, at a later point of time, I will be happy to answer this, but I want to leave it there for saving time.

That gets me to the next slide and to the final question. What about fees and costs? What about money? The first, the court fees, well parties to proceedings will have to pay court fees. The court fees are fixed fees, but with regard to some actions and in particular an infringement action, a fee based on the value of litigation, as determined by the court after having heard the parties will be added.

Small and middle-size companies may ask for a reduction of that fee and reimbursements may apply under certain circumstances. If the court will not have to decide the case or the workload on the court is lower because the

case has been settled in between or the claim has been withdrawn, then that may be a reason for a reimbursement.

Unlike in the US different from US, the UPC, like any other court in the European Union will have a cost-shifting system, which means the reasonable and proportionate legal cost and other expenses incurred for the successful party shall be borne by the unsuccessful party unless equity requires otherwise up to a ceiling set in the course of the rules of procedures. There's always a ceiling depending on the value of litigation of the particular case as determined by the court.

To make it a little bit more concrete for you. I have an example, just assume a case, infringement case, and the value of litigation is determined by the court €1,000,000. then the court fee will be €15,000, which is pretty cheap compared to the court fees you have to pay in Germany, but probably quite expensive compared to court fees in other countries like France or Spain.

And the second aspect, the ceiling of recovery of costs in that case, it will be up to €112,000 which means it doesn't have to be €112,000, it's up to €112,000. When we talk about an infringement case with the value of litigation of €10 million, court fees will be €76,000 and the ceiling will up to €800,000.

That gets me to my final slide. Here you see, a couple of nice pictures from court buildings, as you can find it also on the website of the UPC, and that shows you future, court buildings where you can bring your case. The first one is Stockholm. The second one is Manheim. The third one is Dusseldorf. There you see Paris, the Court of Appeal in Luxemburg, and the local court in Milano. Thank you very much for your attention.

ANNE-CHARLOTTE DE BIHAN: Thank you very much, Klaus. I am absolutely sorry for the technical issues that we've been facing. I was an attendee and not able to jump in as a speaker. Sorry about that. I had a few words of introduction, but I'll still say them because they're worth it.

It's an honor to be moderating this panel for various reasons, but the most important one is that the UPC, as you understood from Klaus's presentation is a revolution for whoever is active on the patent field in Europe. We've been waiting for it for so long, and I don't know how many presentations we've all given on the UPC over the past 10 years, but I think we're all happy to say that it is happening. It's quite exciting to be here today.

And we've got a most impressive panel. I didn't even have time to introduce each of you. You don't need to be introduced Klaus Grabinski from the Federal Court of Justice in Germany, Aloys Hüttermann from Hüttermann & Partner, Myles Jeff from Bristows in London, Miquel Montaña from Clifford Chance in Spain and last but not least, Edger Brinkman from the Court of the Hague.

You may have noticed that we have two unusual suspects on our panel today, namely Myles and Miquel. Myles is from the UK and Miquel is from Spain. Why would I call them unusual suspects on a European panel? Well, the UK sadly decided to leave the EU a few years ago and is no longer an EU member state nor an UPC member state.

Spain, luckily is still an EU member states, but has decided not to be part of the UPC. Yet Myles and Miquel do deserve their place on our panel for the first reason is that they know so much about the UPC that it would be a

real pity not to benefit from their knowledge, but more seriously and more importantly, you've understood that the UK is out of the EU, out of the UPC, but still part of the EP system, Spain is in the EU, out of the UPC, and in the EP system. You can easily understand that those country specificities will play an important and massive role in the patent litigation strategies that will need to be set up in the years to come.

Yes, Miquel and Myles do deserve their place on their panel and we're really happy to have them, so thanks a lot Klaus for having reminded and refreshed our memories as to what this is all about and given us an update of where we stand.

I'd like to give the floor to a lawyer with no further ado so that he can share with us his secret weapon that he has built, the so-called Hüttermann Gambits. Aloys you've got the floor. Thank you very much.

ALOYS HÜTTERMAN: Thank you. Yes. It's an honor, being at the court again, and just one technical, let's say, note. I'm not in my office, actually. I'm in Spain because on Tuesday I turned 50, so I decided to be on vacation and you see how much I love the Fordham so that I'm actually in a hotel room in Sevilla right now, but should the internet connection be bad, tell me immediately so I will click off the video so that hopefully then gets better.

