

EPLAW

European Patent Lawyers Association

YEARBOOK

2009 – 2010

(Editor : F. de Visscher (*Simont Braun*), Past Secretary to the Association)

Association européenne d'avocats spécialisés dans le contentieux des brevets d'invention
Europäische Vereinigung der Patentrechtsanwälte

Siège : Avenue Louise, 149 (boîte 20) 1050 BRUXELLES - BELGIQUE
Association sans but lucratif (Loi du 27 juin 1921)

Dear Colleagues,

This year marks the 10th anniversary of EPLAW; therefore the EPLAW Board at its meeting in March decided that a celebration was to be held with the members during the Congress in Brussels as we did it with the 5th anniversary. We thought that the judges at the Forum in Venice should be reminded how EPLAW's history was connected with the judges' meetings which now have regularly been held since 2005 and were glad that Lord Hoffman accepted our invitation for an anniversary speech there.

The major events of the year started with the *Young EPLAW conference* which was held on May 17 with interesting program features and good teams which you find on our website. I went directly from Brussels to Luxembourg where one day later the hearing before the ECJ on the request of an opinion concerning the Draft Agreement on the EEUPC was scheduled. The setting of 27 judges, 8 advocates general, more than 20 delegations of member states and the representatives of the Council, the Commission and the European Parliament made the impression of a big orchestra playing without rehearsal in view of the controversial views which were expressed¹.

Since then at a number of conferences speculations on the eventual outcome were exchanged, few of them were as negative as my report on the hearing. It was therefore an unpleasant surprise for many that the Advocates General in an unofficially distributed opinion which was first published on the EPLAW website came to the conclusion that the Draft Agreement was incompatible with the EU Treaties for a number of points. Since then the discussion heated up, and I can only name a few conferences to which I had been invited to speak². At all those conferences Margot Fröhlinger gave the contrast program: more optimistic and determined to get all 27 member states onboard. At the last conference in Brussels where I suggested to take advantage of the favorable view of the Advocates General on EPLA and start with a smaller group of countries I got the full support of Lord Justice Jacob, but a clear No from the Commission which may now change after it has been announced that one will initiate the instrument of enhanced co-operation after the language question did not find unanimity in the Council for the EU patent.

I will skip the other conferences mentioned and will rather give a report on the Venice Forum which took place on October 29 and 30. After a short introduction of EPLAW's founding president Pierre Véron into EPLAW's history Lord Hoffman presented the anniversary speech. It was a witty, but at the same time a powerful and critical evaluation of the policy of the EU Commission with respect to the EU project for a Community patent and the court system in the last ten years. He criticized in particular the hostile attitude of the Commission towards EPLA in spite of the overwhelming result of ca. 95% of the users as a result of the survey which the EC Commission itself had conducted in

¹ See for a detailed report Pagenberg 41 IIC (2010) No.6

² GRUR Annual Meeting in Hamburg September 16, AIPPI World Congress in Paris October 4, Venice Judges Forum 29.10. and the conference of the Belgium Presidency in Brussels on November 3, 2010

2006. He finally made it clear how important the regular meetings between judges and attorneys in Venice have become over the years. The discussions between judges have contributed decisively to the frequent citations in court decisions of the case law of neighboring jurisdictions and the adjustment of legal principles in harmonized areas of law.

We felt also honored that Chief Judge Rader, the newly appointed Chief Judge for the Court of Appeal of the Federal Circuit in Washington (CAFC) had accepted my invitation to speak. He is also known as a very entertaining speaker and gave an insight into how the CAFC tries to harmonize the sometimes diverging trends of trial courts in different parts of the US. His announcement that he is working on a project which has the aim to cut back the cost of discovery for smaller companies by determining a litigation value at the beginning of a case and then eventually limit the extent of discovery was a very interesting information.

The two other highlights were the panel on the litigation system and the mock trial. As to the first we will have a "replay" at our Congress in Brussels so that it suffices to say that none of the judges spoke in favor of an involvement of the ECJ as a third instance in future patent litigation proceedings. The discussion will have to be resumed after the decision of the ECJ has come out which is not expected before the end of the year.

The mock trial was based on a rather old German Supreme Court case which I had chosen as a technically less demanding case because a number of judges had complained in the past about difficult factual situations of former mock trials. Since I feared that the question of infringement might not give rise to a long discussion I had invented additional legal questions to which Kevin Mooney added the procedural background and great teams of judges and attorneys which led to lively presentations and partly surprising results in the different language groups and the Court. I do not want to disclose more since perhaps it would be an idea to conduct this case if not at the EPLAW yearly congress, but perhaps at the next Young EPLAW conference.

This report has become a bit long, but the year was full of events (for my taste too many), and I finish with my thanks to all the members of the Board, particularly also those who have had their first year on the Board, for their enthusiasm and support and wish you all an interesting Anniversary Congress in Brussels.

Dr. Jochen Pagenberg
President

2000-2010: TEN YEARS OF EPLAW

Pierre VÉRON speech at the Venice Judges Forum (29 October 2010)

It is probably because self-celebration is the sincerest form of flattery that I have been asked to summarise the first 10 years of EPLAW, the European Patent Lawyers Association!

Conception

You may remember that the Community Patent Convention was signed in 1975, and that in the late nineties we were about to celebrate its 25th birthday without ever having seen any sign of its possible coming into effect because of two controversial issues: the language regime and the litigation system.

In an attempt to solve these problems, the French government decided to convene in Paris a so-called Intergovernmental Conference in June 1999, a diplomatic conference of the States party to the European Patent Convention.

This gave rise, among other results, to the creation of a Working Party on Litigation aiming at building a so-called European Patent Litigation Protocol (EPLP) whereby the States would confer upon a central court the power of decision over the disputes arising about European patents.

Some patent litigation practitioners felt that they should offer their assistance for such an ambitious project.

On 10 March 2000 (ten years ago!) 20 lawyers¹ from Belgium, France, Germany, Italy, Spain, The Netherlands and the UK convened in my Paris office, at that time at Square de l'Opéra.

Shortly thereafter they decided to create an association so that their voices could be better heard.

After some debate², they decided to take the name European Patent Lawyers Association (EPLA); the articles of incorporation were executed on 23 July 2001.

¹ Fernand de Visscher (Braun Bigwood, Belgium), Olivier Lemaire (Nauta Dutilh, Belgium), Jacques Armengaud (Armengaud, Guerlain, France), Pierre Lenoir (Jeantet, France), Damien Régnier (Combeau, France), Dariusz Szeleper (Gaultier, Lakits-Josse, Szeleper, France), Pierre Véron (Véron & Associés, France), Isabelle Romet (Véron & Associés, France), Peter Chrocziel (Bruckhaus, Westrick, Heller, Lober, Germany), Bernhard Geissler (Bardehle, Pagenberg & Partners, Germany), Thomas Reimann (Clifford Chance Pünder, Germany), Peter Von Rospatt (Von Rospatt, von der Osten, Germany), Winfried Tillmann (Lovells, Boesebeck, Droste, Germany), Mario Franzosi (Franzosi, Dal Negro & Associati, Italy), Luca Trevisan (Trevisan & Cuonzo, Italy), Willem Hoyng (De Brauw Blackstone Westbroek, Linklaters & Alliance, Netherlands), David Pellise (Spain), Robert Anderson (Lovells, U.K.), Miles Gaythwaite (Bird & Bird, U.K.), Nigel Jones (Linklaters, U.K.), Edward J. Nodder (Bristows, U.K.)

² Because of its acronym PLEA, the name Patent Litigators European Association was also contemplated.

A few months later, the members of the Working Party on Litigation considered that the name *Protocol* was no longer suitable and called their future baby European Patent Litigation *Agreement* (EPLA).

We were left with no other option than to sue them or to change our name.

As professional litigators, we know that litigation is not always the best way to start building a strong and friendly relationship; we therefore decided to change our acronym to EPLAW.

Relationship with European organisations

It was somewhat difficult to have our voice heard at the beginning.

The Working Party on Litigation did not deem it necessary to involve any representatives from the Bar as participants or observers, which was somewhat bizarre for a committee working on building a future court.

The EU Commission proved to be no more amenable in the early 2000s: its work took place behind closed doors and it considered rather unrealistic options, such as having a central court in first instance to decide all patent disputes in Europe.

Many things changed when Dr Margot Fröhlinger (I should say "*Tireless Margot*") took the controls as she agreed to take the necessary time to listen to experienced judges and practitioners.

We are now engaged together in the formidable challenge of creating the first European court having the power to resolve disputes between private parties.

