

EGMONT PAPER 60

**THE UNIFIED COURT ON PATENTS:
THE NEW OXYMORON OF EUROPEAN LAW**

FRANKLIN DEHOUSSE



Royal Institute
for International Relations



October 2013



ACADEMIA PRESS

The Egmont Papers are published by Academia Press for Egmont – The Royal Institute for International Relations. Founded in 1947 by eminent Belgian political leaders, Egmont is an independent think-tank based in Brussels. Its interdisciplinary research is conducted in a spirit of total academic freedom. A platform of quality information, a forum for debate and analysis, a melting pot of ideas in the field of international politics, Egmont’s ambition – through its publications, seminars and recommendations – is to make a useful contribution to the decision-making process.

* * *

President: Viscount Etienne DAVIGNON
Director-General: Marc OTTE
Series Editor: Prof. Dr. Sven BISCOP

* * *

Egmont – The Royal Institute for International Relations

Address Naamsestraat / Rue de Namur 69, 1000 Brussels, Belgium
Phone 00-32-(0)2.223.41.14
Fax 00-32-(0)2.223.41.16
E-mail info@egmontinstitute.be
Website: www.egmontinstitute.be

© Academia Press

Eekhout 2
9000 Gent

Tel. 09/233 80 88

Fax 09/233 14 09

Info@academiapress.be

www.academiapress.be

All authors write in a personal capacity.

Lay-out: proexsmaes.be

ISBN 978 90 382 2256 1

D/2013/4804/266

U 2115

NURI 754

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the permission of the publishers.

Table of Contents

THE UNIFIED COURT ON PATENTS: THE NEW OXYMORON OF EUROPEAN LAW

FRANKLIN DEHOUSSE

§ 1. The Neverending Quest for a Truly Integrated Patent	5
§ 2. Opinion 1/09 of the Court of Justice: The Return of Opinion 1/91	7
§ 3. The Resulting Conclusion of an International Agreement between the Member States	11
§ 4. The Implications for Patent Law	15
4.1. Substantive law	15
4.2. Language requirements	18
4.3. Costs	19
§ 5. The Implications for the Institutional System	23
§ 6. The Implications for the EU Courts System	27
6.1. A European (but not EU) system of specialized courts completely tailor-made	27
6.2. A new appointment process for the judges	28
6.3. A new governance system for the courts	29
6.4. A new language regime	30
6.5. New procedural rules	31
6.6. A new approach of costs	33
6.7. A subsidiary court during a seven years transition period . . .	34
Conclusions	35

The Unified Court on Patents: The New Oxymoron of European Law

FRANKLIN DEHOUSSE¹

The creation of the unified patent court could be perceived by many observers of European affairs as an extremely specialized debate, which has produced a highly complex compromise after decades of negotiations. This perception is correct, but incomplete. This creation will also have multiple systemic impacts on the general institutional system of the European Union.

This is quite understandable. We have not seen often in the past the application of EU law trusted to an international agency, established with a treaty between Member States and third countries, and the control of EU law trusted to an international court, established with a treaty between Member States. Additionally, the joint use of enhanced cooperation regulations and an international treaty to accomplish a goal of the single market is also not usual.

This paper endeavours very modestly to examine the possible systemic consequences of this situation, for those of us who have devoted their daily life to EU affairs in general rather than to patents in particular. It does NOT aim at providing a detailed comment about the substantive provisions of the two EU enhanced cooperation regulations and the Unified Patent Court Agreement (UPCA), or about the compatibility of the chosen approach with Article 118 TFEU, or about the future functioning of the new patent regime. After a very quick reminder of the neverending quest for a truly integrated patent (§ 1), of opinion 1/09 of the Court of justice (§ 2), and of the subsequent approach adopted by the Member States after this opinion (§ 3), it will briefly wonder about the impact of those texts, if they are finally implemented, for the EU patent law (§ 4), the EU institutional system (§ 5) and the EU courts system (§ 6).

1. The author is Professor (in abeyance) at the University of Liège and judge at the Court of Justice of the European Union (General Court). This comment is strictly personal.

§ 1. THE NEVERENDING QUEST FOR A TRULY INTEGRATED PATENT

Patents sometimes seem a doomed area of European integration. Since the signature of the Treaty of Rome in 1957, the creation of a truly integrated patent (long called the “Community patent”) has remained an elusive objective. In a single market dedicated to the free circulation of goods and services, growth and innovation, this was nonetheless considered an essential objective. However, the creation of such an integrated property right has met an incredible and perpetually renewed flow of obstacles – be they institutional, linguistic, or financial.

The “Community patent” (now become the “EU patent”), still inexistent, should have been a single ownership right covering an invention. It would have been quite similar to the Community trademark or the Community design. This project must be distinguished from the “European patent”. This one exists, and is based on the 1973 Munich Convention on the European patent (CEP). It remains a strictly international instrument and covers both EU and non EU states².

The Munich Convention has established the European Patents Office (EPO). The Office allows to obtain a bundle of national patents on the basis of harmonized criteria. This bundle is flexible and covers only the countries designated by the patent holder. The Convention has thus provided a single evaluation of an alleged innovation. However, it provides only a title, and not a single right. The patent must still be registered (and often translated) in the different concerned States. This is “a common attribution process completed by a validation State per State”³. This system remains moderately efficient. According to the Commission’s evaluations of 2007, it can be nine times more expensive than the existing system in the United States or Japan⁴. In 2003, an international agreement was concluded to crown this international regime with a single judiciary authority. This agreement did not gather much support.

This situation explains the recurrence of proposals aiming at creating a Community patent⁵. First, the strategy in this domain relied on an international agreement. The first project of a convention on the Community patent was signed in 1975⁶. The second project was adopted in 1989⁷. In 2000, the strategy changed and the Commission tried to use a true Community instrument based on the EC

2. <http://www.epo.org/law-practice/legal-texts/html/epc/1973/ff/ma1.html>

3. N. Binctin, *Droit de la propriété intellectuelle*, 2^{ème} éd., 2012, p. 384.

4. COM (2007) 165.

5. For an excellent narrative of these proposals, see T. Jaeger, *The EU patent – cui bono et quo vadit?*, 47 C.M.L.R. 63-115 (2010).

6. OJ L 17, 26. 1. 1976, p. 1-28

7. OJ L 401, 30. 12. 1989, p. 1-27

Treaty. A first draft regulation was accordingly presented in 2000, and covered both the grant procedure and the litigation aspects⁸. In 2007, a second one was presented⁹. In that new strategy too, the creation of a single judiciary authority controlling the implementation of the legal regime appeared necessary. Here too, the proposition failed.

These repeated failures reveal the great difficulties of the endeavour¹⁰. The creation of the EU patent must intervene in a broader setting, already complex and already productive. Due to its efficiency, this setting has to be preserved. Furthermore, the language question remains extremely sensitive. Article 118 TFEU, introduced by the Lisbon Treaty, has provided a more specific legal basis for the creation of European intellectual property rights. However, if these rights can be established through an ordinary legislative procedure, the language rules must be established according to a special legislative procedure, requiring the unanimity of the Council and the simple consultation of the European Parliament.

In 2009, the negotiation turned again. A political compromise was found in the Council about different essential elements. It implied the adoption of an international instrument to establish a European patent court. This agreement was meant to be concluded by the European Union, its Member States, and some third countries linked to the European Patent system. It would have covered both the “European” patent and the “Community” patent. As this agreement had to be concluded by the European Union, it was thought interesting to ask for the opinion of the Court of Justice, as foreseen by Article 218 TFEU¹¹.

8. OJ C 337 E, 28. 11. 2000, p. 278-290

9. COM (2007) 165.final, 3. 4. 2007

10. One observer evokes even a “mission impossible”: see M. Troncoso, European Union patents: a mission impossible? An assessment of the historical and current approaches, 17 Marq. Intell. Prop. L. Rev. 231-263.

11. Formerly art. 300 TEC.

§ 2. OPINION 1/09 OF THE COURT OF JUSTICE: THE RETURN OF OPINION 1/91

The question asked to the Court was quite similar to the one asked in 1991 about the creation of an international court in the framework of the then European Economic Area¹². This had been the origin of opinion 1/91¹³. In this opinion, the Court had acknowledged the capacity of the European Community to submit itself to the decisions of such an international court. This however was subject to the fundamental condition that the judicial functions established by the Treaties could not be altered. According to the Court of justice, the draft negotiated by the signatory States did not fulfil that condition¹⁴. Accordingly, they negotiated a new agreement (see article 111 of the EEA agreement). This new version was submitted again to the Court of justice¹⁵.

This paper does not examine at length the reasoning of opinion 1/09¹⁶. The Court of justice first examined the admissibility of the request for its opinion, considering the level of progress of the negotiation, and the various intentions manifested by the Member States. It rejected easily some arguments invoking the incompatibility of the proposed new judicial system with articles 262 and 344 TFEU. Furthermore, it emphasized the essential characteristics of the legal order and the judicial system of the European Union (§§ 67 to 70). “It is for the Court

12. For a recent global description of this topic, see M. Parish, *International Courts and the European Legal Order*, 23EJIL 141-153 (2012).