Thank you, Klaus, for the, let's say explanation of the fundamentals. I will just tell a little story or maybe a little joke, but maybe to explain what you can do with the UPC if you do it right. This is about the opt-out.

Basically, the idea about the opt-out is that you have to decide, do you want the UPC with a given patent or do you want the national court still. So this is written in article 83(3), which says, "Unless an action has already been brought before a Court, a proprietor or an applicant for a European patent can opt out".

Is that really so, that you have to choose? I mean, can you keep the cake and eat it? I think it is possible to some extent to keep the cake and eat it, why do I think so? Let's take a look at the wording of Article 83(3) in French and German, which are also equally binding. I will not read them to you, especially because my French is so bad, but here it is important that the words that are used in German and French are "action" in French, which is the same as action in English, and in German its "Klage".

This is important in my opinion, because a request for a preliminary injunction is not a "Klage", and I think it's also not an action, and not an 'action'. Especially if you if you take a look at the German wording, I think it's pretty clear a request for a preliminary injunction is not a "Klage". This also comes clear and apparent from other articles of the UPC and also from the set of rules.

If you take a look at Article 62, which is about preliminary injunctions, it says that the court may issue an order, in German, it's "Anordnung". I did not look up the French term, I'm sorry, for preliminary injunction, and that's not a decision, "Urteil" in German.

Also, if you take a look at the rules, Rule 12 is the basic rule for lodging a statement, which means that you go to the court and file an infringement suit, but in Rule 205, this is an application, you apply for a preliminary injunction, and that's not the same.

Especially interesting is Rule 213, which is in line with German law, which gives the defendant, so if you have a preliminary injunction filed against you and you lost, then you are able to force the plaintiff or the applicant actually, to be more precise, into beginning proceedings upon the merits, otherwise, the injunction is lifted.

From all that, it follows that there's a clear distinction between preliminary measures and actions, "actions", "Klage". In my opinion, it should be possible to test out the UPC and later opt out. Its called the Hüttermann-Gambit. I should stress this is not my term, it's actually a pretty old one because I first described it in my book in 2016, and actually I first gave a presentation about this in 2017, where Klaus was also there. Klaus might remember. It was used by Judge Schacht in a presentation last year, so I decided, okay now that's in the world, you can use it.

How does it work? If you see an infringement, you don't go for a full infringement action at the UPC, you file a request for a preliminary injunction instead. Of course, you have to request, or you should request that the other party is not heard, which is a possible according to rule 206.3. Then there are two options.

The first one is the court gives you the injunction then you already have one, the other party must stop. Of course, they can then force you to full proceedings but what you want is to get an injunction and you've already got that injunction so that's good for you.

If the court denies the injunction, then you can withdraw it and under rule 209.4, it's possible that you withdraw it and also request confidentiality, which means that the other party never ever heard that you requested this injunction and then you can read what the court wrote you in their decision.

If you're not happy then you can opt-out because you have not started a "Klage" yet or an action, all you did was preliminary so you can still opt out then, which means that you can, at least to some extent, have the cake and eat it.

Well, does that really work, and what are the dangers? The first danger is that of course the court itself may, if you then file a national lawsuit and it comes out that you have filed a request for preliminary injunction before, then the court can say "no, that's already a 'Klage', an action in the sense of Article 83(3) because in Article 32 there is a wording which says that the court has the competence for action for preliminary injunction. But, in my opinion, Article 62 is pretty clear so you could refer to that. That's the legal danger.

There's also practical danger, and this is from my everyday experience, if some of my clients have a preliminary injunction filed against them then, cut it short, they're pretty angry. It could be that from a psychological point of view, it could be that you don't want to use this trick and not in order to cause too much damage. Or you have to tell the other party that you didn't intend to be so rude, it was more because of tactical measures that you went for a preliminary injunction instead of an infringement suit.

What you should not do is, of course, preemptively file an opt-out, because if you have filed an opt-out then you cannot use the gambit anymore because then you are prevented from filing an application for a preliminary injunction in the first place. In, let's say, the strategical deliberations and considerations, whether you want to opt out or not, this could be another piece

in the strategic puzzle. If you want to have the option to go for the gambit then it might be a good idea that you don't file an opt-out, at least not right now. That's what it is. Thanks very much for your attention.