If I may say so before Chief Justice Randall Rader, who is with us today, the challenge is more impressive still than the one the founders of the Federal Circuit had to face in the 1980s: they were creating one more federal court while we are contemplating the creation of the first such court of its kind.

Only the future will tell us whether we are legal pioneers or poor legal fiction writers...

Achievements

After ten years, our association groups all the experienced patent litigators in Europe; no major patent case is decided without an EPLAW member being on one or the other side of the bar (most often, on both sides).

Our 150 members come from Austria, Belgium, Denmark, Finland, France, Germany, Italy, The Netherlands, Norway, Spain, Sweden, Switzerland and United Kingdom.

Most of them attend our annual meeting in Brussels.

Willem Hoyng, the third EPLAW President, created Young EPLAW, a yearly seminar designed for the younger members of our firms.

He also created a blog, www.eplawpatentblog.com, already an amazing success in its first year of existence: most of the important patent decisions in Europe are made publicly available there within a week or so of being handed down, often with an English translation.

Kevin Mooney, the second EPLAW President opened a transatlantic channel of communication with our US colleagues of the Federal Circuit Bar Association, in addition to other successes.

Mario Franzosi, one of the first Vice-Presidents of our association, worked arduously towards the creation, in 2005, of the Venice Forum which brings us together today on the occasion of its sixth edition: I cannot praise enough the imagination and the energy he applied to this project, reuniting patent litigators and judges on this island (I also praise his sense of humour for holding our reunion in a former lunatic hospital: Mario, what are you trying to say exactly?)

Friendship

Patent cases are so intricate (some might say boring) that only the most tenacious litigators survive; patent law is so complex that only the best judges like it: no awkward people there!

I could therefore not conclude this summary of the first ten years of our association without saying that it has also been a place of friendship.

The Presidents who came after me, Kevin Mooney, Willem Hoyng and Jochen Pagenberg, the Vice-Presidents, Winfried Tilmann, the brain of our association (not surprisingly German), Mario Franzosi, its imagination (not surprisingly Italian), deserve a special tribute.

Fernand de Visscher, and now his partner Éric de Gryse, who kept the minutes of our meetings, Peter Heinrich and now Christian Gassauer who kept our books, have been less visible, but equally indispensable.

A final word in memory of Sir Nicholas Pumfrey who attended most of the past editions of this Forum: in addition to being an outstanding patent specialist, he was an excellent friend whom we miss every day.

I wish a long and successful life to the European Patent Lawyers Association!

CONGRESS of 20 November 2009 in Brussels

EPLAW Congress

Brussels 2009

Limits on Limitation

**Central national limitations and
their effect on national proceedings**

5

BARDEHLE
PAGENBERG
DOST
ALTENBURG
GEISSLER

DR. JOCHEN PAGENBERG

ATTORNEY-AT-LAW, MUNICH/PARIS

Features of National Limitation Practice What do we want in Europe?

- I Legal Basis**
- II National Practice**
- III Future Rules**

Art. 138 (3) EPC 2000

(3) In proceedings before the competent court or authority relating to the validity of the European patent, the proprietor of the patent shall have the right to limit the patent by amending the claims. The patent as thus limited shall form the basis for the proceedings. (When –any time?)

Draft Article 38a Agreement on ECPC
Decision on the validity of a patent

(3) Without prejudice to Art. 138 (3) EPC, if the grounds for revocation affect the patent only in part, the patent shall be limited by a corresponding amendment of the claims and revoked in part.

Draft Rules Procedures

Rule 29 – Request to amend the claims (1)

1. The Reply to the counterclaim for revocation may include a Request to amend the claims which shall contain

(a) the proposed amendments of the claims of the patent in dispute, including where appropriate one or more alternative sets of claims (auxiliary requests),

Rule 29 – Request to amend the claims (2)

(b) the grounds upon which the amendments are sought and

(c) an indication whether the proposals are definite or conditional; the proposed amendments, if conditional, must be reasonable in number in the circumstances of the case.

2. Any subsequent request to amend the claims may only be submitted with the leave of the judge-rapporteur.

Rule 30 – Lodging of the Rejoinder to the request to amend the claims

Within two months of service of a Request to amend the claims, the defendant may lodge a Rejoinder to the request to amend the claims stating why

- (a) the proposed amendments are not allowable or**
- (b) the claims as amended remain invalid.**

....

Two Models of Proceedings in EU

(1) Bifurcation (infringement/revocation) (10)

**Amendment discussion in revocation and
in context of stay of proceedings**

(2) Combined Proceedings (17)

Amendment in counter claim

DE Revocation and EPO Opposition

- **patentee can agree to a limitation**
- **patentee can file auxiliary claims**
- **amendment still possible on appeal**
- **very similar to opposition proceedings before the EPO (several auxiliary petitions)**
- **no uniform practice about reasonable numbers**

Allowability of Amendments

- **scope of protection must not be extended;**
- **claimed subject-matter must be disclosed in original application**
- **amendment must be clear and concise**
- **claim must still protect the same subject matter**

Claim must still protect the same subject matter

**DE NL: Change of category possible:
from product to use claim**

**AT: change from product to Swiss type
claim allowable**

**DE UK Not possible to include new
“subject matter”, if not claimed before**

BGH GRUR 2004, 354 – Vertagung (Suspension)

Limited Defense – No formalities

- ❖ **AT: Infringer can be sued based on a limited claim without formal limitation**
- ❖ **Inter partes limitation possible**
- ❖ **DE: “Limited Defense” possible in opposition and revocation procedure
 (“I defend only claim 3”)**

Competent Authority

UK: must be in the same forum as the revocation action (either in court or comptroller).

FR only in PO; **NL** involvement of PO

DE NL NO UK: Limitation only in revocation, not in “pure” infringement proceeding

DE DK AT Parallel procedure in PO possible

Source of new claim feature

AT DE NL: New feature in limited claim can come from sub-claims, from description only, if also combination disclosed in description BGH XA ZR 148/05-Heizer

DE NL: combination claim 1 with dependent claims generally possible

EPO Art. 105a..: Central limitation allows also feature from description if disclosed

Problem of disclosure: was combination predictable?

Effect of Limitation

**DE AT: For revocation and counterclaim
limitation becomes effective *erga omnes***

**FR DE NL AT (+EPO): Effect of limitation
from filing date, no damages for the past**

UK from granting date

Patentability examination

DE NL: yes in revocation court

**AT: remaining claims must not be an
extension, but no full examination for
patentability conducted**

Stay of infringement Case

DE AT “In general” no stay of infringement case during revocation

FR Yes, pending PO decision

UK NL in general no (validity and infringement usually heard together), although the revocation/infringement case may be stayed until after the hearing on the limitation (assuming the application for limitation is opposed, or opposition pending).

Limits of Art. 138 (3)? *Number of Auxiliary requests*

System of successive auxiliary requests (EPO and DE opposition) allows patent owner to defend patent with maximum possible scope of protection when prior art is found after grant of patent.

In the hearing before Federal Patent Court, main request and all auxiliary requests are discussed before court deliberates; no interlocutory decisions (different from EPO opposition proceedings).

**New Law in DE Art. 83 (4) Pat G (2009) -
Revocation Proceedings
{Procedural Limits}**

**The [revocation chamber of the] Federal
Patent Court can reject ... a defense ..
in the form of an amended version of
the patent which is only submitted
after lapse of a prescribed deadline,
and decide without further
investigation, if...**

**New Law in DE Art. 83 (4) Pat G (2009) -
... if**

- 1. the consideration of the new
ground of defense would require the
adjournement of the already fixed
hearing date, and**
- 2. the respective party does not
sufficiently excuse the late filing, and**
- 3. the respective party had been
warned by the court about the
consequences of a delay**

The ground of excuse must be proven

Limits of Art. 138 (3)? - Due Process?

[DE] NO AT NL

Situation: Can auxiliary limitation request(s) be filed at any time in the proceedings, even during the hearing?

If request is filed very late, plaintiff may in special cases not be in a position to timely react to the request. E.g., plaintiff may have to conduct additional prior art search.

In this case, does plaintiff's right to be heard demand that hearing be adjourned?

Limits of Art. 138 (3) - Time of Filing?

{NL} DE: new procedure in revocation with fixing of time limits,

- rejection of belated submissions**
- no new matter on appeal**

Compatibility with Art 138 (3) EPC 2000?

Can member states limit limitations?

Exclude limitations on appeal?

Suspension of hearing

- Example (BGH GRUR 2004,354- *Vertagung*):

Patent owner files in the hearing new limitation request in which claim is amended by a feature contained in the description but not in any of the claims. Revocation plaintiff could not foresee such limitation and has to conduct additional prior art search to be in position to reply to limitation request.