13. Opinion 1/91 of 14 December 1991 delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.

14. About this opinion, see among many comments D. Simon; A. Rigaux: *L’avis de la Cour de justice sur le projet d’accord CEE/AELE portant création de l’Espace économique européen (EEE)*, Europe, Février 1992, n° 2, p. 1-4; M.-A. Gaudissart: *La portée des avis 1/91 et 1/92 de la Cour de justice des Communautés européennes relatifs à la création de l’Espace Economique Européen. Entre autonomie et homogénéité: l’ordre juridique communautaire en péril...*, *Revue du marché unique européen* 1992, n° 2, p. 121-136; H.G. Schermers.: *Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1992*, *Common Market Law Review* 1992, n° 5, p. 991-1009; T.C.Hartley: *The European Court and the EEA*, *International and Comparative Law Quarterly* 1992, p. 841-848; J.L. Da Cruz Vilaça; N. Piçarra: *Y a-t-il des limites matérielles à la révision des traités instituant les communautés européennes?*, *Cahiers de droit européen*, 1993, n° 1-2, p. 3-37; R. Barents: *The Court of Justice and the EEA Agreement: Between Constitutional Values and Political Realities*, *The European Economic Area EC-EFTA. European Monographs* (Ed. Kluwer – Deventer), 1994, Vol.7, p. 57-71.

15. Opinion 1/92 of the Court of 10 April 1992 pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.

16. See S. Adam, *Le mécanisme préjudiciel, limite fonctionnelle à la compétence externe de l’Union*. Note sur l’avis 1/09 de la Cour de justice, *Cahiers de droit européen*, Vol. 47, N° 1, 2011, p. 227-302; D. Simon, *Avis négatif sur le projet de création d’une juridiction des brevets: (CJUE, ass. plén., avis n. 1/09, 8 mars 2011)*, *Europe: actualité du droit communautaire*, Vol. 21, N° 5, 2011, p. 4-7; M.C.A. Kant, *A specialized Patent Court for Europe? An analysis of Opinion 1/09 of the Court of Justice of the European Union from 8 March 2011 concerning the establishment of a European and Community Patents Court and a proposal for an alternative solution*, *Nederlands Internationaal Privaatrecht*, Editie 2012.2, p. 193-201 et J.-F. Guillot et C. de Haas, *La malediction s’acharne sur le projet de brevet européen à effet unitaire*, *Contratto e impresa / Europa*, N° 2, 2012, p. 543-556.

to ensure respect for the autonomy of the European Union legal order thus created by the Treaties”.

The major innovation brought by opinion 1/09 is probably the accent on the central role of national courts in the implementation of the EU law (§ 68 to 70 of the opinion)¹⁷. From this point of view, the drafted agreement had different specificities (§ 72)¹⁸. Therefore, “the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.” (§ 89).

From the point of view of the EU external relations law, the first lesson of opinion 1/09 is that it confirms clearly the conclusions of opinion 1/91. The creation of an international court in the framework of an external agreement of the EU remains a difficult endeavour. As K. Baudenbacher has emphasized, the EEA court remains the only court non EU/Member States¹⁹.

There remains an interesting hypothetical question. Considering the institutional guarantees integrated in the UPCA after the opinion of the Court of justice, could the formula of an agreement EU/Member States/Third states have been maintained? One can suspect that the answer would have remained negative. The mechanisms established by Articles 20 to 24 of the final agreement offer a sufficient guarantee only because they integrate themselves in “a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions”, as described by opinion 1/09. Third

17. “The Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (...) it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual’s rights under that law” “The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed”. Finally, “The judicial system of the European Union is moreover a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions”.

18. For a more detailed analysis on this point, see R. Baratta, National courts as guardians and ordinary courts of EU law: Opinion 1/09 of the ECJ, 38 *Legal issues of European Integration* 297-320 (2011); A. Rosas, The national judge as EU judge: Opinion 1/09, dans “Constitutionalising the EU Judicial System” – Essays in Honour of Pernilla Lindh – Pascal Cardonnel, Allan Rosas and Nils Wahl eds., Hart Publishing 2012.

19. K. Baudenbacher, The EFTA Court remains the only Non-EU-Member States Court – Observations on opinion 1/09, *European Law Reporter*, 2011, N° 7-8, p. 236-242.

States would not have been part of such an ensemble, and thus could not offer the same guarantees. Furthermore, it would most likely have been complicated for them to establish an international court that would have the mandate to apply the primacy of EU law.

Some points of opinion 1/09 have been interpreted by some as suggesting the contrary, notably when it evokes the precedent of the Benelux Court. This example had been presented later as an acceptable alternative solution during the negotiation in the Council. However, this precedent was in reality quite far from the ambitions of the creators of the unified patent court²⁰.

20. See the excellent comparison between the two concepts by T. Jaeger, Back to square one? An assessment of the latest proposals for a patent and court for the internal market and possible alternatives, *International review of international property and competition law*, 2012, pp. 286 and foll. This is also covered with by J. Pagenberg, Little hope for an EU patent court after the CJ opinion, pp. 6-8, whose conclusions are validly refuted by W. Tilmann: HC 1799 UK House of commons European Scrutiny Committee, Written evidence received from Professor Dr Winfried Tilmann, 65th report session 2010-12, volume II, w9.

The perception in the Commission and the Council at the time seemed less clear.

§ 3. THE RESULTING CONCLUSION OF AN INTERNATIONAL AGREEMENT BETWEEN THE MEMBER STATES

After Opinion 1/09, the negotiations were re-launched. Basically, the opinion allowed three options for the Member States²¹. They could: (a) transfer the patent caselaw to the Court of justice of the European Union; (b) transfer it to the national courts or (c) create a special international court through an international agreement. According to the Commission at that time, “the first two options would appear not to meet the political requirements of the Member States and the interests of the users of the patent system. Member States have expressed in the past their opposition to the first option, i.e. to confer jurisdiction on the CJEU. Moreover, this option would not allow for the creation of a unified patent jurisdiction because the CJEU may not be entrusted with the jurisdiction on disputes relating to “classical” European patents. This is one of the reasons why the users of the patent system are opposed to such a solution. This resulted clearly from the Commission’s consultation on the future patent policy in 2006 and has ever since been confirmed by the users of the patent system on various occasions. The second option, leaving the jurisdiction on the unitary patent protection to national courts, as in the trade mark area, would most likely not be acceptable to most Member States and industry”²².

Finally, a political agreement was concluded, comprehending two enhanced cooperation regulations and one international agreement (the so-called “unitary patent package”). Regulation 1257/2012/EU of the European Parliament and of the Council of 17 December 2012 implements enhanced cooperation in the area of the creation of a unitary patent²³. Regulation 1260/2012/EU of 17 December 2012 does the same with regard to the applicable translation arrangements²⁴. They cover all the Member States, with the exception of Italy and Spain. The international agreement (UPCA) was signed the 13

21. One will find very interesting presentations about the possible options in M. Kant, A specialised patent court for Europe, 30 *Netherlands Internationaal Privaatrecht* 193-201 (2012) and S. Peers, The constitutional implications of the EU patent, 7 *European Constitutional Law Review* 229-266 (2011).

22. Informal Commission document annexed to Council document 10630/11, 26 May 2011.

23. OJ EU L 361, 31.12.2012, p. 1-8

24. OJ EU L 361, 31.12.2012, p. 89-92

February 2013 by most of the Member States. Finally, Italy signed it, but Poland did not, and is thus now in the same category than Spain²⁵.

This agreement establishes the unified patent court completely outside the EU framework. It is described as unified since it deals both with unified patents (which are, as we shall see, a strongly weakened version of the former Community patents) and European patents. In a nutshell, the unified patent court will deal mainly with issues of patent validity and infringement. This agreement may be signed by all Member States, including those which have decided not to participate to the enhanced cooperation established by Regulation 1257 and 1260/2012/EU (art. 84 § 4). The agreement will enter into force after the 13th ratification, provided it benefits from the ratification of the three most important Member States in the field of patent (Germany, France and the United Kingdom). The entry into force also requires preliminary amendments to Regulation 1215/2012/EU concerning its relationship with the agreement (Art. 89)²⁶. In any case, it cannot happen before 1 January 2014.

This agreement contains many institutional and legal innovations. From the point of view of opinion 1/09, the first of them is the huge number of guarantees provided by the signatories to escape any additional criticism from the Court of justice. Firstly, this international agreement is now limited to the EU Member States only. Secondly, different provisions have been introduced in chapter IV to protect the full application of EU law.

For example, according to Article 20, “the Court shall apply Union law in its entirety and shall respect its primacy”. According to Article 21, “As a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court.”. Article 22 establishes a collective liability for Member States in case of infringe-

25. <http://www.unified-patent-court.org/committee-members> (accessed 4 August 2013).

This engenders a superb institutional conundrum. Though Poland is a member of the enhanced cooperation, by way of Article 18 § 2 of Regulation 1257/2012, “a European patent for which unitary effect is registered in the Register for unitary patent protection shall have unitary effect only in those participating Member States in which the Unified Patent Court has exclusive jurisdiction with regard to European patents with unitary effect at the date of registration”.

26. Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351/1) aims at determining the international jurisdiction of the courts of the Member States and preventing parallel proceedings before the courts of different Member States. It also lays down rules for the recognition and enforcement of judgments of national courts in other Member States. The amendments are twofold. First, the amendments must ensure compliance between the UPC Agreement and the Regulation, and also cover the particular issue of jurisdiction rules concerning defendants in non-European Union States.

The amendments have been presented in July 2013: see COM (2013) 554.

ment of Union law by the Court of appeal²⁷. According to Article 23, “Actions of the Court are directly attributable to each Contracting Member State individually, including for the purposes of Articles 258, 259 and 260 TFEU, and to all Contracting Member States collectively”. Furthermore, Article 24 about the sources of law contains an explicit reference to EU law.

In other words, though this text is no more an external agreement of the European Union, the Member States have tried to integrate as much as possible the guarantees for the protection of the EU system of law that the Court wanted to impose. This, in itself, already constitutes an important precedent. The use of an international agreement to implement some EU legal provisions is certainly not a usual process, especially when these provisions are themselves adopted according to an exceptional procedure. This remark is still more valid if one considers that we deal here with the judicial implementation of those EU provisions, and still more essential if this specific international judicial system, though autonomous, is nonetheless submitted to some control of the Court of Justice as any national court²⁸. This control however is certainly not easy since it relies on a collective liability of the Member States. Furthermore, in the present context, such a specific instrument could provoke important difficulties in its functioning, and later in its adaptation.

