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The Unified Patent Court

Survey findings from Wragge
Lawrence Graham & Co's
Intellectual Property team

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You and the Unified Patent Court – survey findings

The Unitary Patent (UP) & Unified Patent Court (UPC) promise to have a significant impact on the patent landscape in Europe.

The IP team at Wragge Lawrence Graham & Co conducted an online survey of patent attorneys and solicitors in private practice and in-house, seeking views on the UP and UPC – Will it work? Will it change anything? And is it really necessary?

Responses varied widely, from strongly in favour to deeply pessimistic. Perhaps surprisingly, private practice advisers appear more cautious than patent holders, and less critical of the current system. Large international corporations in particular appear to regard the new court as a very welcome development, although views on the case for the Unitary Patent are more mixed.

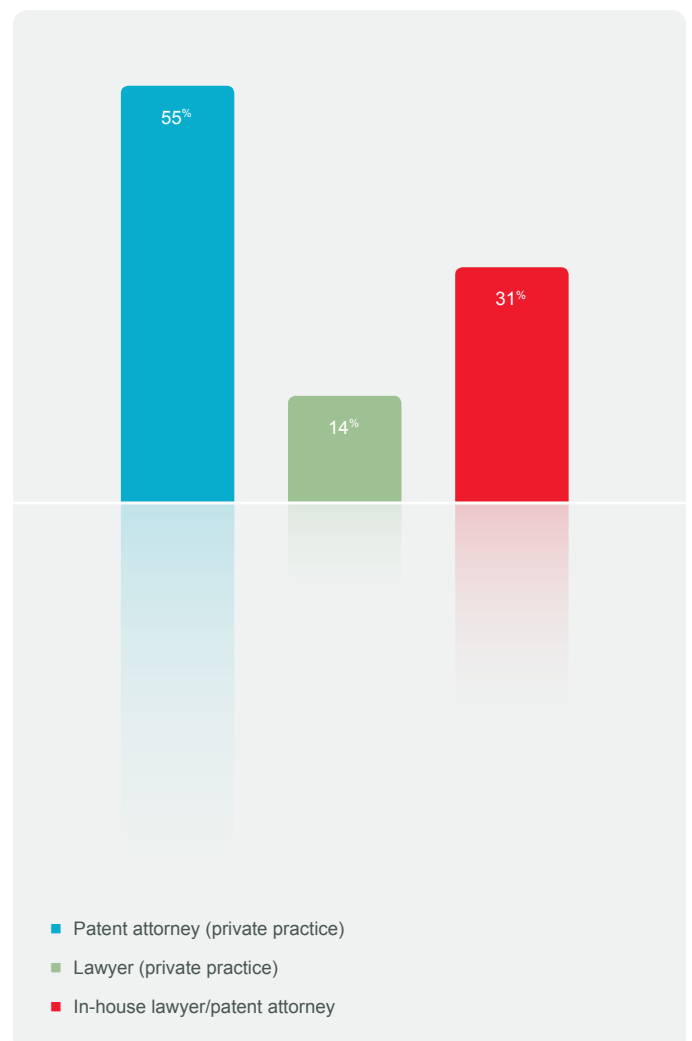
We asked how well prepared companies are for the changes – it seems many have taken the initial steps, but there is a lot of work still to do.

What is clear is that the proposals will have an impact on practice, including the view from a quarter of respondents that revocation actions are likely to be more frequent under this new system.

Who are our respondents?

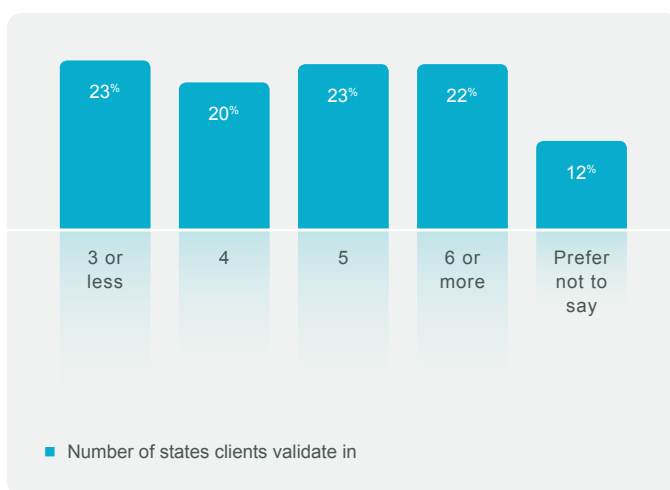
Of the 100 responses received, nearly a third are in-house lawyers working in general manufacturing, pharmaceuticals, aerospace and defence, food and drink, electronics and software sectors.