ANNE-CHARLOTTE DE BIHAN: Thank you very much Aloys, I'm sure you've given thought for many of us and many of the audience. We are sharp on time, and I wanted to thank you both for not having to be rude to both of you, and to have to stop you in your presentations. We are sharp on time for our panel discussion, and I'll jump right into it if you agree.

I'd like to start with a somewhat polemical question. We heard from Klaus earlier today that the UPC is on its rail and it's happening, but I have heard, and others have heard, from very smart international public law professors and practitioners that possibly the UPC would not be so bulletproof after Brexit has taken place.

I'll turn to Miquel, because I know that Miquel has his own words to say about it, and that possibly we'll read something from Miquel today. Miquel, can we have your thought before your paper comes out?

MIQUEL MONTAÑA: Thank you Anne-Charlotte and first of all, I would like to congratulate Klaus and Aloys for their very clear presentations.

As you know, after Brexit, the UPC project is facing some challenges and I would like to mention on four. The first one is that Article 3 of the Protocol of Provisional Application, as you all know requires the ratification of the UK, Germany and France for the PPA to come into force and for obvious reasons that the UK has not ratified.

The second problem is that Article 18 of the Protocol on Privileges and Immunities also requires ratification of the UK, France, and Germany and for obvious reasons, the UK has not ratified either. Article 89 of the UPC Agreement requires the ratification of the three countries where a higher number of European partners were in force the year prior to the signature of the agreement, which was in 2012. The Preparatory Committee is interpreting Article 89 to mean that after Brexit, it mentions France, Germany, and Italy which is the country where more European patents were in force after the UK.

The fourth challenge that in my opinion, the UPC is facing from the perspective of public international law, is that as you all know, according to Article 7.2 of the UPC Agreement, the central division should have a seat in London and as we all know that seat will not be there.

In this panel, I will focus on the first point, if you are interested in the other points today, I will publish a blog at the Clover, a patent blog, so you may wish to read that blog. In relation to the first point, from the perspective of public international law circles, there is some skepticism regarding whether things changed on 19 January 2022 after Austria ratified, the reason being that Article 3 of the PPA required the ratification of the UK and, as I said, the UK has not ratified for reasons that we all know.

This is a very serious legal problem that the Preparatory Committee first tried to address by announcing -- This was announced in their meeting of 27th October 2021, they announced that they would prepare a declaration of the representatives of the signatory states, making a so-called authentic interpretation of Article 3, whereby Article 3 of the PPA which, as I said, requires the ratification of the UK, Germany, and France, would mirror Article

89 of the UPC Agreement which does not explicitly mention those three countries.

The idea is that this authentic interpretation, so to speak, would cause Article 3 of the PPA to say Italy, Germany, and France instead of in the UK, Germany, and France. In my opinion, this interpretation from the perspective of public international law raises two serious legal problems and one very serious legal/democracy problem.

The first legal issue is that according to international law, a treaty may not be interpreted if the position at hand does not need interpretation. This was already highlighted by the Permanent Court of International Justice in the Opinion on the Competence of the International Labor Organization to regulate agricultural labor 100 years ago, where the court highlighted that if there were any ambiguity the court might, for the purpose of arriving at determining, consider the action which has been taken under the treaty.

In other words, there must be an ambiguity in the first place, and in my opinion, in Article 3 of the PPA, there is no ambiguity at all. It says that the PPA must be ratified by the UK, Germany, and France end of story, there is nothing to interpret.

Second, the legal/democracy problem is that, according to the recitals of the PPA itself, the signature of the PPA must be approved by national parliaments. As you know, the way national parliaments control foreign policy in modern democracies is by requiring the approval of international treaties by national parliaments.

From a perspective of public international law, the proposal that the representatives of the member states may sign an interpretative declaration in a coffee break of a corrector meeting, amending what their parliaments allowed them to ratify would not rank very highly in the handbooks of European democracy.

The final legal point is that according to Article 31 of the Vienna Convention on the Law of Treaties, that is the article that enshrines the so-called golden rule of interpretation of international treaties, you may use subsequent treaties to interpret a previous treaty.