27. “(1) The Contracting Member States are jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal, in accordance with Union law concerning non-contractual liability of Member States for damage caused by their national courts breaching Union law.(2.) An action for such damages shall be brought against the Contracting Member State where the claimant has its residence or principal place of business or, in the absence of residence or principal place of business, place of business, before the competent authority of that Contracting Member State. Where the claimant does not have its residence, or principal place of business or, in the absence of residence or principal place of business, place of business in a Contracting Member State, the claimant may bring such an action against the Contracting Member State where the Court of Appeal has its seat, before the competent authority of that Contracting Member State. The competent authority shall apply the *lex fori*, with the exception of its private international law, to all questions not regulated by Union law or by this Agreement. The claimant shall be entitled to obtain the entire amount of damages awarded by the competent authority from the Contracting Member State against which the action was brought. (3.) The Contracting Member State that has paid damages is entitled to obtain proportional contribution, established in accordance with the method laid down in Article 37(3) and (4), from the other Contracting Member States. The detailed rules governing the Contracting Member States’ contribution under this paragraph shall be determined by the Administrative Committee”.

28. Revealingly, the legal service of the Council’s secretariat had expressed a doubt at the time about the conformity of the chosen approach to the EU Treaties. “It could be argued at the outset that, following the ERTA case (case 22/70, 1971, ECR 263), the validity of such an agreement is questionable, since it will concern a –by exercise exclusive competence of the Union, ie civil jurisdiction (see Regulation 44/2001 – Brussels – and the Lugano Convention, as well as Regulation 593/2008 – Rome I –, Regulation 864/2007 – Rome II – and Directive 2004/48/EC on the enforcement of intellectual property rights). The answer to this argument could be that the Union’s exclusive competence applies only to agreements with third states and not between Member States alone (see wording of Article 216 TFEU). It could then be considered that agreements between Member States may affect provisions of the Union law in so far as they are compatible with them.” (Doc. Council 15856/11, 21 october 2011, p. 10, note 23) (accessed 5 March 2012).

The followed approach could then possibly provoke the paradoxical result that Member States are more constrained in the respect of the EU competences when they conclude an external international agreement with third States than when they conclude such an agreement only between them.

Finally, it must be underlined that the agreement contains some substantive rules about patents, alongside those of Regulation 1257/2012/EU. Articles 6 to 8 of the draft unitary patent regulation regulated the right to prevent direct or indirect use of the invention, and the limitation of the effects of the unitary patent. This provoked a growing opposition in some circles. It “started in the Expert Committee of the Commission where the UK position, since a long time skeptically observing the growing influence of the ECJ practice on the national courts, met support from other members. It coincided with a certain frustration of the members when the political actors (Council, Parliament) took over the steering-wheel, reducing the influence of the Expert Committee. Both motives combined resulted in a furor which soon, like a bush-fire, jumped over to the European Patent Lawyers Association (EPLAW), the Venice Judges Meeting 2011, a UK Group submitting a Paper on Principle Objections, large enterprises, the ICC, the American Chamber of Commerce, the CBEE, FICPI and others and to a small group of Member States in the Council (UK, Sweden, Finland).”²⁹

The opposition’s arguments were based on a vivid distrust of the European Court of Justice. We’ll come back to them. They were synthesized in different documents. One of them, often cited, was provided by Professor R. Krasser’s³⁰. Another illustration was provided by Dr. J. Pagenberg³¹. They were countered by another document by Professor W. Tilmann³², and also in some aspects by various comments coming from members of the Max Planck Institute³³. Among the counter arguments one can find the alleged incompatibility of such a solution with Article 118 TFEU, which is not covered here³⁴. One can find thousands of comments on various websites³⁵.

29. HC 1799 UK House of commons European Scrutiny Committee, Written evidence received from Professor Dr Winfried Tilmann, 65th report session 2010-12, volume II, w9.

30. Effects of an inclusion of regulations concerning the content and limits of the patent holder’s rights to prohibit in an EU regulation for the creation of unitary European patent protection, 18 October 2011. <http://www.eplawpatentblog.com/2011/October/Opinion%20Prof%20Krasser%20EN.pdf> (accessed 27 June 2013)

31. The EU patent package – Politics vs. Quality and the new practice of secret legislation, http://www.ipeg.eu/wp-content/uploads/Pagenberg-The-EU-Patent-Package-_article_.pdf (accessed 21 August 2013).

32. See note 29.

33. See for example R. Hilty, T. Jaeger, M. Lamping and H. Ullrich, The unitary patent package: twelve reasons for concern, Max Planck Institute, 2012.

34. See also the interrogation of F. de Visscher, European Unified Patent Court: another more realistic and more equitable approach should be examined, GRUR Int 2012, p. 214.

35. See for example V. Metzler, In defence of Articles 6 to 9 of the unitary patent regulation, 19 March 2012 <http://blog.ksnh.eu/en/2012/03/19/in-defense-of-articles-6-to-9-of-the-proposed-unitary-patent-regulation> (accessed 27 August 2013). Pace Tolkien, an especially colourful comment is: Only Gandalf can protect Europe from the unitary patent <https://www.unitary-patent.eu/content/only-gandalf-can-protect-europe-unitary-patent> (accessed 15 August 2013).

§ 4. THE IMPLICATIONS FOR PATENT LAW

4.1. Substantive law

Many unspecialised lawyers will encounter difficulties to understand quickly the new regime. The EU Patent law (broadly defined) is now based on two enhanced cooperation regulations 1257 and 1260/2012/EU (they cover SOME limited substantive rules) and an international agreement (which establishes an international court and SOME other limited material rules). These texts are themselves strongly connected to the other international regime of the European patent established by the Munich Convention. The Member States participating to these different specific legal regimes are not identical. The rules about patentability remain defined in another international agreement, also concluded with third states. The effects of patentability are defined jointly by the two regulations (not applied in Italy and Spain), the other international agreement, and the national rules. The European Patent Office, an international authority, will deliver European patents with partial unitary consequences and European patents with multiple national consequences.

Essentially, this regime is quite different from the EU regulations covering trademarks, designs or plant variety protection. In a nutshell, these regulations cover a broad range of topics, from the requirements to the scope of protection, the limitations and exceptions, to basic rules about property and infringement.

Basically, according to the Article 142 of the European Patent Convention, “any group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States.” Regulation 1257/2012/EU is meant to be that special agreement, as indicated by its Article 1(2)³⁶.

Its chapter II describes the “effects of a European Patent with unitary effect”. One effect is deemed to be a “uniform protection” (title of Article 5). The scope of the right to prevent infringements and of the applicable limitations “shall be uniform” (Art. 5 § 2). However, immediately, the text makes a reference to a national legal system. “The acts against which the patent provides protection referred to in paragraph 1 and the applicable limitations shall be those defined by the law applied to European patents with unitary effect in the participating Member State whose national law is applicable to the European patent with

36. Some have argued that such a regulation could not be considered as the agreement required by Article 142 EPC. Others consider that the EU has to adhere formally to the EPC system. This topic will not be covered here.

unitary effect as an object of property” (Art. 5 § 3). Another effect is a “unitary effect as an object of property”. As we have seen, the two topics are linked. The same reference mechanism appears. “A European patent with unitary effect as an object of property shall be treated in its entirety and in all the participating Member States as a national patent of the participating Member State in which that patent has unitary effect” and where the applicant has his residence, principal place of business, or a place of business (Art. 7 § 1).

So, basically, a uniform patent is one whose partial effects are “uniform” by the reference to a single national rule, not harmonized. The result is thus partial and very complex. Taking the example of Article 10, one analyst concludes: “Article 10 creates uniformity of the applicable law throughout the territory of enhanced cooperation. However, that uniformity comes at the price of 25 different national laws determining the requirements of form for assignments and licenses and their effects on existing licenses, as well as the admissibility of restricted licenses, and the legal quality of such restrictions.”³⁷

Additionally, a lot of aspects are not “uniform” according to the two Regulations. They remain in the realm of national law. As confirmed by recital 9 of Regulation 1257/2012/EU, “the provisions of the EPC, the Agreement on a Unified Patent Court, including its provisions defining the scope of that right and its limitations, and national law, including rules of private international law, should apply”.

There is however a limited harmonization about some of these effects in the UPCA. The right to prevent the direct use of the invention is for example defined in Article 25 of the Agreement. The right to prevent indirect use is defined in Article 26. Some limitations of the effects of a patent are enumerated in Article 27 and a consequence of the right based on prior use of the invention of the invention in Article 28.

One thus needs to make a global interpretation of some provisions of Regulation 1257/2012/EU, making references to various national laws, in accordance with other provisions of the UPCA (bearing in mind that those texts apply to different participating states), with other parts of national laws dealing with effects uncovered by either the Regulation or the Agreement, and finally without forgetting the need to integrate also the general provisions of the EU treaties (beginning with competition and the four freedoms of circulation), and also other EU regulations, like Regulation 1215/2012/EU. This will most certainly not be a mental discipline for the faint-hearted.

37. H. Ullrich, Harmonizing patent law: the untamable Union patent, Max Planck Institute Research Paper 12-03, 2012, p. 36.

The achieved harmonization furthermore remains quite limited. For example, “as regards the unitary patent as an object of property, the UP Regulation [meaning Regulation 1257/2012] contains only a very truncated set of rules. Basic rules, as contained in all previous proposals (transfer of right, rights *in rem*, treatment in execution and insolvency, *erga omnes* effect of restrictive contractual licensing, date of third-party effects of patent transactions), are missing. Instead, Article 10 of the UP Regulation provides for the exclusive application of national law.”³⁸ “The UP Regulation no longer contains rules on prior user rights and on compulsory licenses for enabling the use of dependent improvement inventions or in the public interest. This perpetuates and entrenches anti-innovative effects in patent protection. Prior user rights are not available at all. Compulsory licenses are assumed to be available under national law only, if at all”³⁹.