More Limits of 138 (3) : Number of auxiliary claims?

UK: None or one?

DE: Unlimited so far, but limitation by rule of reason and misuse (*and statute*)

Requirement: structured “tree construction” – not wild multitude of features

Add feature by feature to overcome lack of novelty against main references

Limits of Art. 138(3) - No Amendment on appeal

DE Today: new limitation requests can be filed on appeal (BGH) still in the hearing.

DE (new law): Only under strict conditions

- ❖ if plaintiff agrees
- ❖ if court regards limitation as reasonable and pertinent

FR NL: [Further] amendment on appeal

AT: Yes (as long as unconditional limitation of claim)

Draft Rule 29 – Request to amend the claims

1. (c)the proposed amendments, if conditional, must be reasonable in number in the circumstances of the case.

Proposed Venice Resolution

Consider the following options

A. Number of citations

a) *I am in favour of a (significant) reduction of the number of citations of prior art – not more than three - (“show me your best piece of prior art”)*

or

b) *I prefer stricter rules on substantiation, but no limitation of the number of prior art citations.*

B. Number of Auxiliary Requests

a) *I am in favour of a (significantly) reduced number of auxiliary requests as a principle*

or

b) *I prefer a reduced number of auxiliary requests in proportion to the number of citations*

C. Fixing of time limits for submissions

E. No filing of new matter on appeal

exception: patentee may file one unconditional limitation?

- Patentee has no further chance
- Plaintiff can file a new case

Rules of Procedure of a Future European and Community Patents Court

Written Procedure

European Patent Judge's Forum,
30 October 2009, Venice

by

Dr. Klaus Grabinski
Judge at the Federal Court of Justice

I. Strict time schedule

Clear and strict time schedule (rule 10):

- 1) **Statement of claim**
- 2) **Statement of defence/counterclaim for revocation**
 - > 4 months later
 - > extension only by the judge rapporteur upon reasoned request (rule 20)
- 3) **Reply to the counterclaim (including a request to amend the claims)**
 - > 3 months later
 - > extension only by the judge rapporteur upon reasoned request (rule 28)
- 4) **Rejoinder to the request to amend the claims**
 - > 2 months later
 - > extension only by the judge rapporteur upon reasoned request (rule 30)
- 5) **Further exchanges of written pleadings**
 - > Only if allowed by the judge rapporteur upon reasoned request (rule 31)

II. Front-loaded proceeding

Front-loaded proceeding:

– If available, all

- motions sought by the parties (orders, remedies, amendments of claim, etc.)
 - facts on which the parties rely,
 - evidence and evidence offers on which the parties rely and
 - arguments of law supporting the view of the parties
- should be introduced in the written procedure**

II. Front-loaded proceeding

- ... in order to
- enable the judge rapporteur in the Interim procedure to make all necessary preparations for the oral hearing (rule 101), like
 - orders to produce documents, experts, inspections, etc.
 - preparation of expert hearings in the oral procedure before the panel (rule 104)
- enable the panel in the Oral procedure
 - to complete the oral hearing within one day without prejudice to the principle of proportionality (rule 114 (1), Venice II (page 5))
 - to limit oral testimony to issues identified by the judge-rapporteur or the presiding judge to be decided by oral evidence (rule 114 (2))
 - to avoid adjournment to call for further evidence (rule 115)

II. Front-loaded proceeding

- Without an obligation to bring forward all available arguments of law, facts and evidence/offers of evidence
- according to a clear and strict time schedule in the written procedure
- parties will tend to withhold important arguments for tactical and other reasons to the last minute
- and, by this, will make proceedings costly, time consuming and inefficient.

III. Content of written pleadings

- **Statement of claim (rule 11):**
 - order or remedy sought by the plaintiff
 - facts
 - place and dates of infringement, attacked embodiment
 - evidence
 - documents, test reports, samples, photos, drawings, written witness statements, etc.
 - evidence offers
 - experts, witnesses for hearing, inspection, experiments, etc.
 - reasons
 - claim interpretation
 - infringement

III. Content of written pleadings

- **Statement of defence/counterclaim for revocation (rules 21, 22):**
 - **counterclaim for revocation**
 - **facts**
 - challenging infringement
 - defences (prior use, exhaustion, limitation)
 - revocation
 - **evidence**
 - documents, test reports, samples, photos, drawings, written witness statements

Rules of procedure of a future ECPC
- Written procedure

7

III. Content of written pleadings

- **Statement of defence/counterclaim for revocation (rules 21, 22) (cont'd):**
 - **evidence offers**
 - Experts, witnesses for hearing, inspections, experiments, etc.
 - **reasons**
 - claim interpretation
 - non-infringement
 - defences
 - revocation

Rules of procedure of a future ECPC
- Written procedure

8

III. Content of written pleadings

- **Reply to the counterclaim for revocation/Request to amend the claims ((rules 28, 29)**
 - **reply to the counterclaim for revocation**
 - **proposed amendments of the patent claims**
 - **allowability of the amendment**
 - amendment is encompassed by the disclosure of the application as an invention
 - **indication whether proposals are definite or conditional**
 - **reply to the statement of defence? (not yet mentioned in the rules)**
 - plaintiff should be allowed to reply to new facts in the statement of defence
 - allowance by the judge-rapporteur according to rule 10 (5)?

III. Content of written pleadings

- **Rejoinder to the request to amend the claims (rule 30):**
 - **rejoinder to the request to amend the claims**
 - **Non-allowability of the amendments**
 - **Non-validity of the amended claims**

Loveffs

Jurisdiction, venue, Court-languages

Prof. Winfried Tilman

Loveffs

Jurisdiction

Jurisdiction of the Court itself

- Art. 15 (1) PCA incomplete regarding CPR
 - Right to a patent (Art. 4,5,6 CPR)
 - Prevent indirect use (Art. 8 CPR)
 - Actions out of transfer, licenses (Art. 14-19 CPR)

Solution:

- expressly listing
- Catch-all-clause referring to CPR

Loveffs www.loveffs.de

Venue = Jurisdiction of divisions

- Art. 15a PCA – a good compromise
 - close to domicile or infringement
= close to infringing object, witnesses, lawyers
 - divisions will be flexible regarding split or no-split

Swedish Council Conclusions

- 7 years evaluation
- Commission proposal
- change to multinational panel-composition
- change to "split only if both parties agree"
- by Mixed Committee

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Cooperation central and local division

- Central filing of claims and counterclaims?
- "Ping pong" central-local-central Registrar?
- Central decision (President) on formal requirements, fees, languages?
- Change announced
- Proposal: Decentral filing, local Vice-President, local Registrar, keeping central division informed