You could use, for example, Article 3 of the PPA and Article 16 of the Protocol of Privileges and Immunities to interpret Article 89 of the UPC Agreement but not the other way round because as you all know, the UPC Agreement was signed previously in 2013.

So in a nutshell, these are the reasons why I do not share this, Aloys, the spirit that the Preparatory Committee has instilled within the patent community.

ANNE-CHARLOTTE DE BIHAN: Thank you very much, Miquel. Would anybody want to give the other thesis and possibly refer to the Vienna Convention Article 31.1(b) which would refer to the member states' behavior or that's now been thrown out of the way but--

MYLES JEFF: Should I, I'm sorry--

ANNE-CHARLOTTE DE BIHAN: Yes, please.

MYLES JEFF: I don't spend a lot of my practice deep in the depths of the Vienna Convention, I have to say, but just listening to Miquel obviously, it's an important point because if the court doesn't actually exist, that's a thing that would be unfortunate.

One can see that once the German constitutional challenge and all the delays that Klaus talked about had been swept out of the way there was an understandable desire by everyone, all of us who've been waiting for so long for this court to come into being, to want to avoid the further inevitable delays that would have been if one had started to amend and to renegotiate the UPCA itself.

One can see why there's a natural suspicion that the positive evaluations that Miquel mentioned, that in fact, there's no need to go into that exercise may have been influenced or driven to some extent by that desire to bring the court to fruition after such a long wait.

As you say, there is an argument that one's heard but in relation to this that the Vienna Convention contemplates a set of circumstances where the precise wording of a convention is no longer capable of being put into action because of supervening events. Then one can look to the intentions of the original parties to try and give meaning to what's otherwise an impossible situation.

I think that has been part of the evaluations have said, "Well, in actual fact, we can interpret what was really meant by the people who originally signed up to this agreement, who were still part of it," as to mean that the lack of the UK is not fatal to the exercise.

The final point I was just going to make is, I'm not sure how this point comes out to play in practice though. It's a very interesting point and as I say, it's an important one but one can see that a losing defendant, in the early stages of the court may want to say, "Well look, in actual fact you have no jurisdiction over me to grant this order," because you really you probably need to bring that in your first instance case as some jurisdiction challenge but say that case has been brought, it's difficult to see either a first instance division or the court of appeal, concluding that they effectively don't exist.

ANNE-CHARLOTTE DE BIHAN: Exactly.

MYLES JEFF: In fact, there's an interesting philosophical question as to if a court doesn't exist, does it have the power to decide that it doesn't exist? In practical terms, if you've got to the point of there being a decision and relief given, and an injunction granted, it seems unlikely that this is all going to play out in some way, and it's hard to see what forum it would play out as well because this isn't really a question of European law, so it's not something that can necessarily be taken from the court or appear on to the CJEU. While it's an important and interesting point, in practical terms, I'm not sure how it will come to be evaluated by the court in its early days.

ANNE-CHARLOTTE DE BIHAN: Thanks a lot Myles. I think this brings us to the second topic that I want us to address altogether. Let's hope that everything goes well, the UPC comes in place. I think it's time to ask ourselves, who the UPC is going to benefit after all? We've seen some patentees expressing some worries that their patents could be subject to a central attack and seeing the UPC as the devil and on the other hand, we've seen patentees saying the UPC as an El Dorado, "Oh, wonderful, I have another tool in my toolbox." I'm wondering what the right vision is. If I may turn to Klaus to have his view on this?

KLAUS GRABINSKI: I think the UPC is only a good court if it is not leaning to one side. It should be fair, of course, to both sides, to the claimant

side, and to the defendant side. I think it is taking into care the different positions in different regards. When you see that both parties, like in the national courts, they have the opportunity to be heard, bring the case to be heard, these fundamental rights are taken into consideration. There are also ways to take into consideration different economic situations. There are ways for small and middle-size companies, for example, to get reductions with regard to fees.

Economically, it's an open court, it's accessible to everyone and if they do not have the money, then there are ways to find out of it. Of course, it has to be proven that in case there is no sufficient money there, that would allow the party to bring the case or to defend itself on both sides. I think you can't say that it's in favor of the one side or on the patentee side or on the implementers' side. It is equally balanced.