Additionally, there are potential incoherencies in the system. A specific problem, for example, concerns the compulsory licenses. According to Recital 10 of regulation 1257/2012/EU, “compulsory licences for European patents with unitary effect should be governed by the laws of the participating Member States as regards their respective territories”. This brings a question concerning the capacity of the participating Member States to impose such a mechanism in a framework of partial harmonization, as established by the combination of Regulation 1257/12 and the UPCA. Furthermore, contradictory national decisions in this field could paradoxically endanger the unified effect of the concerned patent⁴⁰.

Finally, such a partial harmonization, in scope and in depth, risks generating imbalances in this domain. “If, for example, the enforcement of patents is made significantly more effective by virtue of the substantive right and flanking court, whereas the rights of third parties are not safeguarded to the same extent because they are not harmonized, the enforcement system will be one-sided”⁴¹.

38. R. Hilty, T. Jaeger, M. Lamping and H. Ullrich, The unitary patent package: twelve reasons for concern, Max Planck Institute, 2012. (an excellent synthesis in a crowded field). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169254&download=yes (accessed 13 August 2013).

39. *Ibid.* p. 3.

40. On the risk of fragmentation, see the comments mentioned in notes 33, 34 and 37, and also M. Troncoso, European Union patents: a mission impossible? An assessment of the historical and current approaches, 17 Marq. Intell. Prop. L. Rev. 261-262.

41. T. Jaeger, All back to square one? – an assessment of the latest proposals for a patent and Court for the internal market and possible alternatives, Max Planck Institute, 2011, p. 8. (the author mentions precisely the case of compulsory licenses as an illustration).

4.2. Language requirements

This topic was at the origin of the use of the enhanced cooperation regime. Furthermore, it has always been highly sensitive in the institutional debates. Needless to say, the languages remain after 60 years in the treaties one privileged area of the unanimity rule, and regulation n° 1 of 1958 remains some kind of religious icon.

Three elements are important.

Firstly, the rules are largely influenced by those of the European Patent Office (EPO). This results clearly from Article 3 § 1 of Regulation 1260/2012/EU. As a principle, “where the specification of a European patent, which benefits from unitary effect has been published in accordance with Article 14(6) of the EPC, no further translations shall be required”⁴². “Since the EPO is responsible for the grant of European patents, the translation arrangements for the European patent with unitary effect should be built on the current procedure in the EPO. Those arrangements should aim to achieve the necessary balance between the interests of economic operators and the public interest, in terms of the cost of proceedings and the availability of technical information.”⁴³

In that framework, the London agreement of 17 October 2000, entered into force in 2008, tends to facilitate the translation requirements, using the option opened by Article 65 of the EPC⁴⁴. The agreement has been signed by 10 Member States in 2000 and 2001, and ratified by 8 others⁴⁵.

Secondly, very high hopes are entertained concerning the diffusion of automatic translations. “Machine translations of patent applications and specifications into all official languages of the Union should be available as soon as possible. Machine translations are being developed by the EPO and are a very important tool in seeking to improve access to patent information and to widely disseminate technological knowledge. The timely availability of high quality machine translations of European patent applications and specifications into all official languages of the Union would benefit all users of the European patent system. Machine translations are a key feature of European Union policy.” (Recital 11). However, simultaneously, different provisions of Regulation 1260/2012/EU emphasize that “machine translations should serve for information purposes only and should not have any legal effect.”

42. As we'll see later, one of the exceptions concerns the hypothesis of a judicial litigation.

43. Recital 6, Regulation 1260/2012/EU.

44. OJ EPO 2001, 549.

45. <http://www.epo.org/law-practice/legal-texts/london-agreement/status.html> (accessed 20 August 2013).

Thirdly, while waiting for ideal machine translations, one had to define a transitory regime. As Recital 12 explains, “before a system of high quality machine translations into all official languages of the Union becomes available, a request for unitary effect as referred to in Article 9 of Regulation (EU) No 1257/2012 should be accompanied by a full translation of the specification of the patent into English where the language of the proceedings before the EPO is French or German, or into any official language of the Member States that is an official language of the Union where the language of the proceedings before the EPO is English. Those arrangements would ensure that during a transitional period all European patents with unitary effect are made available in English which is the language customarily used in the field of international technological research and publications. Furthermore, such arrangements would ensure that with respect to European patents with unitary effect, translations would be published in other official languages of the participating Member States.”

4.3. Costs

Costs are essential for the enterprises. Translations are naturally one aspect of this concern. From this point of view, the reform’s benefits appear, at least in the short term, limited. There are however other aspects.

Another aspect is the question of the fees required for the registration and the renewal of patents. The future system is well described in the Recitals of Regulation 1257/2012. The Member States should invest the EPO with the power to define the unitary patent fees⁴⁶. There should be a single annual fee for the renewal of a European unitary patent⁴⁷. Half of these fees should be redistrib-

46. “The participating Member States should give certain administrative tasks relating to European patents with unitary effect to the EPO, in particular as regards the administration of requests for unitary effect, the registration of unitary effect and of any limitation, licence, transfer, revocation or lapse of European patents with unitary effect, the collection and distribution of renewal fees, the publication of translations for information purposes during a transitional period and the administration of a compensation scheme for the reimbursement of translation costs incurred by applicants filing European patent applications in a language other than one of the official languages of the EPO” (Recital 17).

47. “Patent proprietors should pay a single annual renewal fee for a European patent with unitary effect. Renewal fees should be progressive throughout the term of the patent protection and, together with the fees to be paid to the European Patent Organisation during the pre-grant stage, should cover all costs associated with the grant of the European patent and the administration of the unitary patent protection. The level of the renewal fees should be set with the aim of facilitating innovation and fostering the competitiveness of European businesses, taking into account the situation of specific entities such as small and medium-sized enterprises, for example in the form of lower fees. It should also reflect the size of the market covered by the patent and be similar to the level of the national renewal fees for an average European patent taking effect in the participating Member States at the time when the level of the renewal fees is first set” (Recital 19).

uted to the participating Member States according to rather complex parameters⁴⁸.

The question of fees is a complex one, since it deals already now both with the EPO level and the Member States' level (especially the renewal fees). Furthermore, the fees perceived at the EPO level are also shared between the EPO and the Member States⁴⁹. Much of the attractiveness of the new patent regime will depend on the precise establishment of the fees, and any evaluation about this remains quite uncertain. The Commission indicates for example that the future regime could bring a reduction, but not during the transitory period. Even after that, the differences with the United States, for example, would remain quite substantial⁵⁰. In the present situation, many inventors tend to have their patent established in a few Member States, beginning with the big ones, and especially with Germany, France, and the United Kingdom. A balance will have to be found between the added value of a new system and its added costs. Meanwhile, wisdom seems to dictate prudence before committing to the new system, since the present texts do not guarantee until now that the added protection in many small states will not result in a strong rise of the fees. This seems confirmed by the statement of 14 December 2012 in the Council: "when deciding on the share of distribution of the renewal fees, the representatives of the participating Member States will be guided by the criteria listed in Article 13(2) of the Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection, with the aim of allowing all participating Member States to

48. "Renewal fees should be paid to the European Patent Organisation. The EPO should retain an amount to cover the expenses generated at the EPO in carrying out tasks in relation to the unitary patent protection in accordance with Article 146 of the EPC. The remaining amount should be distributed among the participating Member States and should be used for patent-related purposes. The share of distribution should be set on the basis of fair, equitable and relevant criteria, namely the level of patent activity and the size of the market, and should guarantee a minimum amount to be distributed to each participating Member State in order to maintain a balanced and sustainable functioning of the system. The distribution should provide compensation for having an official language other than one of the official languages of the EPO, having a disproportionately low level of patenting activity established on the basis of the European Innovation Scoreboard, and/or having acquired membership of the European Patent Organisation relatively recently." (Recital 21)

49. For interesting comments about the nature of these fees, see H. Ulrich, Patent protection in Europe: integrating Europe into the community or the Community into Europe, 8 *European Law Journal* 433-491 (2002), pp. 440-44.

50. "After the transitional period (in which certain additional translations will be required), the cost to obtain a European Patent with unitary effect will be around 5 000 euro. This covers the procedural fees of the EPO as well as the cost of the translation of the claims to the two other procedural languages of the EPO. During the transitional period of maximum 12 years, the cost will be slightly higher, about 6 500 euro. This includes the cost of the additional translation required during the transitional period: in order to facilitate the access to patent information until high-quality machine translations become available, European patents with unitary effect that were granted in French or German will need to be translated to English and the ones granted in English will need to be translated to another official language of the EU. Obtaining patent protection in the territory of the 27 Member States by means of a European patent costs today about 36 000 euro (the majority of which goes on translation and other costs linked to validation, such as fees of local patent offices and costs for local patent agents). By comparison, in the US, a patent costs about 2 000 euros, in China about 600 euros." http://ec.europa.eu/internal_market/indprop/patent/fags/index_fr.htm#maincontentSec11 (accessed 20 August 2013).

keep their current renewal fee income while at the same time ensuring that those Member States which currently have a low renewal fee income will significantly increase this income”⁵¹. The constraints are such that it will be difficult to prevent a rise in costs, at least in the transitory period, compared to the wide present practice of validating only in a few States⁵².

Another aspect yet is the question of the judicial proceedings’ costs. After a transitory period, “the budget of the Court shall be financed by the Court’s own financial revenues”. This concept of a self-supporting international court seems quite original, as we shall see later (see § 6.6).