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Languages of the Court

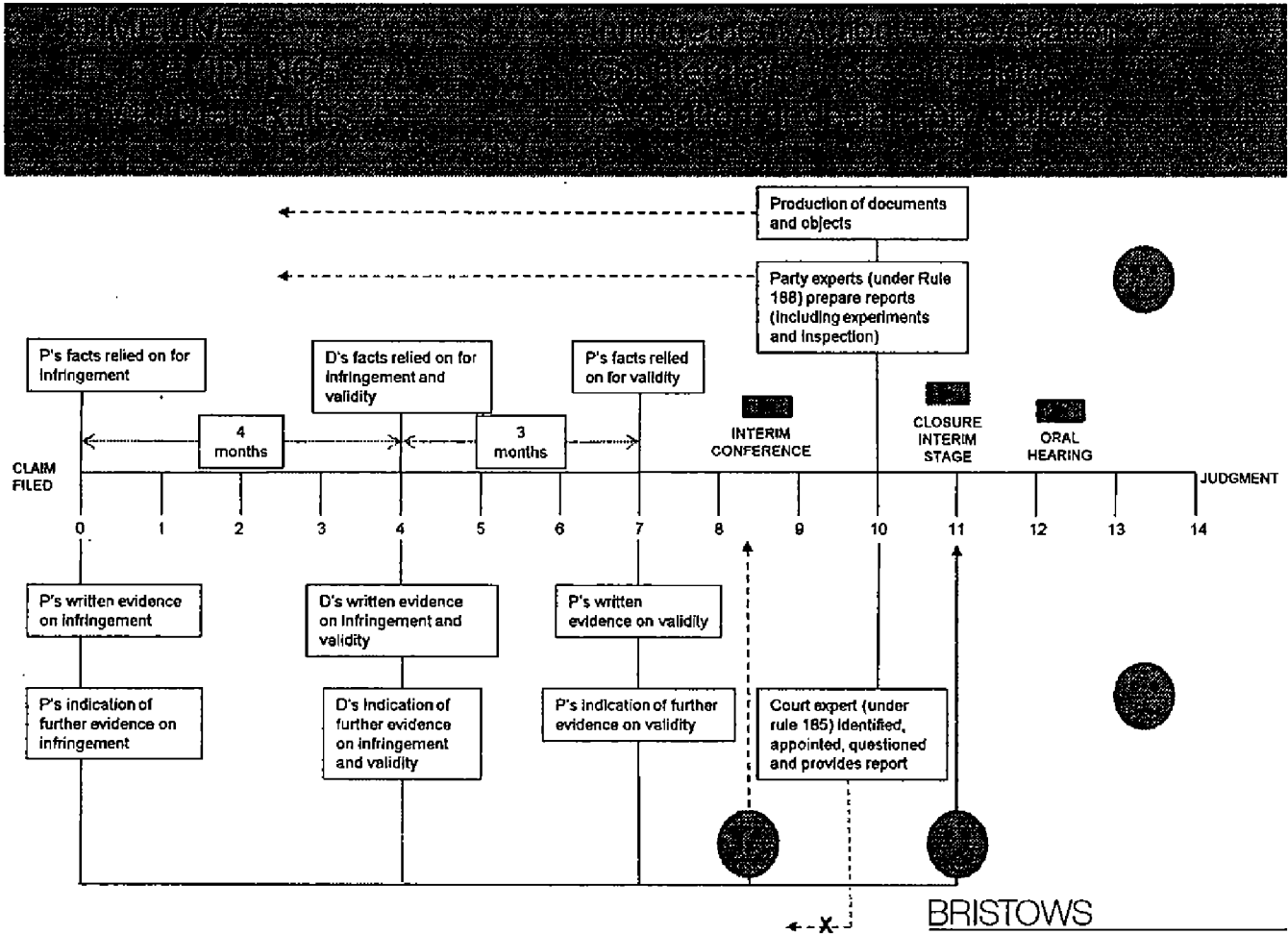
- Art. 29 PCA: Local language
- Art. 29 (3) PCA: EPO-language with consent of both parties
- Exceptional Art. 29 (4) PCA: EPO-language if requested by one party, if that is fair
- Proposal: Appeal Court should be free to switch from the local language to an EPO-language

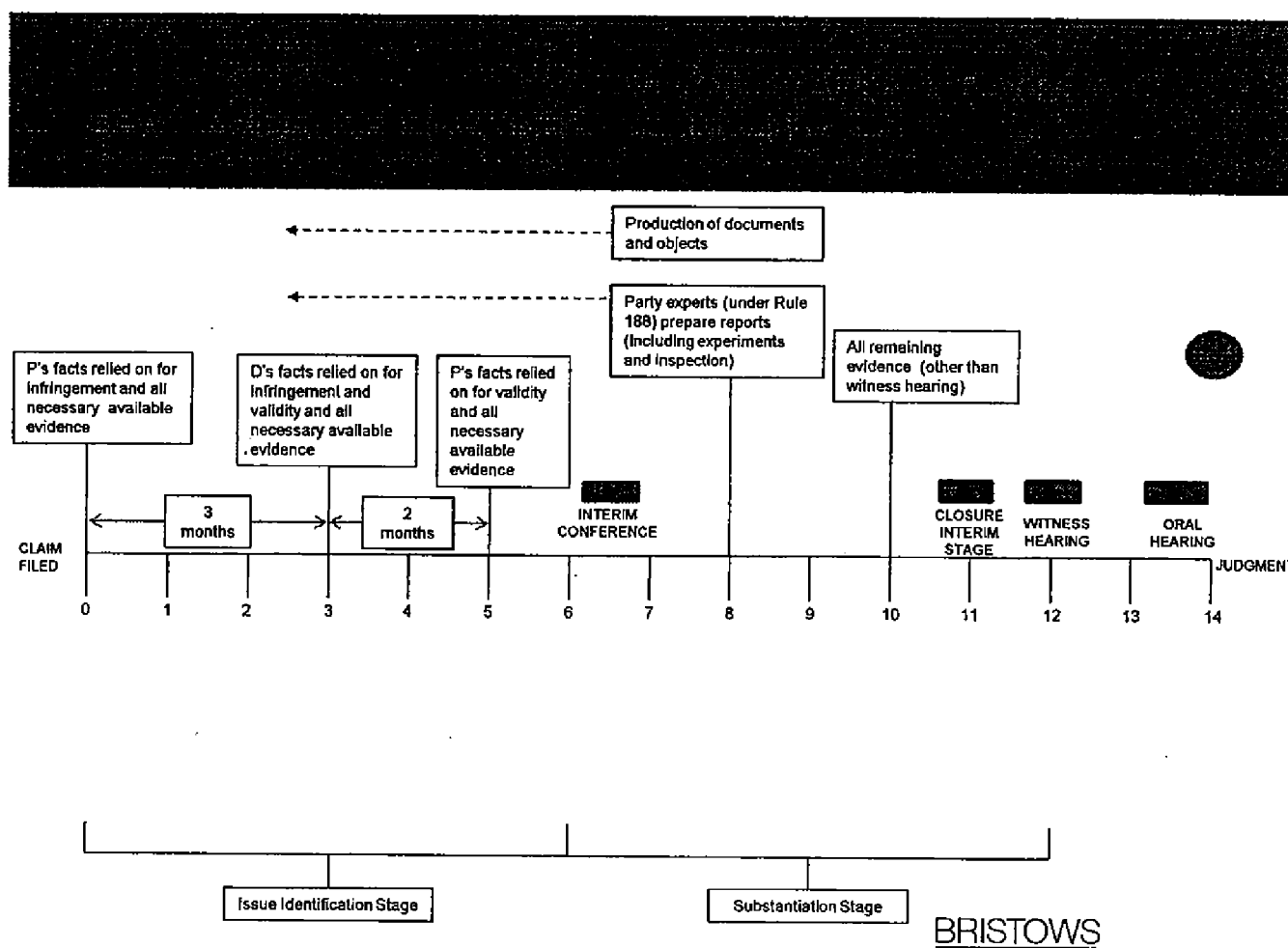
BRISTOWS

Draft ECPC Rules
EVIDENCE

Some Practical Comments

Brussels, 20 November 2009
Edward Nodder, Partner





Judge – Rapporteur assesses main ISSUES and FACTS in dispute

Orders more evidence if necessary

- Production of documents
- Experts (and questions for experts)
- Experiments
- Inspection

Preparatory discussions with witness and experts R 104(f) – better left to Judges at Oral Hearing?

BRISTOWS

BRISTOWS

[REDACTED]

Judge – Rapporteur assesses main ISSUES and FACTS in dispute

Orders more evidence if necessary

- Production of documents
- Experts (and questions for experts)
- Experiments
- Inspection

Preparatory discussions with witness and experts R 104(f) – better left to Judges at Oral Hearing?

[REDACTED]

BRISTOWS _____

[REDACTED]

Judge – Rapporteur checks if

- Parties have complied with orders
- Evidence is as complete as necessary for the efficient conduct of the oral hearing

Sets date for final written submissions

[REDACTED]

BRISTOWS _____



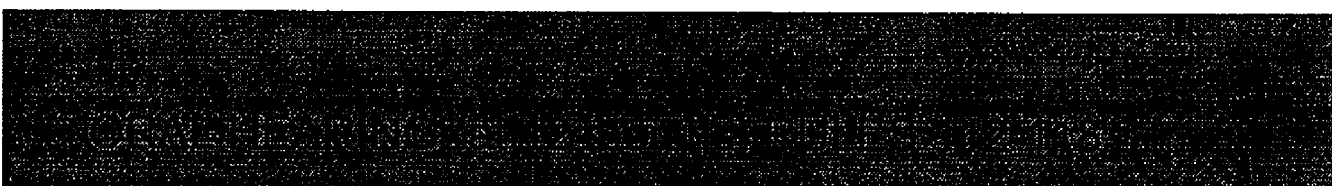
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BRISTOWS



Court may decide:-

- Witness statement and experts reports stand confirmed on written oath alone – PROBLEM OF DISHONESTY
- Witnesses and experts can be questioned (normally for very limited time) – PROBLEM OF LATE EVIDENCE SURPRISE
- Exceptionally, after oral submissions from both parties, Court can adjourn and call for further evidence



BRISTOWS

Court may decide:-

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BRISTOWS

Witness Hearing
(one day –
proportionately
longer in a heavy
case)

Court, having pre-read pleadings and core documents, listens to short oral submissions (30 minutes each side), then conducts questions to witnesses (4-6 witnesses per day as in DK)