Over half are private practice patent attorneys, whose areas of specialism include mechanical engineering, electronics, chemistry, materials science, telecommunications, and pharmaceuticals.



The Advisers' responses

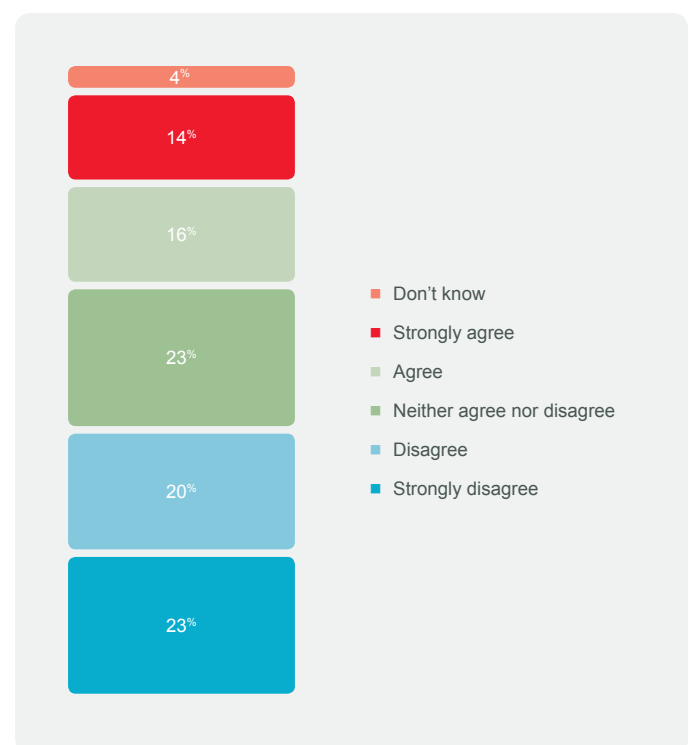
How many EPC states do clients normally validate in?



Although 23% indicated 3 or fewer states, 65% of respondents indicate 4 or more. It appears that UK practice may be to validate in more states than the average of 4 used by the Select Committee to set renewal fees.

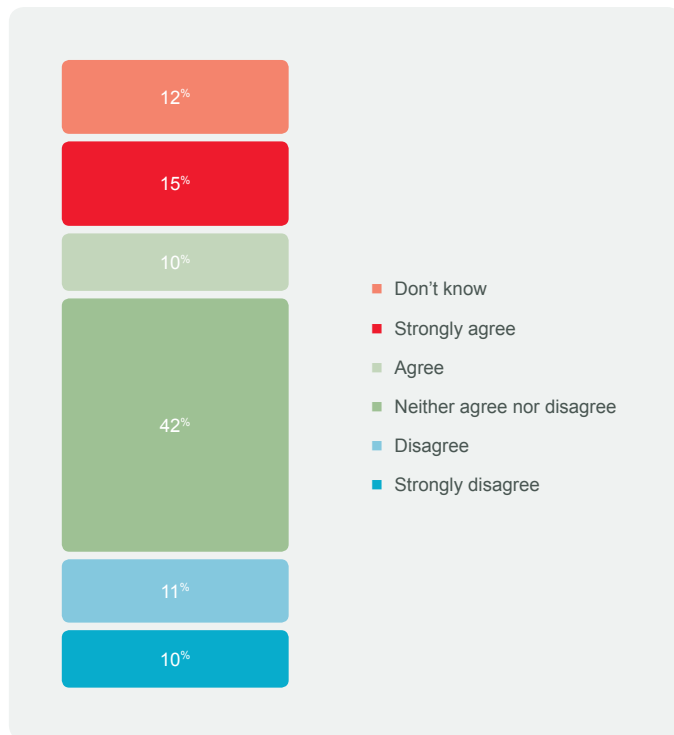
The UP may therefore offer better value to UK businesses than the traditional approach of validating an EP in a number of European states.

Do we need the UP and UPC?