On this, a very tentative evaluation of the benefits has been realized in 2009. According to the Harhoff report made for the Commission, “avoiding duplication of infringement or revocation cases is likely to generate large benefits for the European economy. The results obtained here suggest that *currently*, between 146 and 311 infringement cases are being duplicated in the Member States. By 2013, this number is likely to increase to between 202 and 431 cases. Total private savings in 2013 would span the interval between EUR 148 and 289 million. Comparing the benefits to operating cost of EUR 27.5 million shows that the benefit-cost ratio ranges between 5.4 and 10.5 in 2013. Hence, the cost-benefit assessment focusing on avoided duplication leads to a highly positive evaluation of the proposal. Various checks confirm the robustness of this result in the presence of additional infringement or revocation litigation. The results also show that the level of litigation costs at the new unified Patent Court will play a crucial role for access and for the monetary benefits from avoided duplication. Given that litigation before the unified Patent Court should be feasible at the low-cost levels currently present in the continental patent litigation systems, the financing of the Patent Court should not be purely private. The fact that litigation, in particular revocation, yields external effects is a clear argument in favor of supporting the Court’s budget with public funds”⁵³.

51. Council document, n° 17503/12 ADD 1 REV 1, p. 2.

52. One will find a tentative comparison between the present situation and the future one in Reddie and Grose, How much will the unitary patent cost?, 2013.

53. D. Harhoff, Economic Cost-Benefit Analysis of a Unified and Integrated European Litigation System, 2009, p. 53. http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf (accessed 17 July 2013)

§ 5. THE IMPLICATIONS FOR THE INSTITUTIONAL SYSTEM

The institutional implications of the chosen strategy must also not be underestimated.

Opinion 1/09 has thus provoked the abandonment of an international court with the triple participation of the EU, the Member States, and some third states, in favor of an international court limited to the Member States. This is quite a systemic decision, with multiple collateral consequences. An evaluation depends on the pursued objectives. As the Commission was underlining in 2007, there are very different, and even opposite, objectives among the Member States⁵⁴. Some of them entertained an EU vision, others an international vision of the settlement of conflicts, centred on the European patent of the Munich Convention. Others, on the contrary, were privileging a global vision, encompassing both European and EU patents.

Since the chosen system is limited only to the Member States, the use of an international court rather than an EU court, based on Article 257 TFEU, takes of course a very different significance. In a negotiation setting limited to the Member States, the use of an EU court could appear much more logical⁵⁵. The fact that it has been refused has nothing to do with opinion 1/09, and everything to do with the strong preferences of different actors. Patents thus become a most peculiar area of EU law and especially of the EU courts system.

Firstly, the implementation of EU law is now divided into two areas. In the first one, the judicial control is provided by the system of the EU courts. In the second one, it is provided by a specific system of courts created by an international treaty. This constitutes a fundamental precedent. The UPCA has created a system of courts. “The Court of First Instance shall comprise a central division as well as local and regional divisions” (Art. 5 § 1). “The central division shall have its seat in Paris, with sections in London and Munich.” (Art. 5 § 2). “A local division shall be set up in a Contracting Member State upon its request in accordance with the Statute” (Art. 5 § 3). “An additional local division shall be set up in a Contracting Member State upon its request for every one hundred patent cases per calendar year that have been commenced in that Contracting Member State during three successive years prior to or subsequent to the date of entry into force of this Agreement” (Art. 5 § 4). Such a creation may be discontinued later (Art. 18 § 3). Incidentally, the possibility to decentralize the judicial

54. See COM (2007) 165.

55. On this, see the subtle approach of F. de Visscher, *European Unified Patent Court: another more realistic and more equitable approach should be examined*, GRUR Int 2012, pp. 214.

control of EU law had been debated during decades; the UPCA finally does it and even in various ways.

Secondly, the unified patent court relies on an enhanced cooperation of an extremely particular nature. It is linked to the creation of a specialized court, and additionally this creation is made by an international treaty. This constitutes also an important precedent. Until now, the enhanced cooperation mechanism had been used to circumvent the opposition of one or two Member States against a specific measure. Here, the scope of the operation is substantially wider, since an international agency is authorized to implement EU law and an international court is created to control this implementation. Additionally, these enhanced cooperation measures have been contested by two Member States before the Court of Justice.

Thirdly, these enhanced cooperation regulations have provoked questions about their compatibility with the Treaties. Some of them have already been dealt with by the Court of Justice's judgment of 16 April 2013⁵⁶. Others have been raised by the Spanish government's new applications⁵⁷. Others have been mentioned by observers⁵⁸. This paper will not deal with these questions, since some of them have been submitted to the Court, and this would anyway require a very long analysis.

From the legal point of view, it must be noted in any case that the EPO becomes an organ in charge of the implementation of EU rules. Such a mechanism raises interesting questions. How can enterprises contest an implementation decision of the EPO in that framework? And how can the EPO's interpretation of EU law be controlled by the Court of Justice? Let's imagine for example that an enterprise intends to contest the conformity of the decision establishing the fees to the parameters defined by Regulation 1257/2012. Interestingly, the EPO gives the following description of its boards of appeals system: "the boards of appeal, though integrated in the organisational structure of the EPO, are independent from the Office in their decisions and are bound only by the European Patent Convention"⁵⁹.

Fourthly, the international treaty establishing the specialized court also defines substantive rules. The cohabitation of these rules with the principles of the European Treaties and some particular EU regulations will have to be defined.

56. See the Court of Justice's judgment of 16 April 2013 in joint cases C-274-11 and 295/11.

57. See cases C-146/13 and C-174/13.

58. See M. Lamping, *Enhanced Cooperation – A Proper Approach to Market Integration in the Field of Unitary Patent Protection?*, *International Review of Intellectual Property and Competition Law*, 2011, N° 8, p. 879–925 et A.-S. Lamblin-Gourdin, *Les coopérations renforcées au secours du brevet européen*, *Revue de l'Union européenne*, Avril 2012, n° 557, p. 254-269

59. <http://www.epo.org/about-us/boards-of-appeal.html> (accessed 20 August 2013).

For example, we have seen that the UPCA establishes specific rules about the use of languages. In some cases, this could constrain the parties to plead in a language they have not chosen. Interestingly, the General advocates of the Court of Justice have underlined that such a regime could be seen as incompatible with the rights of defence⁶⁰. If one follows this line of reasoning, the rule could thus be contested in the future.

Fifthly, in the future, the use of an international convention could complicate any revision. Generally, any consequent revision will require the unanimity of the participating States. There are possibilities of simplified revisions. According to Article 87 § 2 UPCA, “the Administrative Committee may amend this Agreement to bring it into line with an international treaty relating to patents or Union law”. This option concerns however only limited hypotheses. Even in this simplest case, the process can be blocked by a participation member⁶¹. Furthermore, some changes of the substantial provisions concerning the legal effects of patents could become extremely complex, since they could concern both the UPCA and Regulation 1257/2012/EU.

Sixthly, this negotiation has provoked recurrent interventions of the European Council. The first one concerned articles 6 to 8 of the enhanced cooperation regulation presented by the Commission. These provisions were reproducing (and bringing precisions to) the existing mechanisms in the fields of trademarks, drawings and designs. They were contested for reasons both constitutional and technical⁶². In its June 2012 conclusions, the European Council indicated: “we suggest that Articles 6 to 8 of the Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection to be adopted by the Council and the European Parliament be deleted”⁶³. Most fortunately for the coherence of the unified patent, this abandonment provoked the opposition of the European Parliament. Finally, these provisions have thus been transferred from the Regulation to the international agreement. This explains the final hybrid nature of the legal regime.

Interestingly, this transfer did not fulfil the objective pursued by some actors in the process, meaning the elimination of any intervention of the Court of Justice. “As a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the Euro-

60. Position of 2 July 2010, § 121. <http://europeanpatentcaselaw.blogspot.com/2010/08/jurisdiction-commune-et-brevet.html>

61. “A decision of the Administrative Committee taken on the basis of paragraphs 1 and 2 shall not take effect if a Contracting Member State declares within twelve months of the date of the decision, on the basis of its relevant internal decision-making procedures, that it does not wish to be bound by the decision. In this case, a Review Conference of the Contracting Member States shall be convened” (Art. 87 § 3 UPCA).

62. See the very useful report of the UK House of Commons: *The unified Patent Court: help or hindrance?*, vols. I and II, 2012. (accessed 13 March 2013).

63. § 3.

pean Union to ensure the correct application and uniform interpretation of Union law, as any national court”. (Art. 21 UPCA). Its judgments are based on “Union law” and “this agreement” (Art. 24 UPCA). In that context, “the Court shall apply Union law in its entirety and shall respect its primacy”. (Art. 20 UPCA). Thus, the contested role of the Court of Justice has been maintained, but in a slightly less expressed way. The system of “unitary” effect however has become meanwhile much more complex.

The second intervention of the European Council has also contributed to the complexity of the regime, but from a different point of view. It concerns different aspects related to the seats of the organs of the UPC. “Heads of State or Government of the participating Member States agreed on the solution for the last outstanding issue of the patents package, namely the seat of the Central Division of the Court of First Instance of the Unified Patent Court (UPC). That seat, along with the office of the President of the Court of First Instance, will be located in Paris. (...) Given the highly specialised nature of patent litigation and the need to maintain high quality standards, thematic clusters will be created in two sections of the Central Division, one in London (chemistry, including pharmaceuticals, classification C, human necessities, classification A), the other in Munich (mechanical engineering, classification F)”⁶⁴. If one adds to that the localization of the Court of appeal in Luxembourg, of the patent mediation and arbitration centre cumulatively in Ljubljana and Lisbon (Art. 35 UPCA), and of the Training Centre for judges in Budapest, the unified court of patent appears as the most dis-unified international court, as far as its management is concerned.