4 weeks later

Written Arguments in Chief (and any permitted pleading amendments)

2 weeks

Written Arguments in Reply

2 weeks later

Court hears oral submissions to supplement Written Arguments (half day each side)

ASAP

Judgment

Oral
Hearing
(one day)

BRISTOWS


GÓMEZ-ACEBO & POMBO
ABOGADOS

The Oral Hearing under the Future UPLS CFI RoP

EPLAW Annual Meeting & Congress
20 November 2009, Brussels

Gonzalo Ulloa
Head of IP/IT, Gómez-Acebo & Pombo (SPAIN)


Courtesy of Judge Robert van Peursem
Vice President District Court The Hague



Introduction

- **Why is designing European RoP so difficult?**
- **Benchmark = your own system**

- German infringement proceedings: 1 hour max
- Dutch oral hearing in AR proceedings amounts to closing arguments Anglo Saxon style + Q&A by the panel: takes a good deal of a day – will be not so different in other front loaded systems across Europe without bifurcation like France, Italy, Scandinavia (and Scotland maybe?)
- and there is England/Wales/Ireland – like in Continental criminal proceedings fairly much has to be dealt with at the oral hearing itself - amounts easily to several days



2

Introduction II

- **Difficult to imagine proceedings *not* according to your own system**

- just because you're brought up in it and don't know any better doesn't necessarily guarantee your own system as the best
- every national jurisdiction has rather different perceptions of what amounts to facts, written/oral evidence, and arguments/reasoning
- even if we try very hard to understand each other it very often ends in frustrating Babylonian confusion
- can we do better? yes we can!

GOMEZ-ACEBO & POMBO
ABOGADOS

3

Oral Hearing: Rules 112 – 118

- **Rule 112**

- fair, orderly, efficient cf. Rules 422 and 424 on case management
- ready for decision at the end

- **Rule 113**

- before full panel
- hearing parties' oral submissions
- time limits and cutting off possible – Rule 114
- if necessary and under judicial control:
- hearing witnesses and experts
- where appropriate: questioning opposite party's exp & witn's

GOMEZ-ACEBO & POMBO
ABOGADOS

4

Intermezzo

- **Seems the corner stone of how to conduct the UPLS CFI Oral Hearing**

- major features:
- witness and expert evidence will be dealt with for a major part during the written phase
- purpose hearing to confront experts with their statements and what has been brought against that -cf. Rule 179
- but not English style: under the (strict) control of the panel and to the extent deemed necessary -cf. Rule 179(5)
- bearing in mind 2 rules: a) taking oral evidence shouldn't overburden the hearing b) hearing within 1 day if possible

Oral Hearing: Rules 112-118 II

- • **Rule 114**

- 1st: principle of proportionality
- but 2nd: as a rule hearing in one day – will not always be feasible
- under these rules – and rightly so (1 stop shop for Europe / no *de novo* appeal proceedings) this should be done right in 1st instance
- limited oral testimony:
- to issues identified by judge-rapporteur or presiding judge to be
- decided by oral testimony
- NL: after oral hearing interim-order for taking oral evidence
- before judge-rapporteur (outdated procedure, but our law)
- how to do this all in one day? something to discuss

Oral Hearing: Rules 112-118 III

- **Rule 115**

- as an exception // the Dutch main rule: after hearing the parties' oral submissions, the panel may decide to adjourn proceedings and call for further evidence
- This might happen more than occasionally – although judge-rapporteur will seek to avoid this and front-loading the procedure will also keep this within boundaries

Oral Hearing: Rules 112-118 IV

- **Rule 116:**

- oral hearing = recorded – like the interim conference, cf. Rule 106
- public as a rule – safe confidentiality issues

Oral Hearing: Rules 112-118 V

- **Rule 117**

- what if a party does not show up at the hearing?
- never seen this happening in serious patent litigation outside *force majeure* – but if both parties inform the Court they don't want to attend the hearing the CFI may skip the hearing and decide forthwith on the file
- rather self-evident

- **Rule 118**

- decision in writing <6 weeks>

Further Oral Hearings

- **Rule 195**

- oral hearing in case of preserving evidence (non ex parte)

- **Rule 206**

- oral hearing in case of provisional measures

- **In appeal**

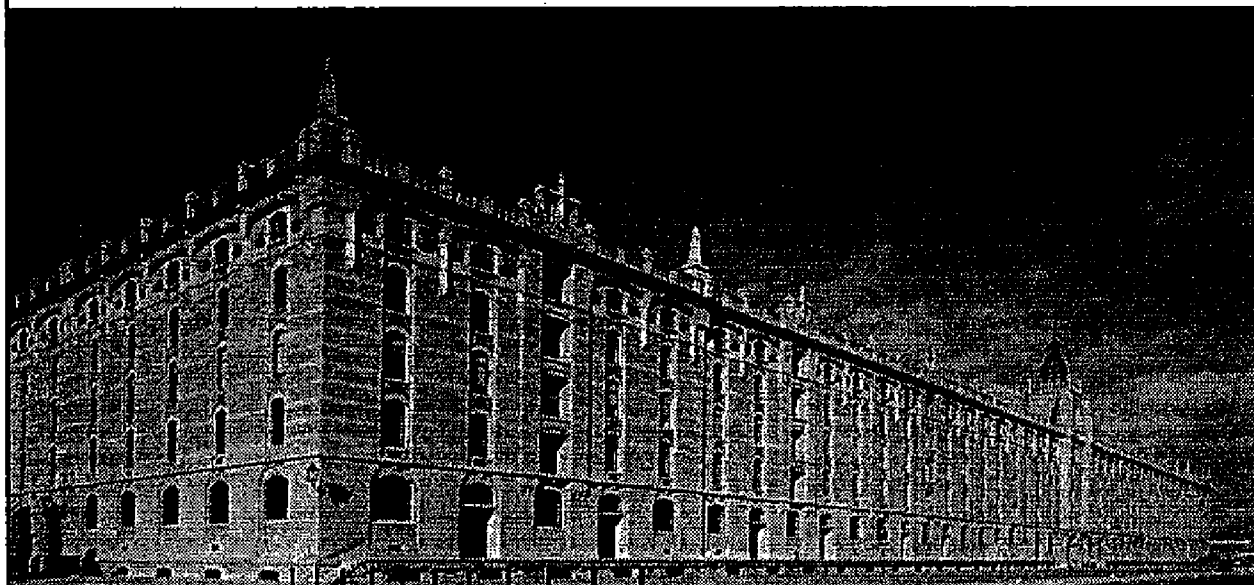
- Rules 112-117 apply *mutatis mutandis*

- **Rule 428**

- early hearing judge-rapporteur for case management orders



The 'Judge-rapporteur' in the European and Community Patents Court



ALTIUS

Brussels, 20 November 2009



OVERVIEW OF THE PRESENTATION

1. General principles under the Draft Agreement (version 23 March)
2. The 'judge-rapporteur' (JR) according to the Rules of Procedure (version 16 October)
3. Some further thoughts and considerations

ALTIUS



● ● ● | **Draft Agreement on the
European and Community
Patents Court**

- Article 21a (3) and 22 (3) – efficiency, cost-effectiveness and equitable access
- Article 22(3) – required level of discretion, but also predictability of the proceedings

ALTIUS

^

● ● ● | **Draft Agreement on the
European and Community
Patents Court**

- Article 23 – Proportionality and fairness:
 - (1) Litigation is to be dealt with in ways which are proportionate to its importance and complexity.
 - (2) The rules, procedures and remedies must be used in a fair and equitable manner and not distort competition.

ALTIUS

^

● ● ● | **Draft Agreement on the
European and Community
Patents Court**

○ **Article 24 – Case Management:**

“The Court shall actively manage the cases before it in accordance with the Rules of Procedure without impairing the freedom of the parties to determine the subject-matter and the supporting evidence of their case.”

=> Preamble of the Rules of Procedure: case at first instance must be concluded in one year

ALTIUS

Λ

● ● ● | **Draft Agreement on the
European and Community
Patents Court**

○ **Article 32 (2) – Written, interim and oral proceedings:**

“In the interim procedure, after the written procedure and if appropriate, the judge acting as Rapporteur, subject to a mandate of the full panel and designated in accordance with the Rules of Procedure, shall be responsible for convening an interim hearing. He shall in particular explore the possibility for a settlement.”

