

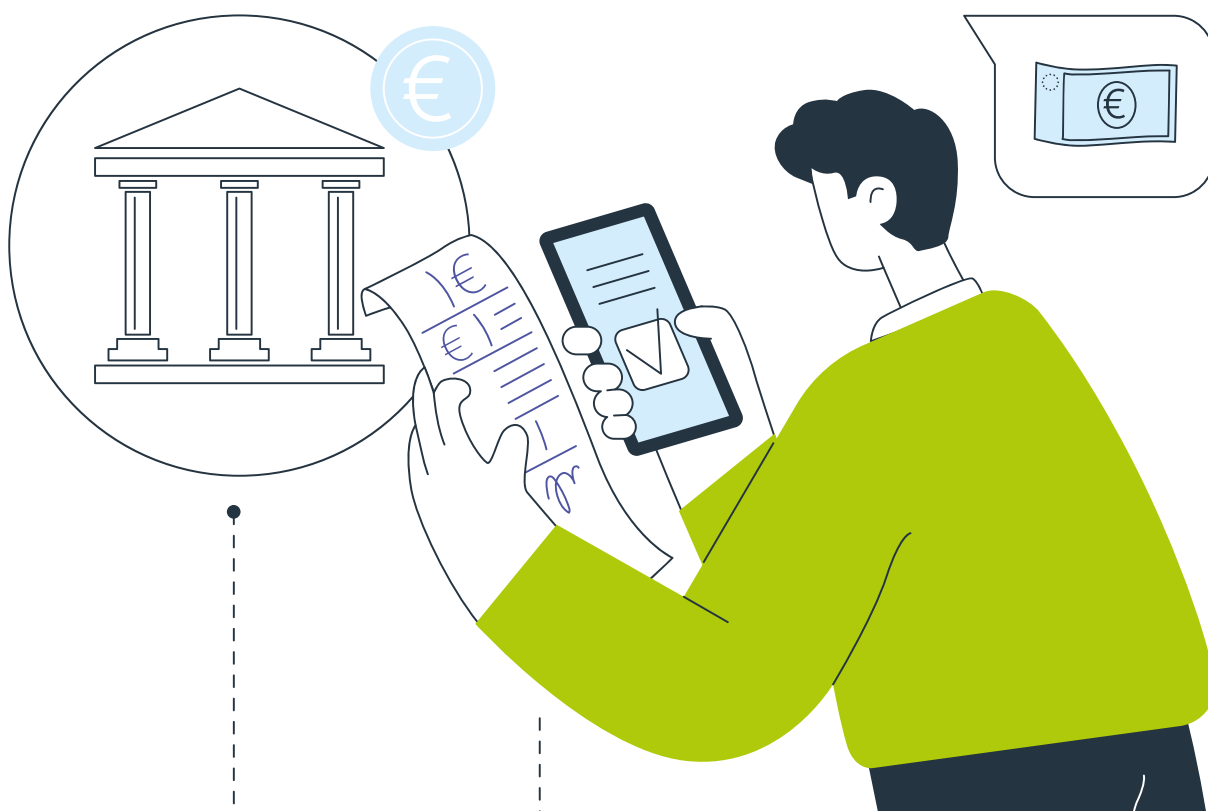
# Court fees and recoverable costs at the UPC

## The real costs of litigation before the UPC

### I. Introduction

Since the Unified Patent Court (UPC) became operational, one of the most frequently asked questions by clients and practitioners alike has been ›What are the costs of UPC proceedings and how do they compare with national litigation?‹. While the UPC's court fee structure is set out in the official regulations, many aspects of the actual costs initially remained unclear.

In practice, legal teams regularly involved in UPC litigation are increasingly concerned that the total cost of UPC litigation may be **significantly higher than in national patent infringement proceedings** – especially when compared to German practice. The latter is based on remuneration of costs on the basis of the so-called ›Rechtsanwaltsvergütungsgesetz‹ (RVG).



Drawing from the legal framework and our own experience before the UPC, this article aims to shed light on the practical cost implications for parties involved in UPC litigation. Our goal is to provide some initial guidance in this evolving landscape and to help better anticipate the financial exposure associated with patent litigation under the UPC system.