For those of us mature/old enough to have followed the 1993 tough negotiation about the institutions’ seats, this reflects clearly a substantial deterioration. One can only hope that, in case the European Council deals in the future with the creation of a “single” European energy regulator, the coal department will not be localised in Warsaw, the petrol department in Edinburg, the sun department in Malaga, the wind in Copenhagen, the gas department in Bucarest, the nuclear department in Tampere, the biofuel department in Salzburg, and the board of appeals in Riga.

The participating Member States have even agreed about the nationality of the first president of the central division. “The first President of the Court of First Instance should come from the Member State hosting the central division.” This is also an important precedent, as it indicates that the use of the intergovernmental method could allow the Member States more direct influence on the functioning of the courts in the future.

64. Ibid.

§ 6. THE IMPLICATIONS FOR THE EU COURTS SYSTEM

Finally, the implications of the creation of this quite special specialized court for the EU courts system have been underestimated. On one side, the chosen approach is generating a lot of complexity. On the other side, the autonomy of the two systems allows for very interesting comparisons and experiments. They are many original concepts in the new system, which call for a comparative study in depth of the old one.

6.1. A European (but not EU) system of specialized courts completely tailor-made

The new Court will thus have jurisdiction for unitary patents but also for traditional European patents. Mainly it will deal with validity cases and infringement cases. After the signature of the UPCA, one could have imagined to find some synergies between the existing administrative and procedural aspects of the EU courts system and the new one. This is not what happened. This was partly inevitable. The preference for an international agreement does not allow easily the use of many EU instruments and organs. However, the signatory States have clearly decided to keep these two systems as separate as possible. The budget of the UPC system will be completely separate from the EU budget. Its public servants will not be covered by the EU public staff regulations. Its rule of procedure will absolutely not be coordinated with the EU courts.

Revealingly, the signatory States have even decided that the negotiations aiming at the implementation of the UPCA will not be organized in the buildings of the European Union, and will barely tolerate a representative of the Commission. A notice has been published by the Council in the Official Journal about the signature of the Agreement⁶⁵. This seems to be the only exception to the total separation between the UPC and the EU courts systems.

There are both opportunities and risks in this strategy. The opportunity is to allow a lot of experiments in the creation of a specialized court at the European (but not EU) level. This has been absolutely impossible until now due to the adamant opposition of the Court of justice to the creation of any new EU specialized court (more about this later). From this point of view, many new interesting elements deserve attention in the new system. The risk is however to redefine a lot of already existing instruments, to limit the contacts and possibly

65. OJ C 175/1.

the transfers between the two systems, and thus possibly to increase the misunderstandings between them.

6.2. A new appointment process for the judges

According to Article 15 UPCA, “the Court shall comprise both legally qualified judges and technically qualified judges. Judges shall ensure the highest standards of competence and shall have proven experience in the field of patent litigation”. Two innovations appear already at that level. The first one is the distinction between legally and technically qualified judges. The second one is the organization of a broad training framework by Article 19 UPC, “in order to improve and increase available patent litigation expertise and to ensure a broad geographic distribution of such specific knowledge and experience”⁶⁶.

According to Article 16 UPC, “the Advisory Committee shall establish a list of the most suitable candidates to be appointed as judges of the Court, in accordance with the Statute. On the basis of that list, the Administrative Committee shall appoint the judges of the Court acting by common accord.” This is completed by Article 3 of the Statute. “Vacancies shall be publicly advertised and shall indicate the relevant eligibility criteria (...). The Advisory Committee shall give an opinion on candidates’ suitability to perform the duties of a judge of the Court. (...) The list shall contain at least twice as many candidates as there are vacancies”. Furthermore, “when appointing judges, the Administrative Committee shall ensure the best legal and technical expertise and a balanced composition of the Court on as broad a geographical basis as possible among nationals of the Contracting Member States”. According to Article 4, “judges shall be appointed for a term of six years, (...) and may be re-appointed”⁶⁷.

From this point of view, the procedure is largely similar to the selection mechanism for the Civil Service Tribunal. There are however two differences. Firstly, “where necessary, the Advisory Committee may recommend that, prior to the decision on the appointment, a candidate judge receive training in patent litiga-

66. This will encompass: (a) internships in national patent courts or divisions of the Court of First Instance hearing a substantial number of patent litigation cases; (b) improvement of linguistic skills; (c) technical aspects of patent law; (d) the dissemination of knowledge and experience in civil procedure for technically qualified judges; (e) the preparation of candidate-judges.
See also the precisions by Article 11 of the Statute.

67. In September 2013 a call was made for expression of interest from candidate judges. According to this document, “the pre-selection of candidate judges will be conducted by the Preparatory Committee. An Advisory Panel composed of experienced, active or former members of appeal courts or supreme courts or active or former lawyers with recognised competence in patent litigation is to be established (...). This Advisory Panel will assist the Preparatory Committee and the Human resources and training working group both on assessing the qualification and experience of candidates and on establishing the training requirements for the candidate judges. This procedure is without prejudice to the formal appointment procedure.” <http://www.unified-patent-court.org/images/documents/judges-expression-interest.pdf> (accessed 8 October 2013).

tion”. This could provoke debates about the required level of qualification. Secondly, the appointment of the members of the committee has not been defined with the same degree of precision.

Fundamentally, one essential question remains: will this court be saddled with the same instability problem as the Civil Service Tribunal and the General Court? In that context, after long negotiations, the Member States have indicated in 2012 a desire to establish a rigid rotation of nationalities in the Civil Service Tribunal at each renewal⁶⁸. The same preoccupation seems to explain (at least partially) the repeated failure in 2002 and 2013 of the Court of justice’s propositions to increase the number of judges of the General Court⁶⁹.

6.3. A new governance system for the courts

The management of the Court system relies on four different committees. Firstly, there are the Administrative Committee, the Advisory Committee and the Budget Committee (art. 11 UPC). The most essential one is the Administrative Committee, consisting of one representative of each Contracting Member State, and taking generally general decisions by a majority of three quarters of the Contracting Member States represented and voting (Art. 12 UPC)⁷⁰.

The Administrative Committee adopts the Rules of Procedure on the basis of broad consultations with stakeholders (Art. 41 UPC). It adopts the financial regulations (art. 33 Statute). It sets the remuneration of the President of the Court of Appeal, the President of the Court of First Instance, the judges, the Registrar, the Deputy-Registrar and the staff (Art. 12 statute). The budget shall be adopted by the Budget Committee (Art. 26 Statute).

Secondly, there is a presidium formed by “the President of the Court of Appeal, who shall act as chairperson, the President of the Court of First Instance, two judges of the Court of Appeal elected from among their number, three judges of the Court of First Instance who are full-time judges of the Court elected from among their number, and the Registrar as a non-voting member” (art. 15 § 1 of the Statute). The Presidium draws up propositions for the amendment of the Rules of Procedure and the annual budget, manages the training programme for judges, takes decisions on the appointment and removal of the Registrar. It may

68. Three judges were thus constrained to leave, including the president, though two had expressed their desire to remain. In 2013, the replacement of the leaving Polish judge has provoked a lot of discussions between the Member States.

69. For more comments about the functional consequences, see F. Dehousse, *The reform of the EU courts – The need of a management approach*, TEPSA/Egmont Paper n° 53, 2011, § 3.1.1.

70. As we have seen, according to Article 16 UPCA, on the basis of the list established by the advisory committee, “the Administrative Committee shall appoint the judges of the Court acting by common accord.” This is thus, for example, one decision which is not taken by “the majority of three quarters of the Contracting Member States”.

also waive the immunity of judges (Art. 8 Statute). Its decisions require the presence or representation of all members, and are taken by a majority of the votes (art. 15 § 5 Statute).

In this domain, the governance system appears substantially more transparent and clearer than the existing system in the Court of justice of the European Union (the institution). The CJEU is in fact managed largely by the general reunion of the Court (the judicial organ) and its specific registrar⁷¹. An administrative committee exists, but its role remains vague in the official texts.

Most interestingly, there is no clear description of the governance system of the Court of justice of the European Union (the institution) in its statute. Recently, the extreme sensitiveness of the topic was again confirmed during the revision of the rules of procedure of the Court of justice (the judicial organ)⁷². The Court proposed to introduce a provision about the management of the institution's services, though it is a purely administrative and not procedural matter, already covered in the statute, in its specific rules of procedure. This was approved by the Council in the new article 9 § 3 of the Rules of procedure. However, the text's meaning is clearly different from one linguistic version to the other. The English version, which was the basis of the negotiation inside the Council, indicates: "the President shall ensure the proper functioning of the services of the Court". The other languages versions indicate that the President shall ensure the proper functioning of the services of the "institution"⁷³. The same divergence is reproduced in the new Article 20 § 4 of the same rules, concerning the powers of the Court of justice's registrar. This appears more than a nuance, regarding such a fundamental question as the management of the whole institution⁷⁴.

6.4. A new language regime

Regulation 1260/2012 imposes a general translation obligation to the patent proprietors. More specifically, according to Article 4 § 2, they have to "provide

71. The will to maintain this situation was already one source of the resistance of the Court during the Nice Treaty negotiation of 2000, repeated in the Convention on the future of Europe, to be called "the Constitutional Court" or "the Supreme Court". This maintained the confusion surrounding the whole question and the Court has thus become officially "the Court of justice of the Court of justice of the European Union", the General Court "the General Court of the Court of justice of the European Union", and the CST "the Civil Service Tribunal of the Court of justice of the European Union".