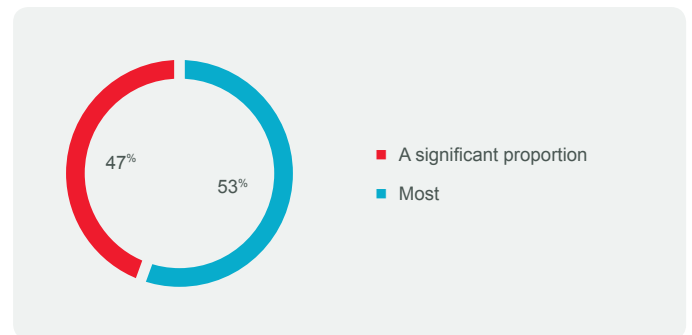
Most professional advisers appear to have an opinion one way or the other. While a significant proportion of professional advisers strongly disagree that the package is necessary, this figure may reflect comments from some respondents who observed that while the UPC is needed, the UP may be of interest to only a limited proportion of patent holders. Although there is a preponderance against, almost one third support the package.

Will the UP and UPC be a success?



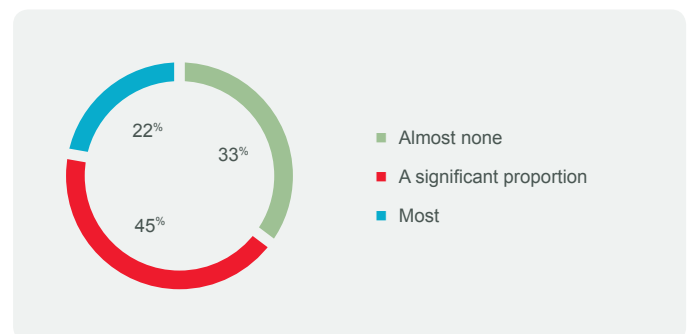
The jury is out among the patent profession, but even the scheme's supporters are not entirely confident that it will succeed.

Are your clients aware of the UP and UPC?



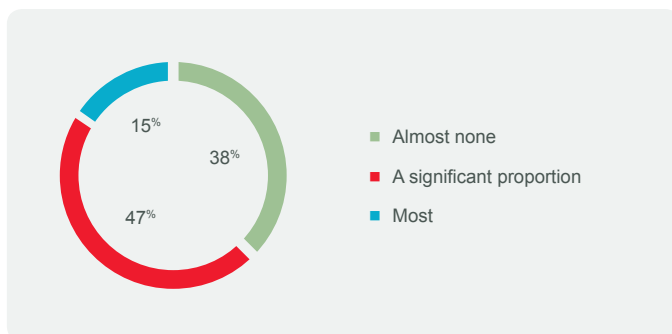
Awareness is high: of those attorneys who feel able to answer the question, 53% think that most of their clients are aware, and 47% think that a significant proportion of clients are aware. We would add that the debate has been prominent in the UK.

How many of them are actively following developments?



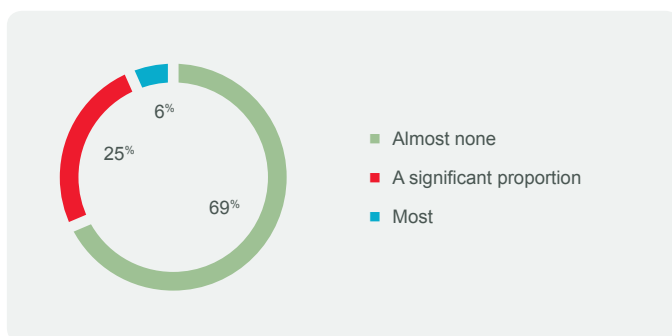
Perhaps it is cause for concern that 33% of advisers think that almost none of their clients have been following developments, although they are aware of the change. This may of course depend on the efforts made by firms to educate their clients, but with time running out before the system is in force, it is important for all patentees to have at least a basic knowledge of the system so that they may decide whether to opt their existing EPs out of the system.

How many clients have asked you for advice?



The unresponsive rump is consistently present in these figures, and at a level which gives cause for concern. It looks like firms still have a job to do to increase knowledge among clients, notwithstanding the strong engagement from all parts of the UK IP professions.