ALTIUS

Λ



Draft Rules of Procedure – extensive powers of the JR

1. General powers
2. Preliminary objection
3. Setting of the procedural calendar
4. Request to amend claims
5. Interim conference and proceedings
6. Preparation of oral hearing
7. Presentation of evidence
8. Stay or accelerate proceedings
9. Intervention of third party
10. Award of damages
11. Other powers
12. Request for rehearing

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Draft Rules of Procedure – general powers of the JR

- o Rule 1: the JR = the Court
- o Rule 101 (2): *“The judge-rapporteur shall have all authority to ensure fair, orderly and efficient interim procedure.”*
- o Rule 421 (1): *“During the written procedure and the interim procedure, case management shall be the responsibility of the judge-rapporteur”*

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Draft Rules of Procedure – written proceedings

- Dealing with preliminary objection
- Extension of deadlines for written pleadings and allowance of additional pleadings (in all types of proceedings)
- Allowance of second or further request to amend claims

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Draft Rules of Procedure – interim proceedings

- Order a party to provide further clarification or answers, produce evidence or lodge documents
- Rule 104: interim conference in view of prepare oral hearing
- Make further arrangements in view of oral hearing before handing over the case management to the president of the panel

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Draft Rules of Procedure - Evidence

- Order production of evidence at any time (Rules 7 and 172)
- Appoint Court expert
- Order inspections or experiments
- Issue letters rogatory
- Orders to preserve evidence = for the full panel

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Draft Rules of Procedure – Other powers

- Stay or acceleration of proceedings after hearing the parties
- Allow or invite third party intervention
- Any other powers not explicitly reserved for the full panel
- Management of additional proceedings for the award of damages

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Draft Rules of Procedure – Control mechanisms

- Mandate of the full panel (article 32(2) of the draft Agreement)?
- Review by the panel at the request of any party or on his own motion:
 - not suspensive;
 - the JR will sit on the panel.

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Some further thoughts and considerations

- What's in a name?
 - The JR is a case manager, not a rapporteur (cf. one year deadline)
 - No definition of 'case management' => Exemplative list of powers (Rules 422 and 424)

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Some further thoughts and considerations

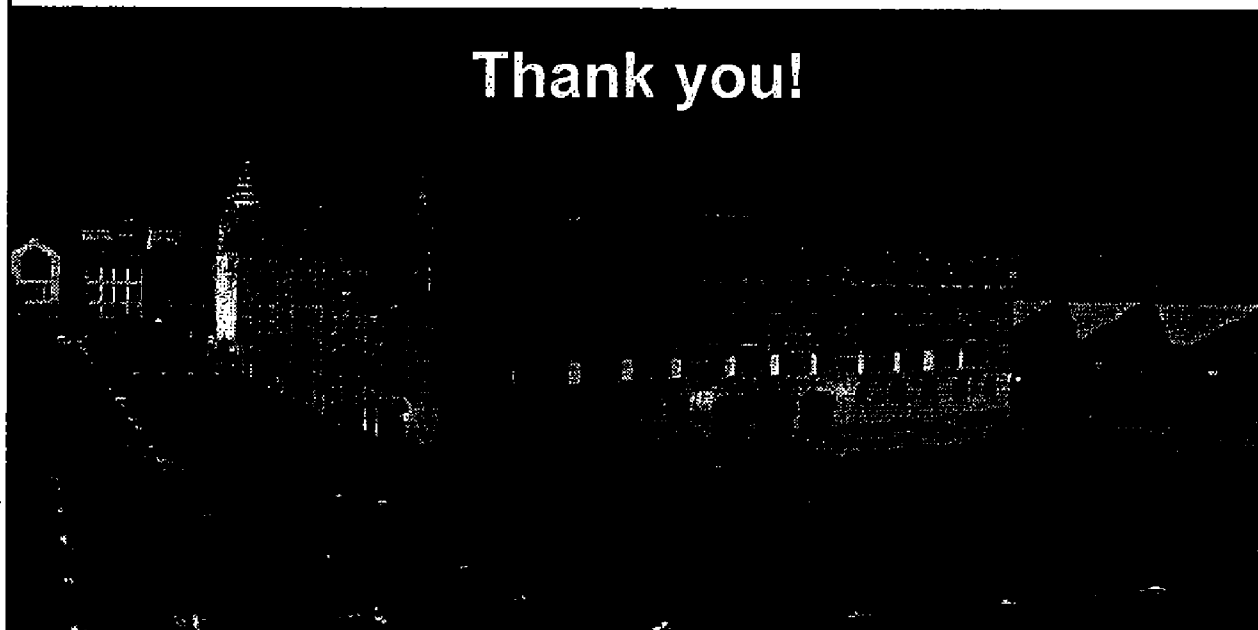
- o The JR plays a central and deciding role in the preliminary stages of the proceedings and even beyond => Court-managed proceedings
- o Is the overriding role of the JR compatible with (a) limited provisos in the draft Agreement; (b) the parties' freedom to 'set the agenda' (cf. article 24 of the draft Agreement)?

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The end

Thank you!



ALTIUS

Christophe.Ronse@altius.com



Interim injunctions

in the future European and Community Patents Court

5th Venice European Judge's Forum • San Servolo • 30 October 2009

Gabriella Muscolo, Court of Rome (IT)

Pierre Véron, Véron & Associés, Paris (FR)

Interim injunctions

Sources

■ **Article 37 Draft Agreement**

on the European and Community Patents Court
(7928/09) 23 March 2009

■ **Rules of procedure 201 to 209**

(Preliminary set of provisions for the Rules of procedure of a
Unified Patent Court - version 16 October 2009)

Interim injunctions

Article 37 Draft Agreement on the European and Community Patents Court (7928/09) 23 March 2009

Provisional and protective measures

- (1) *The Court may grant **injunctions** against an alleged infringer or against a third party whose intermediary services are used by the alleged infringer, **on a provisional basis**, intended to prevent any impending infringement, to forbid the continuation of the alleged infringement or to make such continuation subject to the lodging of guarantees.*
- (2) *The Court shall have the discretion to weigh up the interests of the parties and in particular to take into account the potential harm for either of the parties resulting from the granting or the refusal of the injunction.*

3

Interim injunctions

Article 37 Draft Agreement on the European and Community Patents Court (7928/09) 23 March 2009

- (3) *The Court may also order the seizure or delivery up of the goods suspected of infringing a patent right so as to prevent their entry into or movement within the channels of commerce. If the injured party demonstrates circumstances likely to endanger the recovery of damages, the Court may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets.*
- (4) *The Court may, in respect of the measures referred to in paragraphs 1 and 3, require the applicant to provide any reasonable evidence in order to satisfy itself with a sufficient degree of certainty that the applicant is the right-holder and that the applicant's right is being infringed, or that such infringement is imminent.*
- (5) *Article 35a, paragraphs 4 to 7, shall apply by analogy to the measures referred to in this Article.*

4

Interim injunctions

Rules of procedure 201 to 209

(Preliminary set of provisions for the Rules of procedure of a Unified Patent Court - version 16 October 2009)

- **Rule 207 – Decision on provisional measures**
- 1. The Court may in particular order the following provisional measures:
 - (a) **injunctions** against a defendant or against a third party whose intermediary services are used;
 - (b) the seizure or delivery up of the goods suspected of infringing a patent right so as to prevent their entry into or movement within the channels of commerce;
 - (c) if an applicant demonstrates circumstances likely to endanger the recovery of damages, a precautionary seizure of the movable and immovable property of the defendant, including the blocking of his bank accounts and other assets.
- 2. In taking its decision on provisional measures, the Court shall have the discretion to weigh up the interests of the parties and in particular take into account the potential harm for either of the parties resulting from the ordering or the refusal of a provisional measure.

5

Interim injunctions

Contents (focus on critical points)

- Judges skills
- Judges independence
- Right of action
(balance of interests vs. limits of plaintiff's rights)
- Protection of defendant interests

6

Judges' skills

Rule 203 – Appointment of of a panel or a single judge

- 1. In cases where proceedings on the merits of the case are already pending before the Court, an Application for provisional measures shall be immediately forwarded to the panel already dealing with the case. In urgent cases, the decision on an Application for provisional measures may be taken by the presiding judge or by one of the judges of the panel, acting as single judge.
- 2. In cases where proceedings on the merits of the case have not yet been commenced before the Court, the case shall, immediately after the receipt of an Application for provisional measures, be assigned to a panel in accordance with Rule 15(1)(d). In urgent cases, the presiding judge or an experienced judge of the panel, acting as single judge, shall decide on the Application.
- 3. The single judge deciding on an Application for provisional measures shall have all necessary powers of the Court.