## »What are the costs of UPC proceedings and how do they compare with national litigation?«

### II. Court fees: fixed and value-based

UPC court fees, which are generally payable in advance by the claimant, consist of a fixed fee and, where applicable, an additional value-based fee. The fee structure is governed by Rule 370 of the Rules of Procedure (RoP) and the fee schedule adopted by the UPC Administrative Committee.<sup>1</sup>

Type of Action	Fixed Fee	Value-Based Fee
Infringement action	EUR 11,000	EUR 2,500 – EUR 325,000 (value between > EUR 500,000 and EUR > 50,000,000)
Declaration of non-infringement	EUR 11,000	Value-based component applies as above
Counterclaim for revocation	EUR 20,000 (flat)	–
Standalone revocation action	EUR 20,000 (flat)	–
Applications for interim measures	EUR 11,000	–
Appeal (ordinary)	EUR 11,000	–

### Overview of the additional value-based fees:

Value of the action	Additional value-based fee
≤ EUR 500,000	EUR 0
≤ EUR 750,000	EUR 2,500
≤ EUR 1,000,000	EUR 4,000
≤ EUR 1,500,000	EUR 8,000
≤ EUR 2,000,000	EUR 13,000
≤ EUR 3,000,000	EUR 20,000
≤ EUR 4,000,000	EUR 26,000
≤ EUR 5,000,000	EUR 32,000
≤ EUR 6,000,000	EUR 39,000
≤ EUR 7,000,000	EUR 46,000
≤ EUR 8,000,000	EUR 52,000
≤ EUR 9,000,000	EUR 58,000
≤ EUR 10,000,000	EUR 65,000
≤ EUR 15,000,000	EUR 75,000
≤ EUR 20,000,000	EUR 100,000
≤ EUR 25,000,000	EUR 125,000
≤ EUR 30,000,000	EUR 150,000
≤ EUR 50,000,000	EUR 250,000
> EUR 50,000,000	EUR 325,000

### III. Recoverable costs and security for costs

As in German proceedings, **the costs of legal representation and other necessary expenses incurred by the successful party generally have to be reimbursed by the unsuccessful party**, provided that such costs are reasonable and proportionate (Art. 69(1) of the Unified Patent Court Agreement (UPCA)). However, **the reimbursement is subject to a ceiling** determined by reference to the value of the proceedings (Rule 152(2) RoP). Rule 370(6) RoP stipulates that the assessment of the value of the proceeding *»shall reflect the objective interest pursued by the applicant at the time of bringing the action«*.

<sup>1</sup> [https://www.unified-patent-court.org/sites/default/files/upc\\_documents/ac\\_05\\_08072022\\_table\\_of\\_court\\_fees\\_en\\_final\\_for\\_publication\\_clean.pdf](https://www.unified-patent-court.org/sites/default/files/upc_documents/ac_05_08072022_table_of_court_fees_en_final_for_publication_clean.pdf)

*The value of the proceeding ›shall reflect the objective interest pursued by the applicant at the time of bringing the action‹.*

The **ceiling of recoverable** costs per instance ranges from EUR 38,000 (for cases with a value of up to EUR 250,000) to a maximum of EUR 2,000,000 (for cases with a value of over EUR 50,000,000). A detailed table of the applicable ceilings is set out in Section IV below.

Where a party is only partially successful, or in exceptional circumstances, the court may order an equitable apportionment of costs or that each party bear its own costs (Art. 69(2) UPCA). In addition, any party who has caused unnecessary costs, whether to another party or to the court, shall bear those costs (Art. 69(3) UPCA).

**Security for costs:** Upon a reasoned request by the defendant in an action, the court may order the claimant to provide adequate security for the legal costs and other expenses of the defendant (Art. 69(4) UPCA and Rule 158 RoP).

Further, a **reduction** of the court fees of 40% is possible for small and micro enterprises (SME) under certain conditions (Rule 370(8) RoP). Legal aid is also in principle possible (Rule 375 et seq. RoP).



#### IV. Ceilings on recoverable costs

Recoverable legal representation costs are capped depending on the value of the proceedings.

The ceilings apply **per instance**, regardless of the number of patents, claims, or parties involved. Where success is only partial, ceilings are adjusted proportionally.