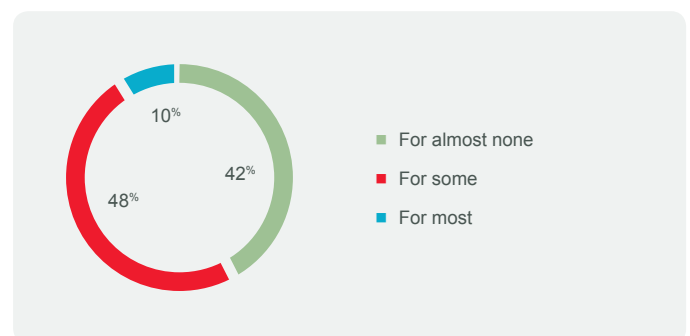
How many clients have taken active steps to prepare?



It seems we are at a hiatus: awareness is good, nearly a third of clients are now taking active steps, but the perception of their advisers is that twice as many have yet to actually do anything. This will hopefully change as the UPC increasingly becomes a reality and practical issues are ironed out.

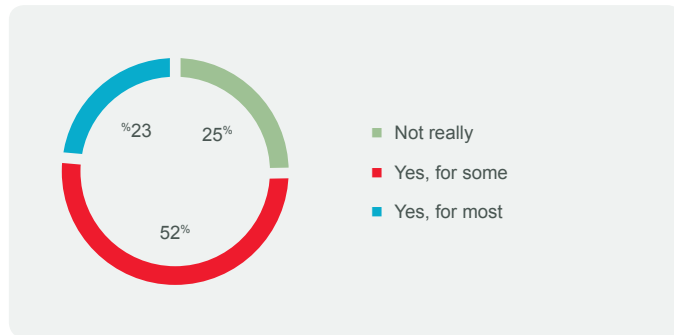
If the Advisers' perceptions are correct this is cause for concern, because internal preparations for these changes will require quite a lot of work for many companies. It is not simply a question of whether to remain within or opt-out of the system. Companies will face important decisions regarding their enforcement and licensing strategies, as well as the impact on their patent portfolio. See [Wragge Lawrence Graham & Co's analysis of steps which companies should be taking now](#).

Will it be cheaper for your clients?



The view among Advisers seems to be that the UP is bound to benefit some companies in cost terms, but its effect is unlikely to be widely felt or very pronounced. Of course there may be companies which do not achieve any savings but obtain better coverage for the same cost.

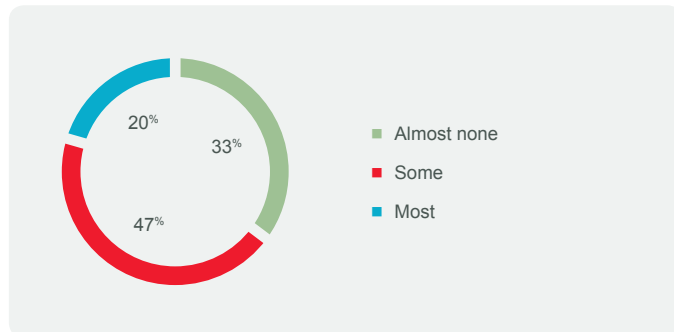
Will it affect your clients' filing strategies?



While some think that the introduction of the UPC will not change filing behaviour, that seems to be very much a minority position.

If that is the case, why is there so much discussion of the opt out and transition period, and concern over UP renewal fees? It seems most people expect they will have to adapt to at least some extent.

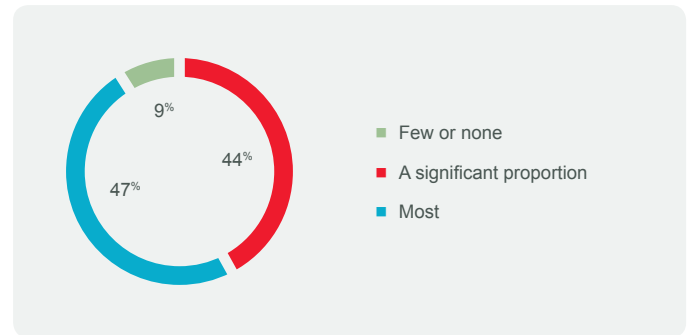
Will your clients turn to national filings?



To many advisers, using more national filings seems to be a logical approach for at least some clients. This is backed up by the response from in-house counsel (see page 9) – 55% of in-house respondents say they will not file more national patents, while 37% say they will.