7

Judges' skills

- European Judges appointed to the Court are already expected having an experience in dealing with interim injunctions
(see EC directive 48/2004, enforcement directive, art. 9)
- A single Judge is more suitable for deciding on interim injunction than a panel of three Judges, but Judges appointed to decide on provisional measures ought to be the more experienced ones
- A permanent training both on Patent and Procedural law is required

8

Judges' independence

- Can the judge who has decided on interim injunction sit thereafter in the panel deciding on the merits of the case, in view of Human Rights Convention ?

■ Article 6. Right to a fair trial

- ▶ *"1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*

9

Right of action

- Most of European Constitutions protect the right of action, interpreted also as right of urgent action
- The Court guarantees the defendant from abuse of the right of action
- Article 37 and Rule 207.2 provides for Court's *"discretion to weigh up the interests of the parties"* and the power of the court of taking *"into account the potential harm for either of the parties"* that means a balance between the Patent owner and the presumed Infringer's interests
- Is it too much? (In most of continental law systems the so called *periculum in mora* is ascertained referring only to the claimant position)
- A proportionality limit may work better (see enforcement directive art. 3; in Resolution Venice IV no balance is mentioned in guidelines on preliminary Injunctions)

10

Protection of claimant's interests

Article 37 Draft Agreement

Provisional and protective measures

- (1) *The Court may grant injunctions... to forbid the continuation of the alleged infringement or to **make such continuation subject to the lodging of guarantees***

11

Protection of defendant's interests

Rule 209 – Revocation of provisional measures

2. *Where provisional measures are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of the patent right, the Court may order the applicant, upon request of the defendant, to provide the defendant **appropriate compensation for any injury caused by those measures**.*
3. *If requested by the defendant, the Court may also order the applicant to provide **adequate security for the legal costs and other expenses** incurred by the defendant which the applicant may be liable to bear. The Court shall decide whether it is appropriate to order the security by deposit or bank guarantee.*

12

Interim injunctions

Protection of defendant's interests

- Security (before the injunction)
- Compensation (when injunction is revoked)

13

The End

Thank you for your attention

EPLA RULES ON REPRESENTATION

EPLAW Annual Meeting & Congress 2009

Dr. Christian Gassauer-Fleissner

Attorney at Law in Vienna
Treasurer to EPLAW

 **Gassauer-Fleissner**
RECHTSANWÄLTE | ATTORNEYS AT LAW

Art 28 Draft Agreement ECPC

- Parties shall be represented by lawyers authorized to practise before a court of a Contracting State
- Parties may alternatively be represented by European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the European Patent Convention and who have appropriate qualifications such as a European Union Patent Litigation Certificate
- Representatives of the parties may be assisted by patent attorneys who shall be allowed to speak at hearings of the Court in accordance with the Rules of Procedure
- The requirements for qualifications pursuant to § 2 shall be established by the Mixed Committee on the basis of a proposal from the Commission of the European Communities. A list of European Patent Attorneys entitled to represent parties before the Court shall be kept by the Registrar.

 **Gassauer-Fleissner**
RECHTSANWÄLTE | ATTORNEYS AT LAW

Rule 6 – Party and party's representative

Where these Rules provide that a party perform any act, that act shall be performed by a representative, unless otherwise provided

 Gassauer-Fleissner
RECHTSANWÄLTE | ATTORNEYS AT LAW

EPO Homepage on EPLA

- Representation before the European Patent Court will be compulsory and entrusted to persons registered as European patent counsel, who may be assisted by professional representatives.

 Gassauer-Fleissner
RECHTSANWÄLTE | ATTORNEYS AT LAW

Art 19 Statutes ECJ

- ❑ The states, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner
- ❑ Other parties must be represented by a lawyer
- ❑ Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.
- ❑ Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

 Gassauer-Fleissner
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National situations

- ❑ Germany: Expert Committee on Community Patent and on EPCP: Only lawyers shall be entitled to represent parties
- ❑ Austria: Before courts only lawyers may act as representative. Patent agents according to Patent Agents Act have the right to speak on technical issues

 Gassauer-Fleissner
RECHTSANWÄLTE | ATTORNEYS AT LAW

Resolution Venice IV

- For a speedy and effective procedure it is highly desirable that the technical aspects and all relevant legal questions of the case are presented to the court at least by attorneys who are fully entitled to represent parties in ordinary civil proceedings in the court of first instance of the convention states (Venice II Resolution XI5)

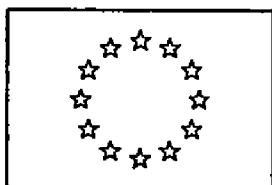
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**The COMMUNITY PATENT
(now the “EUROPEAN UNION PATENT”)**



EUROPEAN COMMISSION

Brussels, 30.6.2010
COM(2010) 350 final

2010/0198 (CNS)

Proposal for a

COUNCIL REGULATION (EU)

on the translation arrangements for the European Union patent

{SEC(2010) 796}
{SEC(2010) 797}

EXPLANATORY MEMORANDUM

1. CONTEXT OF PROPOSAL

In the European Union (EU), patent protection is currently provided by national patents granted by Member States or by European patents granted by the European Patent Office (EPO) under the European Patent Convention (EPC). When a European patent is granted, it must be validated in Member States where protection is sought.

For a European patent to be validated in a territory of a Member State, national law may *inter alia* require that the patent proprietor files a translation of the European patent into the official language of that Member State. In order to reduce the costs caused by validation requirements, in 2000 the EPC Contracting States adopted the so-called "London Agreement"¹ which is currently in force in ten EU Member States. The London Agreement is an optional scheme and therefore results in differences in the translation regimes in the EU Member States. Seventeen Member States are not parties to the London Agreement and still require a translation of the entire patent into their official language. Only France, Germany, Luxembourg and the United Kingdom (which have an official language in common with one of the official languages of the EPO) have agreed to dispense entirely with translations requirements. Six other EU Member States that have ratified the London Agreement (but do not have a language in common with the EPO) have agreed to dispense with translation requirements only in part. They still require translation of the claims into their official language and, in some Member States, also a translation of the description into English where the European patent has been granted in French or German.

Therefore, the current patent system in the EU, in particular in terms of translation requirements, involves very high costs and complexity. A European patent validated in 13 countries costs as much as 20 000 EUR, of which nearly 14 000 EUR arises from translations alone. This makes a European patent more than 10 times more expensive than a US patent costing about 1 850 EUR². The high costs in Europe would be considerably reduced with an EU patent having cost-effective, legally-secure and simplified translation arrangements. Under this proposal, processing fees for the EU patent covering all 27 Member States would be less than 6 200 EUR, with only about 10% due to translations. By improving accessibility to patent protection, particularly for small and medium-sized enterprises (SMEs) and public research organisations, an affordable EU patent should be an important element in stimulating innovation and competitiveness in the EU.

In August 2000, the Commission adopted a proposal for a Council Regulation on the Community patent on the basis of Article 308 EC³. This aimed at the creation of a unitary Community patent title that is affordable in terms of translation costs. After grant of the patent by the EPO in one of the official languages of the EPO (English, French or German) and publication in that language together with a translation of the claims into the other two official languages of the EPO, the Community patent would have taken effect in the entire EU. In

¹ Agreement on the application of Article 65 EPC, OJ EPO 2001, 550.

² Bruno van Pottlesberghe de la Potterie and Didier François, the Cost factor in Patent Systems, Université Libre de Bruxelles Working Paper WP-CEB 06-002, Brussels 2006, see pp.17 et seq.

³ Proposal for a Council Regulation on the Community patent - COM(2000) 412.

2002, the European Parliament adopted a Legislative Resolution⁴. In 2003, on the basis of a common political approach⁵, the Council started discussions on a different solution requiring translations of claims into all EU languages. However, no final agreement on this was reached, given that this approach was rejected by the users of the patent system as too costly and too complex.

Discussions on the proposal were re-launched in the Council after adoption by the Commission of the Communication "Enhancing the patent system in Europe" in April 2007⁶. The Communication confirmed the commitment to the creation of a single Community patent. It also offered to explore with Member States an approach to the translation arrangements with a view to reducing translation costs while facilitating the dissemination of patent information in all EU official languages.

In December 2009, the Council adopted conclusions on an "Enhanced patent system for Europe"⁷ and a general approach on the proposal for a Regulation on the EU Patent⁸. Due to the change of legal basis for the creation of the EU patent following the entry into force of the Lisbon Treaty, the translation arrangements for the EU patent that were initially present in the Commission proposal of 2000 must now become the subject of a separate proposal. The present proposal largely reflects the translation system in the original Commission proposal, but builds on the progress made in the Council since the re-launch of the discussions in 2007.