72. OJ 2012, L 265/1.

73. "Le président veille au bon fonctionnement des services de l'institution" (French version). "Der Präsident sorgt für einen ordnungsgemäßen Arbeitsgang der Dienststellen des Organs" (German version). "El Presidente velará por el buen funcionamiento de los servicios de la institución" (Spanish version). "Il presidente vigila sul corretto funzionamento dei servizi dell'istituzione" (Italian version).

74. According to the new Article 20 § 4 of the Rules of procedure in the English version, which was also the basis of the negotiation in the Council, "the registrar shall direct the services of the Court under the authority of the president of the Court". In the other languages versions, he directs the services of the whole institution.

in the course of legal proceedings, at the request of a court competent in the participating Member States for disputes concerning European patents with unitary effect, a full translation of the patent into the language used in the proceedings of that court”.

The general rules regarding the use of languages during the judicial proceedings are defined by Articles 49 and 50 UPC. They reflect a clear preference for the language in which the patent was granted. The UPC Court of first instance and Court of appeal can use a limited flexibility, provided they obtain the agreement of the parties.

However, there are quite some innovative provisions beyond that.

Firstly, according to Article 51 UPC, “any panel of the Court of First Instance and the Court of Appeal may, to the extent deemed appropriate, dispense with translation requirements”. This possibility does not exist in the EU courts. Furthermore, in the context of an infringement action, the right to a translation is conditional. “A defendant having its residence, principal place of business or place of business in a Member State shall have the right to obtain, upon request, translations of relevant documents in the language of the Member State of residence, principal place of business or, in the absence of residence or principal place of business, place of business, in the following circumstances: (a) jurisdiction is entrusted to the central division in accordance with Article 33(1) third or fourth subparagraph, and (b) the language of proceedings at the central division is a language which is not an official language of the Member State where the defendant has its residence, principal place of business or, in the absence of residence or principal place of business, place of business, and (c) the defendant does not have proper knowledge of the language of the proceedings.”

6.5. New procedural rules

Article 42 UPC begins with an interesting general statement. “The Court shall ensure that the rules, procedures and remedies provided for in this Agreement and in the Statute are used in a fair and equitable manner and do not distort competition”. The focus given to competition is certainly interesting in a text dedicated to the correct protection of exclusive rights.

First, the draft rules of procedure do not foresee any precise rule about the attribution of cases to panels and to judges-rapporteurs. According to rules 17.2 and 18, this could become a discretionary power of the president of the Court of first instance and of the presiding judge of the panel. It remains to be seen whether this will not provoke problems regarding languages, national interests, and the principle of the “juge legal”.

Interestingly, the draft Rules of procedure foresee different possibilities to circumscribe the hearings. According to Rule 113 § 2, “oral testimony at the oral hearing or at any separate hearing shall be limited to issues identified by the judge-rapporteur or the presiding judge as having to be decided on the basis of oral evidence”. According to Rule 113 § 3, “the presiding judge may, after consulting the panel, limit a party’s oral submissions if the panel is sufficiently informed”.

Rule 220 § 2 indicates that “procedural decisions or orders may be appealed with leave of the Court” (it remains to be seen whether this possibility will really simplify the proceedings). Rule 243 reflects that referrals back to the Court of first instance will be limited to “exceptional circumstances” (on the contrary, this is certainly a factor of judicial efficiency).

Case management has been covered extensively by the draft Rules of procedure. Rule 332 of the draft Rules of procedure defines what an “active case management” is⁷⁵. Rule 334 defines the case management powers of the judge-rapporteur, the presiding judge or the panel⁷⁶. According to Rule 333, a review of case management orders would be possible⁷⁷.

75. “Rule 332 – General principles of case management

Active case management includes

- (a) encouraging the parties to co-operate with each other during the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and disposing summarily of other issues;
- (d) deciding the order in which issues are to be resolved;
- (e) encouraging the parties to make use of the Centre and facilitating the use of the Centre;
- (f) helping the parties to settle the whole or part of the action;
- (g) fixing timetables or otherwise controlling the progress of the action;
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the action as the Court can on the same occasion;
- (j) dealing with the action without the parties needing to attend in person;
- (k) making use of available technical means; and
- (l) giving directions to ensure that the hearing of the action proceeds quickly and efficiently.”

76. “Rule 334 – Case management powers

Except where the Agreement, the Statute or these Rules provide otherwise, the judge-rapporteur, the presiding judge or the panel may

- (a) extend or shorten the period for compliance with any rule, practice direction or order;
- (b) adjourn or bring forward the interim conference or the oral hearing;
- (c) communicate with the parties to instruct them about wishes or requirements of the Court;
- (d) direct a separate hearing of any issue;
- (e) decide the order in which issues are to be decided;
- (f) exclude an issue from consideration;
- (g) dismiss or decide on a claim after a decision on a preliminary issue makes a decision on further issues irrelevant to the outcome of the action.
- (h) dismiss a pleading summarily if it has no prospect of succeeding,
- (i) consolidate any matter or issue or order them to be heard together,
- (j) make any order pursuant to Rules 103 to 109.”

77. “1. Case management decisions or orders made by the judge-rapporteur or the presiding judge shall be reviewed by the panel, on a reasoned Application by a party. 2. An application for the review of a case management order shall be lodged within two weeks of service of the order. The application shall set out the grounds for review and the evidence, if any, in support of the grounds. The other party shall be given an opportunity to be heard. 3. The party seeking a review shall pay the fee for the review of a case management order”.

Most fundamentally, according to Rule 262, “written evidence, decisions and orders lodged at the Court and recorded by the Registry shall be available to the public for on-line consultation, unless a party requests that certain information be kept confidential and the Court makes such an order”. This could be (if approved) a fundamental change in the direction of a much greater transparency of judicial proceedings.

The agreement also opens the possibility, “in exceptional circumstances” of a dissenting separate opinion by a judge (Art. 78 § 2 UPCA). This is an important precedent at the EU level. It appears not certain that all its implications have been examined. Finally, it also opens a possibility of “patent mediation and arbitration” (Art. 35 UPCA), another precedent.

6.6. A new approach of costs

The UPCA and its implementation texts reflect a regular preoccupation with judicial costs. In itself, this is already an innovation. According to Article 40 § 3 UPCA, “the Statute shall guarantee that the functioning of the Court is organised in the most efficient and cost-effective manner and shall ensure equitable access to justice”.

In a more detailed way, Rule 332 of the draft Rules of procedure foresees that case management includes “considering whether the likely benefits of taking a particular step justify the cost of taking it”. This brings a quite new question: are we going to see in the future some costs assessments of procedural decisions? And what will be the weight of such a consideration?

Another important innovation is established by Article 36 UPCA. In principle, after a transitory period, “the budget of the Court shall be financed by the Court’s own financial revenues”. In that line of reasoning, according to Article 70 §§ 1 and 2, “parties to proceedings before the Court shall pay court fees” and “court fees shall be paid in advance, unless the Rules of Procedure provide otherwise. Any party which has not paid a prescribed court fee may be excluded from further participation in the proceedings”. In that framework, it must be noticed that this will bring the parties to finance also the training programme of the UPC⁷⁸.

More generally, this is the first time that the European institutions open a real reflection about the costs of justice. In 2009, a first study was produced about the costs and benefits of an integration European litigation system⁷⁹. In 2011, a

78. Consequently, if the future Court is self-financing, it means that the applicants will also have to finance the training costs of prospective judges. Without determining whether such a mechanism is proportional or not, one can certainly conclude that this is another innovation.

79. D. Harhoff, *Economic cost-benefit analysis of a unified and integrated European patent litigation system*, 26 February 2009.

second one was produced about the caseload and the financing of the unified patent court⁸⁰. Though of course these reflections are of a highly prospective nature, they represent a considerable progress.

6.7. A subsidiary court during a seven years transition period

One flexible aspect of this new judicial system resides in the transitory regime established by Article 83 UPCA. “During a transitional period of seven years after the date of entry into force of this Agreement, an action for infringement or for revocation of a European patent or an action for infringement or for declaration of invalidity of a supplementary protection certificate issued for a product protected by a European patent may still be brought before national courts or other competent national authorities.” (Art. 83 § 1). In fact, enterprises may thus choose.

According to Article 83 § 5, “five years after the entry into force of this Agreement, the Administrative Committee shall carry out a broad consultation with the users of the patent system and a survey on the number of European patents and supplementary protection certificates issued for products protected by European patents with respect to which actions for infringement or for revocation or declaration of invalidity are still brought before the national courts pursuant to paragraph 1, the reasons for this and the implications thereof. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to prolong the transitional period by up to seven years.”

A lot of enterprises will probably prefer waiting to have first indications about the productivity and costs of the new judicial organs before committing themselves. The very important uncertainties surrounding them will most likely be a strong incentive in that direction.

80. DG Internal market and services, *Study on the caseload and financing of the Unified patent court*, 7 November 2011.

CONCLUSIONS

What does all this tell us about the present state of the European Union? Firstly, the new EU of 28 Member States and nearly 500 million people has become extraordinarily difficult to manage. This is especially the case when, as here, unanimity applies. Except in an acute crisis, the will to compromise is weak. Secondly, this applies especially when languages are at stake. An extensive and various case-law illustrates this extreme sensitiveness. Thirdly, this episode offers a new illustration of the Member States' tendency to use the classical instruments of international law to compensate the present extreme rigidity of the EU instruments. Fourthly, the single market remains quite incomplete in the area of intellectual property. Patents provide a strong illustration, and so do copyrights.

After a long tour, we can now come back to the essential question: why has it been deemed necessary to maintain an international court, and not an EU one, when it had been decided to limit its members to those of the European Union? Different reasons played a role, as usual. However, it remains difficult to understand this outcome without reading some positions taken by some professionals and operators in the field of patents, and also by the Court of Justice.