ANNE-CHARLOTTE DE BIHAN: Thank you, Klaus. Let me turn to you, Edger because there's two things. It seems to be a balanced court and I heard you say, also that the patentee, the implementers and then there's the SMEs and the big companies. I heard you say and this is true that from the outset, from I remember when everything started, there was a real concern that the UPC would be a solution for SMEs to actually do patent litigation because it was practically impossible for them to litigate in 15 countries. Edger, what is your view on this? Have we achieved that goal because we hear and we read sometimes that the UPC, it might be a wrong idea, but would be a rich man's club 17. What's your view on this?

EDGER F. BRINKMAN: That is a little bit hard for me to answer as a question as being a judge, of course. I just want to, before I go on to your question, one thing popped in my mind when Myles was talking about when will this point that Miguel made come to the court to be decided? I was thinking that you could envisage, for instance, if there's a preliminary measure requested ex-parte, that the court ex-official has to check whether it's actually competent to hear that claim. It might come in there because there's no other party putting up the point, then it might be the court to take a look at it. That's just off the top of my head, something that sprang to mind.

On your question, I think it's both sides. It may be relatively expensive if you're only going to be litigating in, for instance, one or two countries. On the other hand, if you want to, even as a small inventor, want to have across Europe, a Pan- European injunction, if it's not possible to come to Holland, as you know, we sometimes entertain these cross European injunctions but supposing that that's not a possibility in your case, I suppose this can be a very cheap solution, actually. There are also possibilities for SMEs to even ask, for instance, if their livelihood will be coming into place to ask for reduction of the ceilings that Klaus just talked about. There are things and places that can make the pills are more easily swallowed by SMEs.

ANNE-CHARLOTTE DE BIHAN: Miquel, in one minute, do you want to take the opposite approach because I know that you have some concerns that the UPC would not be suitable for SMEs? Am I correct? Express some concerns, right?

MIQUEL MONTAÑA: From the perspective of Spanish litigation, obviously, it depends on from where you look at the UPC, right? If you look at the UPC from the UK, you would probably feel that it's just going to be cheap

but if you look at the UPC from the Spanish perspective, where court fees are peanuts, and the legal fees that may be reimbursed by one side to the other side, it's also peanuts, it will be a pretty expensive venue. Some people complain that patent litigation is not only about big multinationals, but also about this guy who has a little garage in the corner, and who perhaps, is using a machine that may infringe third party's rights. That guy might be a defendant as well, so this is where these concerns arise but we will see.

ANNE-CHARLOTTE DE BIHAN: Thanks a lot. Let's see what'll happen. As a matter of fact, we'll switch to another topic because before we see what happens, we need people to use the system. To have people to use the system, people need to have confidence in the system. To have confidence in the system, one topic that we have thought of is actually access to court decision and transparency in the court decision. Actually, this also addresses a question that came into the Q&A because we've heard recently a debate as to whether UPC court decisions should actually be publicized or not. I know that for the time being, nothing has come up yet as a tangible solution to that set of rules of proceedings.

But my understanding is that the German and the UK systems are in extremes, one being totally transparent, and do correct me if I'm wrong Myles, but you can even have access to court filings and exhibits and everything in your court docket, whereas the German system, which is not known as being an inefficient system, is way less transparent. I'd very much like to have your views, Myles, Klaus, and Aloys as to whether you think that there'll be a good option to limit the publicity or the access to the court's decision, or whether you think would be key, so that people can get confidence in the system and use it as quickly as possible.

MYLES JEFF: I'll start and then Klaus can set me straight. [laughs]

ANNE-CHARLOTTE DE BIHAN: Because Aloys has raised his hand as well.

ALOYS HÜTTERMAN: I had raised my hand for the previous point.

ANNE-CHARLOTTE DE BIHAN: Sorry I didn't see that.

ALOYS HÜTTERMAN: No, I was kidding.

MYLES JEFF: As you say, Anne-Charlotte, we're in slight flux at the moment. The last draft, the 18th draft of the rules of procedure that we've had for a number of years, in essence, has a quite a UK-like completely open, transparent system. There is access to everything on the court file decisions and orders unless something was confidential. If it's confidential, you could make an application as opposed to filing it to say, "This can't be seen unless a request is made and justified."