Value of the proceedings	Ceiling for recoverable costs
≤ EUR 250,000	EUR 38,000
≤ EUR 500,000	EUR 56,000
≤ EUR 1,000,000	EUR 112,000
≤ EUR 2,000,000	EUR 200,000
≤ EUR 4,000,000	EUR 400,000
≤ EUR 8,000,000	EUR 600,000
≤ EUR 16,000,000	EUR 800,000
≤ EUR 30,000,000	EUR 1,200,000
≤ EUR 50,000,000	EUR 1,500,000
> EUR 50,000,000	EUR 2,000,000

However, these ceilings may be adjusted in certain circumstances, meaning that a party's cost exposure may not be entirely clear at the outset of the proceedings. The court has discretion to raise the ceiling upon a party's request in some specific situations – for instance, where the case is particularly complex. The extent to which the ceiling can be raised depends on the value of the proceedings<sup>2</sup>:

- › Up to 50% increase for cases valued up to EUR 1 million,
- › Up to 25% increase for cases valued between EUR 1 and 50 million,
- › Up to an absolute cap of EUR 5 million for cases valued above EUR 50 million.

Conversely, the court may also lower the ceiling if a party (especially an SME, non-profit organization, public research organization, or individual) can demonstrate that enforcement of full recoverable costs would threaten its economic existence.

Requests to raise or lower the ceiling must be submitted as early as practicable – ideally with the statement of claim or defense – and must include supporting evidence.

<sup>2</sup> Art. 2(1) of the Scale of ceilings for recoverable costs by the Administrative Committee.

V. UPC vs. German courts: A cost comparison

As an example, for an assumed value of the proceedings (infringement action) of EUR 3 million, the costs for UPC proceedings and German proceedings for infringement proceedings (without revocation proceedings) are compared.

	UPC	Germany
Court Fees	EUR 11,000 fixed fee + EUR 20,000 value based fee (infringement claim) = EUR 30,000	EUR 41,403
Recoverable Costs	Up to EUR 400,000 (based on value of the proceeding of EUR 3.0 million)	Approx. EUR 100,388 (1x patent attorney and 1x attorney at law; including court fees; based on RVG)

This example shows that the recoverable costs before the UPC (maximum of EUR 400,000) are higher than the recoverable costs before German courts (about EUR 100,000). Although court fees before the UPC are lower than before national German courts, the broader scope for recoverable legal costs can result in a higher overall cost risk, which of course also reflects the (in most cases) extended territorial scope of UPC proceedings.

VI. How to claim cost reimbursement

From a practical perspective, the question is how the aforementioned principles are applied in UPC proceedings. In particular, parties must consider how a (separate) cost proceeding is conducted and which expenses are actually regarded as reasonable and therefore recoverable.

According to Rule 150(1) RoP a cost decision may be the subject of separate proceedings following a decision on the merits and, if applicable, a decision for the determination of damages. Where the successful party wishes to seek a cost decision, it must lodge an application for a cost decision within one month of service of the decision (Rule 151 RoP).

Under Rule 152(1) RoP, the successful party (i.e., the applicant in cost proceedings) is entitled to recover the reasonable and proportionate costs of legal representation (including costs of experts, witnesses, interpreters, and translators, see Rules 153 to 155 RoP). According to Rule 151(d) RoP, the application for a cost decision must indicate the costs for which reimbursement is sought, in particular the costs of representation.



### VI.1 Detailed breakdown of costs

A detailed specification of the claimed costs, i.e., of which costs arose at what time and for which specific activity, is generally not required by the Rules of Procedure. A broad overview of the cost categories may be sufficient, provided the submission remains plausible and coherent.

### VI.2 No general requirement to submit cost evidence

Pursuant to Rule 156(1) RoP, the judge-rapporteur may request written evidence of any claimed costs, but such a request is discretionary. In principle, the cost decision can be made without written substantiation.

That said, the judge-rapporteur will typically request supporting documents if the cost submission appears implausible or lacks transparency. There is no general obligation to itemize and document legal fees, patent attorney fees, or translation expenses in detail.

### VI.3 Objections from the other party

The more granular a cost submission is, the more likely it is that the other side will use it to challenge the necessity or proportionality of individual cost items. This can lead to lengthy disputes – a situation largely unfamiliar in German cost reimbursement practice. In the authors' view, such scrutiny may also be difficult to reconcile with the professional code of conduct of lawyers. Therefore, while it is advisable to substantiate costs sufficiently, one may consider avoiding excessive detail that may invite counterarguments (e.g., regarding the number of hours spent drafting a submission).