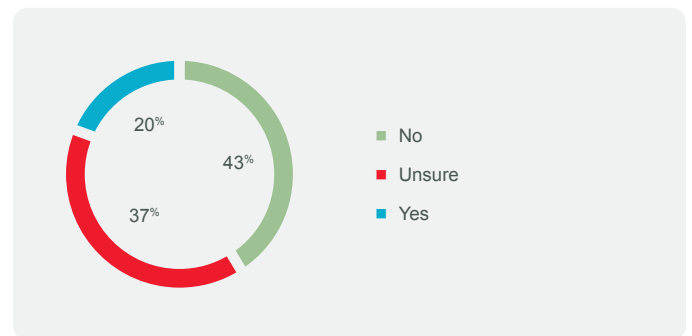
Even this proportion may be enough to cause significant changes in fee income to the patent offices of participating states and risk an adverse impact on the EPC system.

Will your clients opt out their EPs?



UK advisers seem very certain that clients will opt out, but the clients themselves are not so sure – see below!

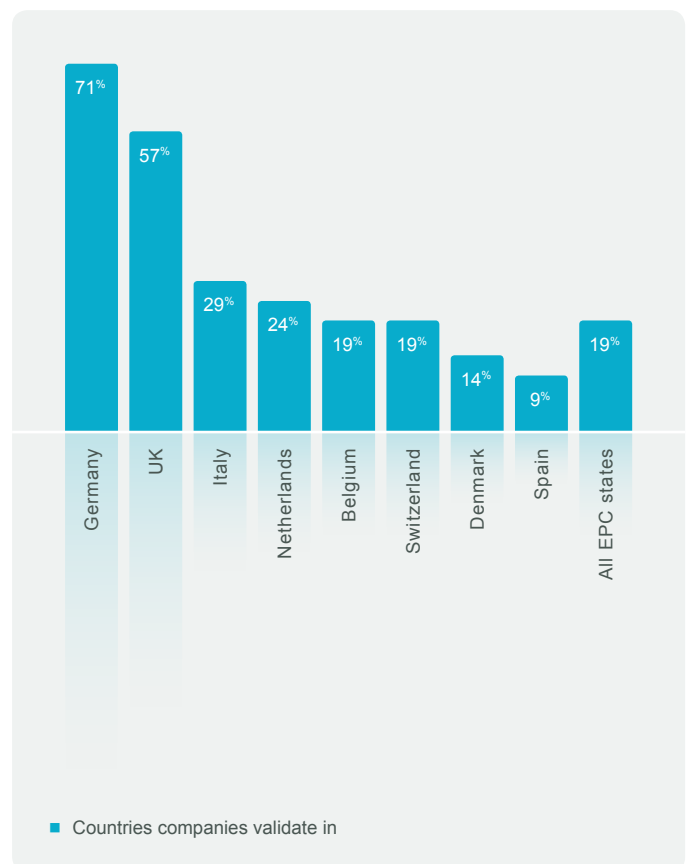
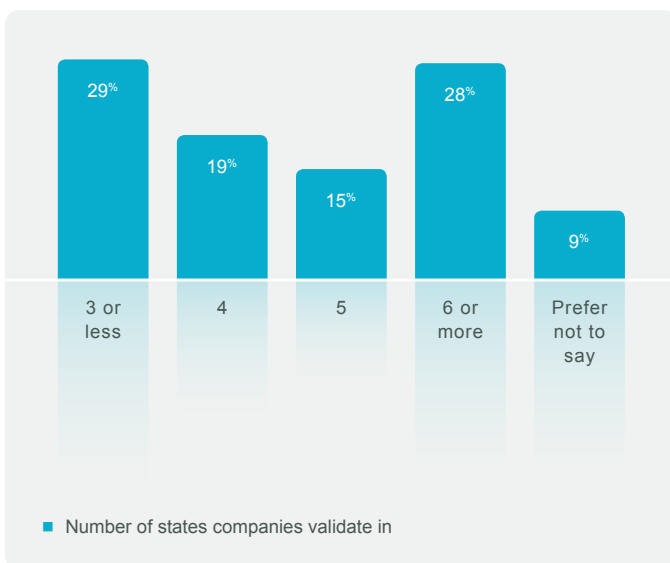
Will the UP and UPC help SMEs?



A high proportion of advisers seem confident that this development will not assist SMEs, although this is a slightly different question to whether SMEs will use the UPC and UP, which we think they will.

The In-House Counsel responses

How many EPC states does your company normally validate in? Which ones?



Our survey indicates that around 43% of UK patent holders validate in 5 or more countries, and so for those patentees the UP may represent good value (leaving aside any other considerations).