Because of the advent since I think those rules were created of the GDPR in Europe, there's a concern that maybe that's too open, there could be issues of being able to see everything on the file without scrutiny could cause problems. There are various different proposals, and I'm not sure that they're yet public, but if there's an awareness that are being discussed, and I think the original proposal that was being considered might be that there would only be access to anything with a reasoned request, and that might even include the decisions even the final decisions of the court. There would need to be a reason request made to the judge and he would have to consult with the parties and decide whether it was appropriate to have that material provided. I think

positioners, a number of parties are very concerned about that. I know, EPLO and others, the APB have written to the administrative committee saying that that doesn't seem very helpful both in terms of conceptual terms of this being a public body, exercising public authority, but more immediately in terms of the court having a rapid and successful uptake.

The easier it is to see what's being filed, what's being accepted, what's being rejected by the courts, then the faster practitioners and defendants, and claimants will be able to successfully navigate these new rules and procedures. I think the position is perhaps softening so there is an acceptance that decisions at least should be automatically public, although it's not at the moment clear whether that would be final decisions, only or they would also include interim procedural decisions. But the access to the files, the pleadings, the filings would fall under this new reason to request regime.

I think, at the moment, as I understand it, decisions haven't been taken, soundings are being taken that the matter is somewhat in flux. I think that's where we stand and I think there are a number of people who feel certainly from a UK perspective, that more transparency is better, but others from different traditions, as you say, courts operate very successfully without having that full transparency. Maybe some compromise is needed. I think that's where we stand, maybe hand back to Klaus.

KLAUS GRABINSKI: Yes, I think there can be no doubt that the decisions of the court have to be accessible to the public. That's the standard we have in Europe, and this is going to be the standard also for the UPC. I think the amendments that are now discussed to what you referred, Myles, as the draft we had on the table for about three years, and now we have suggestions for amendments of this draft is more about taking into consideration that in between, we also got the data protection regulation. It is also known that the European Court of Justice, all EU courts are committed to the data protection regulation. That also, decisions from these courts have to be in line with the data protection regulation.

I think it's only about this, that it has to be sure that also decisions from the UPC are in line with the data protection and regulation to make this sure. It is not about whether to make decisions accessible to the public, yes or no. As you can see, when you look at all decisions from the European code of justice, you have the full plain names. When you now look at decisions and you no longer have the names of private parties, they are a black card. Probably the same will be the case with the UPC, but it is not about the decision itself, of course not.

ANNE-CHARLOTTE DE BIHAN: Thank you very much. We are running out of time and there's one topic that I like to address before we have to end everything. We've heard that different sectors see the UPC differently. Not to name them, but let's say that the pharma industry seems to be more skeptical than the tech industry. We've heard some say, "Oh, I'll take a wait-and-see approach, and I'll opt my entire portfolio out and look what's happening." Others have said, "Oh, I'll have a tailor-made approach. Patent-per-patent and I'll put some in some out." Edger, I know that you may have your views as to what-- I mean, I'll be very straightforward. Is it a good strategy to opt for your entire portfolio out? [chuckles]

EDGER F. BRINKMAN: It depends on which portfolio you are talking about. If it would be a friend portfolio, or a separate portfolio, I can imagine, please put in some of them in the basket, and opt them in, so that you can test these new courts to see what they think, what is a reasonable friend rate, with a little bit more international standing perhaps than, just going to the national court. I think that would be an ideal test case to go to and see also how they, for instance, go and treat transparency. Whether you have to submit comparable licenses and so on and so forth. That's going to be very interesting, I think in this court.

I have heard that for instance, pharma might go like the cat in the tree. They will first take a look and see how things go, but even there, you could envisage one divisional in one divisional out, and so forth. I think it's wise to have an option, have an idea whether the court is going to be, also for your sector, an addition and a valuable addition at that.

ANNE-CHARLOTTE DE BIHAN: Don't you think it would be dangerous for patentees just to decide on which patents putting in, of which patents putting out. Does it give us a signal to the market as to which patents I can consider as strong, and the other ones as less strong? Possibly that is something that would need to be considered. Before we close, let me jump to the tech industry because Myles, I know that you have your thoughts on this. We've seen that some have said openly that they wanted to be the first ones and they wanted to have the first case on the UPC. Why do they see the UPC as a new El Dorado for possibly a front debate and whether the UPC will actually have jurisdiction to hear for a front debate? That's an open question to me for the time being.