***While it is advisable to substantiate costs sufficiently, one may consider avoiding excessive detail that may invite counterarguments.***

Often, disputes often arise on how many representatives are considered appropriate. Under Art. 48(3) UPCA, a party may be represented both by a lawyer and, in addition, by a patent attorney. Neither the UPCA nor the Rules of Procedure impose a numerical limit on the number of legal representatives. Since recoverable costs must be reasonable and proportionate (Art. 69(1) UPCA) and within the applicable ceiling, there is no need for a hard cap on the number of lawyers or patent attorneys.

The Local Division Munich appears to follow a pragmatic approach: In a recent case, the judge-rapporteur considered the number of representatives for the applicants in light of

- the number of representatives appointed by the respondent,
- the number of judges deemed necessary to decide the matter under the UPC's procedural rules, and
- the case's complexity.



In a moderately complex preliminary injunction case involving one applicant and two respondents, the participation of one lawyer and two patent attorneys representing both respondents jointly was found to be reasonable – especially since separate legal teams for each respondent would also have been permissible.

#### VI.4 Interim award of costs

In appropriate cases, the UPC also allows for interim award of costs. Pursuant to Rule 150(2) RoP (or Rule 211(1) lit. (d) RoP with regard to applications for provisional measures), the court may, upon a party's request, in its decision on the merits (Rule 119 RoP) or in a decision awarding damages, order that certain costs be reimbursed even before the final decision on costs is rendered. This may be **particularly relevant in proceedings for provisional measures or other urgent matters**, where one party incurs substantial costs that would otherwise not be reimbursed for quite some time.

Such interim cost awards are at the discretion of the court and require that the court is satisfied that the claim for reimbursement is well-founded and that there are equitable grounds justifying an early cost award. This tool can be strategically valuable, especially where the financial burden of interim proceedings is significant or has a deterrent effect on further enforcement.

#### VI.5 Interim award of damages

According to Rule 119 RoP, the court may award provisional damages to the successful party. Such damages shall at least cover the preliminary costs incurred by the successful party in the proceedings for damages and compensation. It should be noted that the value of the claim in damages proceedings is not necessarily the same as in the corresponding infringement actions. Rather, the value of the proceedings is determined by calculating the damages to which the claimant is entitled pursuant to Rule 131(2) lit. (e) RoP. For this, it should be possible to estimate the relevant costs on the basis of the value of the claim assumed for the damages proceedings in accordance with the court's scale of court fees and a reasonable estimate of legal costs.

### VII. Conclusion and practical takeaways

Understanding how court fees and cost reimbursement operate under the UPC framework is essential for strategic and financial case planning.

Our experience with UPC litigation confirms that estimating the actual costs remains challenging, especially when compared to the much more predictable cost risks in national German litigation. The ceilings for recoverable

costs under the UPC Rules of Procedure are significantly higher than the typical cost exposure for comparable cases before German courts. However, infringement actions before the UPC usually cover several countries and may also include a central revocation action or a counterclaim for revocation, which increases the scope and complexity of the proceedings. In order to make a meaningful comparison of costs, additional factors such as geographical scope, procedural efficiency and enforcement value need to be taken into account. Nevertheless, **the initial concern that UPC proceedings could prove more expensive and burdensome than national litigation appears to have been confirmed within the first 22 months of the UPC** - although this may also be due, at least in part, to the current lack of settled case law, particularly from the Court of Appeal, on the many procedural and substantive legal issues arising under the new system.

Given the limited number of decisions to date, many important issues - in particular the amount and appropriateness of costs - remain to be resolved by the Local Divisions and the Court of Appeal. Until guidance from the Court of Appeal becomes available, parties are advised to proceed with caution.

#### Recommendations:

- Assess litigation cost risks early and carefully
- Substantiate the value of the proceedings clearly in pleadings
- Consider the implications of cost ceilings - especially in high-value and multi-defendant cases
- Where justified, consider early applications to adjust cost ceilings
- Consider finding an amicable agreement on cost reimbursement with opposing party



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