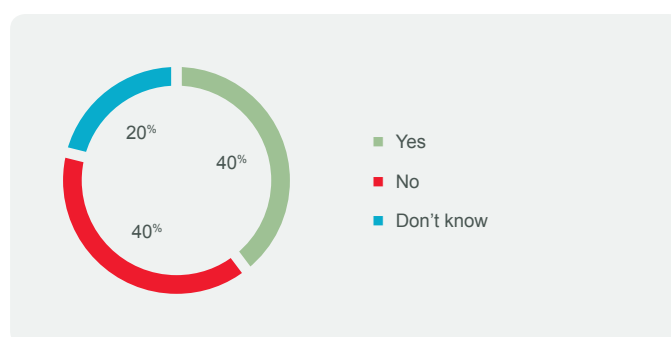
The distribution of replies to this question is remarkably even, indicating that it is not possible to generalise about whether the UPC and UP will be attractive to patent holders.

As would be expected, the top five states in which companies routinely validate their EPs matches the data provided by the EPO. The value of the UP is now further enhanced by Italy's participation.

What experience does your company have of patent litigation?

Roughly half of our in-house respondents have been involved in revocation proceedings in Europe, 40% in infringement proceedings, and nearly 90% in opposition proceedings, so this is an experienced and informed group.

Will the UPC and UP be of benefit to your company?



The jury appears to be out. But more specifically, 60% think that the UPC and UP are necessary measures and only 30% think that they will not succeed. The majority view is therefore positively in favour. This is in part because of the view that the present situation is very unsatisfactory – see “what they said” below.

Are you ready for the UPC?

How prepared are patent holders? We asked the following questions, with the “Yes” percentages below:

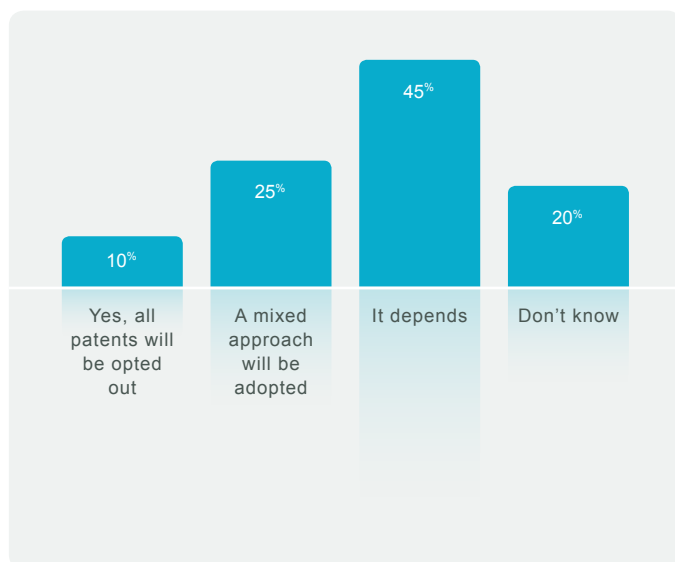
Have you:

- a) Been following developments? – “Yes”: 89%
- b) Reviewed your filing strategy? – 61%
- c) Sought external advice? – 50%
- d) Decided on your opt-outs? – 31%
- e) Reviewed your licensing arrangements? – 25%
- f) Reviewed your enforcement strategy? – 24%

For many companies we are reaching a turning point where they are aware of the UPC and UP, have thought about it and taken advice where necessary, but they now need to take more concrete steps to prepare their business for the change.

It is likely that companies are beginning to consider their opt-out and enforcement strategy in more detail. There are many steps which companies can take to prepare for the system, especially if they license their patents or are themselves licensees – see [Wragge Lawrence Graham & Co's analysis for Managing Intellectual Property here](#).