MYLES JEFF: Yes, absolutely. I think the tech community, those on the patentee side have been not shy about saying, well, "This could be great thing for us. It's efficient. We can deal with a lot of countries in one hit, and that's going to be a very powerful level in our negotiations and discussions with implementers." From the implementer side, it's the other side of that coin. It's interesting to see whether the existence of the UPC and its availability to patent holders will alter the fundamental balance of power between those two communities. As you say, Anne-Charlotte, it's very interesting to look forward and see how the new court will deal with this particular difficulty in SEP standard-essential-patent FRAND cases.

There's a very narrowly controlled set of things, the court is allowed to do under article 32. It is said under 32-1A that in deciding patent infringement issues, it's expressly said, it can look at, license-based defenses and counteracts. That's the root in for the courts to look at the FRAND aspect of the claim. Given the nature of the procedure, and how it does that. As Edger says, how it deals with things like looking at comparable is going to be interesting to see. One could characterize the way FRAND is dealt with in different courts around the world. There are some who focus on the contractual side, and there are some who focus more on the antitrust aspect, the monopoly power Article 102, and whether some abuse is being committed to the assertion of the patent.

If you're more on that side, it's an easier decision for the court. It's a go, no-go decision on injunct or don't injunct. If you focus on the contractual side, it's a more nuanced discussion perhaps, which can be a more utility, perhaps

it's more balanced because then the implementer can come forward and say, "Well, this shouldn't all be a bad injunction. I want a license, but I need somebody to help me say, what is a fair license." That debate is going to be more difficult for the court to get engaged in. I think looking at the ambit of Article 32, but I know that those engaged in it, the new judges are really going to want to have a voice in all these debates. It's going to be so interesting to see how that plans out.

ANNE-CHARLOTTE DE BIHAN: It will definitely. Aloys, you've had your head up for so long. I feel so bad I didn't see it from the outset. Would you like to compliment before we close the session?

ALOYS HÜTTERMAN: Yes. As I just said, 2I turned 50 some days ago, which means I'm old and gray now, but I'm not as old as I've seen the opening of the European Patent Office. Of course, when I was younger, I talked with older colleagues. I think this is something we could compare with, and all let's say, old attorneys, experienced attorneys told me that when the EPO was introduced, there was a huge discussion about how this was going to work out and in which direction would it go.

In the end, it went in a totally different direction than anyone had anticipated before. I think we should not underestimate this, and we should keep that in mind. I mean, of course, we can speculate and see how it works, but in the end, it could be that it all goes into a whole different direction. Of course, two things, in my opinion, are important. First one, the quality of the decisions, but here I have no doubt we're going to have excellent decisions by excellent judges. The second one, where I think the court could actually do something is about the costs. In my opinion, the ceiling of recoverable costs is too high but here, the court has flexibility and could do something.

I think if these two points are provided for, then the UPC will be the most important court in the world in a few years.

ANNE-CHARLOTTE DE BIHAN: Thank you very much for these--

KLAUS GRABINSKI: May I add?

ANNE-CHARLOTTE DE BIHAN: Go ahead.

KLAUS GRABINSKI: The ceiling is in the competence of the administrative committee, to set ceilings.

ALOYS HÜTTERMAN: Yes, but you don't have to go to the ceiling.

KLAUS GRABINSKI: Sorry?

ALOYS HÜTTERMAN: You don't have to go to the ceiling. You can say, 'Hey--'

KLAUS GRABINSKI: That's true, that's not the issue, but also, the ceilings are for the administrative committee to decide on.

ALOYS HÜTTERMAN: Yes, but I hope that the court will have wise decisions about costs.

KLAUS GRABINSKI: There are ceilings. That's what it is. [chuckles] There is discretion up to the ceiling. That's clear.

ALOYS HÜTTERMAN: You don't have to go up to the ceiling all the time.

ANNE-CHARLOTTE DE BIHAN: I don't even have the time to thank you all, but I'll still take the time to thank you all for this exciting discussion. There's one note that I'll take from our session, is that we are going to have fun in the years to come, litigating in Europe. I hope we can continue our

## Session 2A

conversation hopefully before, and hopefully live this time, not before a screen. Thank you so much.