On one side, as G. Triet and M. Vivant note, some circles do not wish at all any control of the Court of justice, fearing that the Court is not really prepared to the particularities of the patents case-law, or sufficiently understanding for the interests of enterprises (author's translation)⁸¹. To give a few illustrations, the 29 October 2011 resolution of EPLAW (European Patent Lawyers Association) declares: "(The rejection of Articles 6-8) by the great majority of member states and practically all users results from the promise by the Commission and the Council that only judges with the *highest qualification and experience* in patent law should deal with patent litigation between private parties, so that an involvement of the ECJ beyond the EU legal order as it exists today should be avoided, otherwise the entire project could be endangered. Users request an efficient and predictable procedure before highly experienced judges which they would not get in proceedings which would include referrals on substantive law to the ECJ."

The explanations of P. Veron in the European Parliament in 2011 are much more candid. "The third concern of the patent users is that the new system should not allow too many recourses, notably to the ECJ which is not the best

81. "Certains milieux d'affaires ne souhaitent pas vraiment un tel contrôle, craignant que la Cour ne soit pas réellement préparée à la spécificité du contentieux des brevets ni suffisamment réceptive aux intérêts des entreprises", G. Triet et M. Vivant, Juridiction européenne: une nouvelle donne pour le brevet?, Cahiers de droit de l'entreprise, Janvier 2012, n° 1, dossier 4

court to have the final word about each and every patent infringement case in Europe; this means not only that the ECJ should not be a third instance court (cassation court) for patent cases; it also means that the ECJ should not have to rule on matters related to patent law which do not directly involve the EU legal order. The patent community unanimously believes that the ECJ should not decide on matters like novelty, inventive step and infringement; these are areas where hands-on experience of patent litigation is vital. If I may tease you, I would say that practitioners do believe that predictability is more important than justice⁸². One can still prefer the absolute clarity of the UK *Chartered Institute of Patent Attorneys*: “The CJEU must not decide European patent infringement law. They do not have the specialist expertise and are not suited to it. References to the CJEU lead to further expense and delay. This is also a further ceding of sovereignty to Europe, without justification”⁸³. The prize in these comments could go to the EPLAW President’s 2011 report: “If one wants a really unattractive, inefficient, unpredictable and probably extremely expensive patent court system, then we will get it; one must only give the ECJ a chance to receive as many referrals in patent law as possible. If one wants to see substantive patent law in Europe to be decided by judges without any solid knowledge and experience in this field, then one must involve the ECJ whenever possible.”⁸⁴ Interestingly, some of these practitioners tend to present their community as ‘unanimous’ when the reading of many comments reflects on the contrary a very divided one.

These drastic words find an echo in other drastic words of the Court of justice in its 2011 proposal of revision of its own statute. In this proposal, the Court has excluded in categorical terms any creation of an EU specialized court, for the sake of legal coherence⁸⁵. According to the Treaties, any creation of a specialized court implies the transfer of appeals to the General Court. For the Court, this would logically also require the transfer of prejudicial rulings to the General Court, also allowed by the Treaties. As the Court is not satisfied by the review process provided in such cases by the Treaty of Nice, it concludes: “review is not, therefore, an appropriate tool for ensuring consistency of case-law other than in relation to important issues of principle.” In matters of prejudicial rulings, it adds: “the advantages, in terms of consistency in the case-law on trade marks, are slight in comparison with the negative repercussions of such a transfer on other areas, such as the internal market – including, in particular,

82. P. Veron, What model for the jurisdictional system for patent disputes in Europe?, European Parliament – Committee on Legal Affairs, Public hearing – Brussels 11 October 2011.

83. Briefing paper on European patent law proposals – Unitary European Patent and Unified Patents Court (6 December 2011), p. 5. <http://www.cipa.org.uk/pages/whatsnew/article?D97A217E-AD81-4766-9981-EE84D944A1E5> (accessed 15 March 2013).

84. <http://www.eplaw.org/Downloads/President's%20Report.pdf> (accessed 30 September 2013).

85. Proposition of 28 March 2011. http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf (accessed 21 May 2013).

the free movement of goods – or the principles applicable to references for a preliminary ruling as such”⁸⁶. This adamant opposition has quite systemic consequences. Specialized courts, as revealed by the analysis of the unified patent court agreement, could offer much more flexibility in terms of appointment and specialization of judges and personal, of procedure and of translation. They could permit to take better into consideration some specific needs of the enterprises. Furthermore, they could bring increased productivity and reduced costs⁸⁷.

This evokes somewhat a dialogue of the deaf. On one side, some representatives of the patent specialists’ community seem to desire a harmonization of the effects of patents in the single market... but without the constraints of EU law, and the control of a court... but without any interference of the Court of justice. The desire of specialized judges is quite understandable, but the refusal of any competence of the Court of justice much less so. One gets sometimes the feeling that what is strongly asked for is in fact a real single market with a simultaneous opt-out of all EU law constraints. Though patents are important, free circulation, competition, and fundamental rights are also important, and a balance must be found between all of them⁸⁸. This is the Court of justice’s mission. On the other side, the Court of justice seems eager to expand without limit generalist courts, in spite of their numerous constraints, rigidities and costs. Patents provide a marvelous example of the dead end brought by a systematic refusal of any need for specialization. The accumulation of these rejections can only bring the establishment of a real oxymoron of the EU law. A court which does not belong to the EU, but is meant to implement EU law, has to combine substantial rules about the same topic defined (a) in the EU Treaties, (b) in a Treaty concluded between some of the Member States and some third countries, (c) a Treaty concluded by some of the Member States, (d) specific EU enhanced regulations covering some of the Member States (but different of the formers), (e) other EU regulations and (f) various national legislations of reference.

The final – and most paradoxical – result of this extremely complex maze could be to require more intervention of the Court of Justice in the future.

After decades of negotiations, the conclusion in the EU of different agreements about patents can only inspire mixed feelings. On one side, so many efforts were

86. Another reason of this opposition could be that the expansion of a three level judicial system could also provoke a reform of the institution’s governance system, which remains a very sensitive question (see § 6.3). The link between the two topics has however never been explicitly made until now.

87. For more detailed comments, see F. Dehousse, *The reform of the EU courts – The need of a management approach*, TEP/SA/Egmont Paper n° 53, 2011, § 4.

For example, a brief analysis of the budgets indicates that the productivity of the cabinets’ personnel is more or less 2,5 higher in the Civil Service Tribunal than in the Court of Justice. Additionally, the costs per unit are lower.

88. About this, see also T. Jaeger, *Shielding the unitary patent from the ECJ: a rash and futile exercise*, IIC, 2013, pp. 389-391.

invested so long that any solution brings relief. On the other side, the new system's extreme complexity can also generate doubt and frustration. One must never forget that this colossal work is meant to simplify the life of the European enterprises (meaning those who register patents as well as those who contest them). From this point of view, the reading of the texts is not fully comforting.

One can easily draw a first conclusion: this is certainly not the end of this saga. The UPCA must be ratified. Numerous acts will have to be adopted to allow its entry force⁸⁹. Many new mechanisms will have to be tested. Finally, according to the author, important corrections will be required at the end of the whole process.

From the institutional point of view, the unified patent court offers a magnificent illustration of the extreme complexity level reached by the European Union during the last years. Of course, the deep and broad integration of so many States, so different, with nearly a population of a half billion people, is an extraordinarily ambitious objective. Complexity is inevitable. However, a part at least of the system's complexity seems to come not from functional requirements, but from various misunderstandings and inability to compromise.

From the judicial point of view, the chosen approach reflects a persistent suspicion of the Court of justice in some circles of patents specialists, and also in some Member States. It also reflects the consistently hostile attitude of the Court of justice regarding the creation of any new EU specialized court. Corporatist, national and/or cultural reasons seem to explain a quite generalized resistance to change.

Another solution, possibly more efficient, could in fact have been possible. For this, however, the different parties involved would have needed to compromise. The Court of justice could have accepted the possibility to create new specialized courts in targeted domains, and explored different solutions, already available, to protect the coherence of the caselaw. The Member States could have preferred the advantages of a full-fledged EU specialized court, examined the possible simplification of its procedural constraints, and also explored means to improve the present (in)stability of the EU courts. Finally, in that framework, the patent specialists could have accepted some concessions for the sake of a broader and much simpler protection of patent rights at the EU level, and also for the coherence of the whole EU legal system. However, the new system will require time to become fully operational. Some adaptation could become possible anyway in the future.

89. On this, see the roadmap adopted in 2013 by the preparatory committee: <http://www.unified-patent-court.org/images/documents/roadmap.pdf> (accessed 10 October 2013).

In that perspective, there is a real need to deepen the analysis about the possible simplifications that could be brought by the creation of EU specialized courts. Though this has not been done until now, it is important to connect the two negotiations concerning the unified patent court and the revision of the statute of the Court of justice of the European Union⁹⁰.

One needs to come back to the basics, and forget prejudiced ideas. Since the years 1970s, some basic elements seem to be accepted. A harmonized protection of patents could offer serious benefits to inventors, and to the enterprise system which supports them. Such a harmonization cannot be dissociated from the creation of a common court. It can however cohabite with a partial decentralization at the level of the Member States. The protection of all interests involved requires judges with high qualifications and simplified procedures. It would maybe be simpler to begin with the existing EU legislations and judicial system, and then try to adapt them to those specific requirements. EU law offers already the required flexibility. It would be superbly ironic to see at the end the repeated failure of an efficient protection of patents, crucial for European competitiveness, due to ... a lack of inventiveness.

90. On this, see F. Dehousse, *La nécessité d'une approche managériale de la réforme des cours européennes – Quelques questions après 18 mois de débat législatif sur la réforme du tribunal*, Université de Paris, 26 oct. 2012. (to be published).