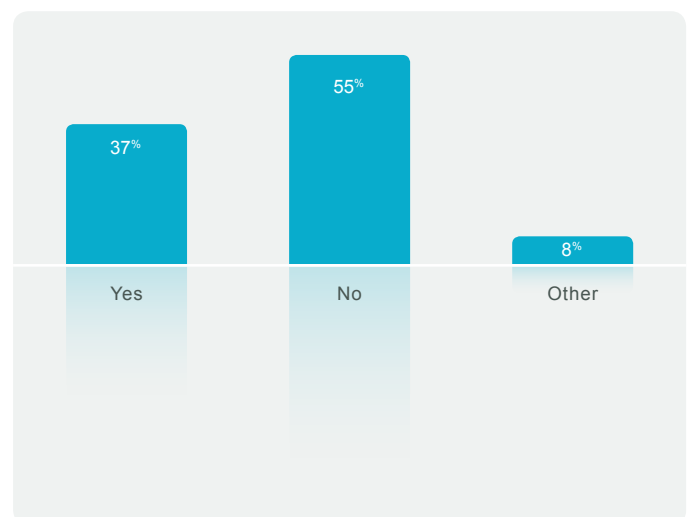
Will your company opt out its EPs?



This is consistent with the 31% of respondents who have decided on their opt-outs, but uncertainty (until recently) about the opt-out fee and the continuing uncertainty about the effect of an opt-out may be preventing companies from making decisions about this.

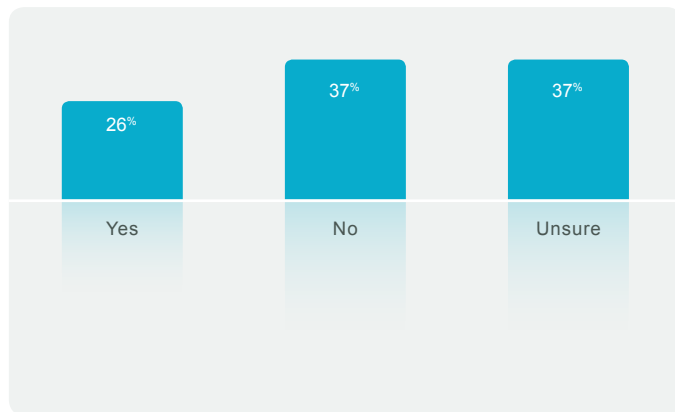
Responses included an observation that a mixed approach is the way to deal with uncertainties about the new court's approach and performance, and that the spreading of risk for important portfolios will play a part in this decision.

Will your company file more nationals?



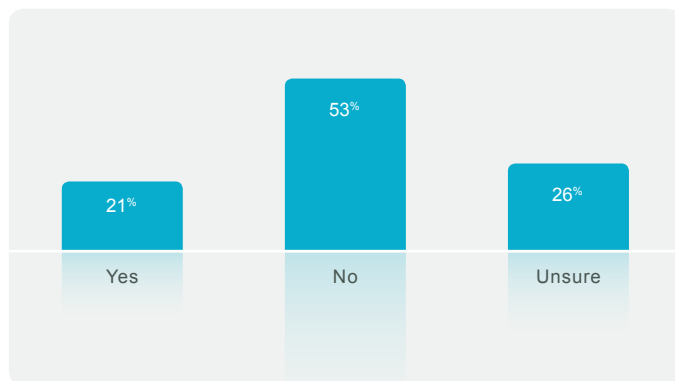
Again, a mixed response, but an encouraging one from the perspective of the UPC, and a more optimistic approach than anticipated by private practice advisers.

Will your company use the UP for its most valuable patents?



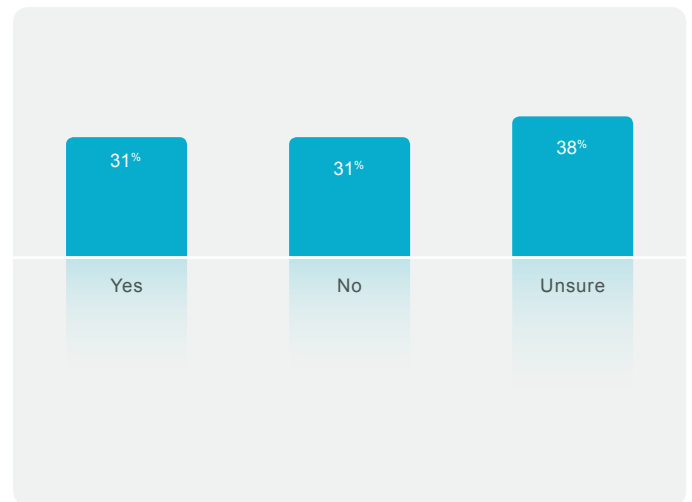
For new filings there seems to be a wide range of views and approaches, with many companies yet to decide what their strategy will be; however, over half think that the introduction of the UPC and UP will result in a change to their filings, or in other words a strategic response to this change.

Will your company use opt-out as its default position?



While advisers tend to assume that opt-out will be the default position adopted by the majority, more than half our in-house respondents are clear that it will not be, and a further 26% still have an open mind on the question.

Will your company opt out its most valuable EPs?



Even for the most valuable patents the balance is even, with many still to make up their minds.

Will your company be more likely to be involved in infringement or revocation proceedings under the UPC?

The general view is that infringement proceedings are neither more nor less likely, although just over a quarter of respondents think that revocation proceedings will be more likely than at present, given the significant impact of a Europe-wide revocation. The majority view perhaps reflects the fact that, although Advisers are very focused on litigation issues, companies are largely focused on the portfolio aspects at present.

What they said...

Views are very mixed, both among private practice advisers and in-house counsel. However, some in-house counsel are very positive about the change, perhaps because they have direct experience of multi-jurisdiction litigation, or litigation in jurisdictions which are less well-used at present. Views on the UPC are generally more positive than on the UP itself.

The advisers

"A political compromise, not an improvement"

"The UP and UPC is a new playground. We shall learn to use it"

"Most US or Asian applicants will... assume that the system will be more predictable and therefore more cost effective. I suspect the system will cost more overall but the quality of justice will probably be more transparent and predictable than it currently is"

"The UPC represents a solution without a problem"

"It will be a success for some and unhelpful for many"

"Of course it's not necessary – people have managed for decades without it... is it desirable? Yes – but not at any price..."

"It will increase the probable cost of litigation for SMEs which currently have the option of IPEC"

"Most of my clients are corporations with US-based HQs and Patent Departments and they see the UPC as a great step forward as a way of controlling costs for EP-wide litigation"

What they said...

“Until now I have not bothered my clients with views as to its prospects. Having now seen the court fees and expected UP renewal fees I believe my clients will dive in with both boots... for most patentees cost of maintenance far outweighs cost of litigation in their strategy.... It won't help in filing costs but will make it far more likely that [SMEs] will develop a European strategy... My guess is that with reasonably low fees, and a well-functioning court, at steady state over 70% of patentees will go unitary”

“I believe interest in the opt-out is lower outside Europe and that it will diminish in a few years”

“Due to doubts on the quality of initial decisions I currently do not feel able to advise clients to utilise the unitary patent system. I am also very concerned with the cost of bringing a counterclaim for revocation”

The companies

“The UPC is very necessary. The Unitary Patent less so...”

“It will be a significant period of time before the benefits are seen”

“A big benefit will be the harmonisation that will happen over time because of the Appeal Court decisions... In most countries in Europe patent litigation is a disaster. We expect the UPC to do much better than the national courts in most EU countries, which will be the second big benefit ...We hope that we will all put our energy into making the UPC successful...”

“A lost opportunity for Europe to develop a really innovative approach to IP protection”

“We haven't landed answers yet...”

“The decision whether to opt out will depend upon: what other patents we have; the strength of the patent; the potential competition; proving the case in the UPC versus the national courts (speed, procedural limitation); how enforcement will work in the UPC versus national courts (PIs, securing evidence); damages in the UPC; which countries have ratified, etc...”

Conclusions

Our headline take-aways are:

- 1) there is a lot more work to be done by patent holders to prepare for the UPC;
- 2) the UPC is a welcome development for some and the hope is that it will soon prove to be reliable. This could realistically mean a much wider choice of venues for enforcement;
- 3) the UP is not for everyone, but a significant proportion of UK patent holders will benefit from the added value it can provide;
- 4) there is no “one size fits all” answer to whether the UPC and UP will be of benefit, but as the scheme appears increasingly likely to be implemented, In House Counsel are turning to the practical issues.

Wragge Lawrence Graham & Co IP team

Wragge Lawrence Graham & Co advises on the full range of IP issues from offices in the UK, Germany, France and China. Acting for some of the world’s biggest organisations, its clients range from global pharmaceutical companies and leading research and academic bodies, to small private companies and start-up businesses.

In mid-January 2016 the firm will join forces with leading Canadian firm Gowlings to create a new international law firm called Gowling WLG.

The new firm will be home to one of the world’s premier intellectual property practices, with over 70 partners and 200 fee earners focusing on, among others, the life sciences, tech, automotive and aerospace and defence sectors. The Global Legal Post reported that it will “put the firm in the top five specialising in intellectual property”.



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