The Council conclusions affirm the need for a Regulation to cover the translation arrangements, which should come into force together with the Regulation on the EU patent. The conclusions confirmed that in order for the EU patent to become operational, to the extent necessary, amendments might be made to the EPC. The Council also agreed on the main features of the unified patent court which is another main element in improving the patent system in Europe. The conclusions, however, are without prejudice to the pending opinion of the Court of Justice of the European Union on the compatibility of the draft Agreement creating the unified patent court with the EU Treaties.

Furthermore, in the Europe 2020 strategy⁹ the Commission, as part of the Flagship Initiative "Innovation Union", reaffirms its commitment to working towards the creation of a single EU patent and a specialised patent court in order to improve the framework conditions for innovation as a driver for future growth. On 25-26 March 2010 the European Council agreed on the major elements of this strategy¹⁰. The need for business and innovators, particularly SMEs, to have access to an attractive and cost-effective single patent regime and jurisdiction system was also highlighted in the report to the President of the Commission by Mario Monti¹¹. This report recommended adoption of both the single patent and the unified patent court as a matter of urgency, stated that the patent is a test ground on which to measure the seriousness of the commitment to a re-launch of the Single Market, and called for the Commission to maintain its ambition in this area. The Commission Communication on the

⁴ European Parliament legislative resolution on the proposal for a Council regulation on the Community patent - COM(2000) 412 - C5-0461/2000 - 2000/0177(CNS) (OJ C 127E, 29.5.2003, p. 519–526).

⁵ Council document 7159/03.

⁶ Communication from the Commission to the European Parliament and the Council - COM(2007) 165.

⁷ Council document 17229/09.

⁸ Council document 16113/09 Add 1.

⁹ Europe 2020 "A strategy for smart, sustainable and inclusive growth" - COM(2010) 2020.

¹⁰ European Council Conclusions, 25/26 March 2010, EUCO 7/10.

¹¹ "A new strategy for the Single Market – at the service of Europe's economy and society" - Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010.

"Re-launch of the Single Market" planned for autumn 2010 should re-affirm the patent reform as one of the priorities for such re-launch. The present proposal covering the translation arrangements of the EU patent is therefore an essential part of achieving this goal.

2. CONSULTATION OF THE INTERESTED PARTIES

In January 2006, the Commission launched a broad consultation on the future patent policy in Europe¹². More than 2500 replies were received from a variety of stakeholders, including businesses in all sectors of the economy, industry associations, SME associations, patent practitioners, public authorities and academics. The replies clearly showed disappointment with the lack of progress on the Community patent. In particular, sharp criticism was voiced against the translation arrangements of the Council's common political approach of 3 March 2003¹³. Nearly all stakeholders rejected this solution as being unsatisfactory due to the high costs and practical difficulties for patent proprietors as well as the legal uncertainty for all users of the patent system resulting from the legal effect which would have been given to translations. The support for other options varied substantially; some stakeholders requested an English-only regime, while others preferred various multilingual arrangements. Despite these criticisms, stakeholders did, however, express continued support for a unitary, affordable and competitive Community patent. These messages were affirmed at a public hearing held on 12 July 2006.

Discussions with stakeholders have continued following adoption of the Communication in April 2007. On 16-17 October 2008, the Commission organised a conference on Industrial Property Rights in Europe jointly with the French Presidency¹⁴. Participants reiterated that the EU patent "should be cost-effective, legally secure and reduce complexity", and expressed broad support for new initiatives to develop specialised machine translations for patent documents for purposes of patent information¹⁵.

Translation arrangements for the EU patent were also extensively addressed in the consultation on the Small Business Act in 2008. Again, stakeholders identified high patenting costs as the main obstacle to patent protection in the EU and requested the creation of a unitary EU patent as soon as possible¹⁶. In their separate submissions to the consultation, businesses in general and SME representatives in particular unequivocally requested a significant reduction of the costs of patenting (including translation costs) for the future EU patent¹⁷. Other recent position papers from stakeholders have referred to translations for the EU patent. A new approach based on specialised machine translations is generally welcomed, but it is emphasised that such machine translations must not have any legal effect and be used for information purposes only.

¹² The consultation document, replies from stakeholders and a report on the preliminary findings of the consultation are available at http://ec.europa.eu/internal_market/indprop/patent/consultation_en.htm.

¹³ Council Document 6874/03, 2490th Council meeting - Competitiveness (Internal market, Industry and Research), Brussels, 3 March 2003.

¹⁴ Documents and conclusions of the Conference are available at http://ec.europa.eu/internal_market/indprop/rights/index_en.htm.

¹⁵ See Council document 6985/08, 28 February 2008 and Council document 8928/08, 28 April 2008.

¹⁶ Small Business Act for Europe, Report on the Results of the Open Consultation, 22 April 2008, available at www.ec.europa.eu/enterprise/newsroom.

¹⁷ UEAPME Expectations on the Proposal for a European Small Business Act, 14 December 2007, available at www.ueapme.com. Response to the Consultation on a Small Business Act for Europe, 2 April 2008, available at <http://www.eurochambres.eu>.

3. IMPACT ASSESSMENT

This proposal is accompanied by an impact assessment which compares the economic impact of four options:

- 1) An EU patent system in English only,
- 2) An EU patent processed, granted and published in one of the three official languages of the European Patent Office with claims translated into the other two official languages,
- 3) An EU patent processed, granted and published as in option 2, but with claims translated into the other four most commonly spoken EU official languages; and
- 4) An EU patent processed, granted and published as in options 2 and 3, but with claims translated into all EU languages.

The analysis carried out in the impact assessment has demonstrated that Option 2 is the preferable option as it maintains the linguistic regime of the well-functioning system of the EPO and implies only minimum translation costs.

4. LEGAL ELEMENTS OF THE PROPOSAL

The Lisbon Treaty has established a new legal basis, Article 118 TFEU, for the creation of European intellectual property rights providing uniform protection throughout the European Union. The first paragraph of this Article sets out the basis for establishing measures creating these rights in accordance with the ordinary legislative procedure. Based on this Article, the EU patent will be created by Regulation xx/xx on the European Union patent. As follows from Regulation xx/xx, the EU patent will be a European patent granted by the EPO.

The second paragraph of Article 118 provides for the basis to establish language arrangements applicable to European intellectual property rights providing uniform protection by means of regulations adopted by a special legislative procedure with the Council acting unanimously after consulting the European Parliament.

The problems of high costs and complexity that arise from the current fragmented patent system, in particular, the translation requirements established by Member States can only be addressed by a unitary patent created at the level of the EU.

5. BUDGETARY IMPLICATION

The proposal indicates the necessity *inter alia* for arrangements concerning the rolling out of the automated machine translation programme of the EPO. The proposal has no impact on the EU budget.

6. DETAILED DESCRIPTION

6.1. Comments on the articles

Article 1 – Subject matter

This Article defines the subject matter of this Regulation.

Article 2 – Definitions

This Article provides for definitions of the main terms used in this Regulation.

Article 3 – Publication of the EU patent specification

This Article provides that once the specification of an EU patent is published in accordance with Article 14(6) EPC, no further translation is required. Article 14(6) EPC provides that specifications of European patents are published in the language of the proceedings (one of the three EPO official languages in which the application for the patent has been filed – English, French or German) and includes translations of the claims in the other two official languages of the EPO. This minimum requirement established in the EPC will also apply to EU patents, but no further translations after the grant of the EU patent will be required. The Article also specifies that in accordance with the EPC the EU patent specification in the language of the proceedings will be the authentic text.

This requirement is identical with the Commission's original proposal for a Community patent Regulation in August 2000 and builds on the existing system of official languages at the EPO and the use of languages by the majority of applicants¹⁸. This solution is likely to have a positive impact on all users of the patent system in Europe by achieving a considerable reduction in translation costs.

Article 4 – Translation in case of a dispute

This Article requires that in the case of a legal dispute the patent proprietor provides at the request and the choice of the alleged infringer a full translation of the EU patent into an official language of the Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled. The patent proprietor shall also provide a full translation of the EU patent into the language of proceedings of the competent court in the European Union at the request of that court. The costs of such translations shall be borne by the patent proprietor.

Article 5 – Report on the implementation of this Regulation

This Article provides for an evaluation exercise including a report on the implementation of the Regulation. Not later than five years from the date of the entry into force of this Regulation, the Commission shall present to the Council a report on the operation of the

¹⁸ Currently, 88.9% of the applicants of European patents file their patent applications either in English, French or German. Applicants from Europe use these languages as their filing language in 93% of the cases.

translation arrangements for the EU patent and, where necessary, make proposals for amending this Regulation.

Article 6 - Entry into force

This Article provides that this Regulation shall enter into force on the twentieth day after its publication in the *Official Journal of the European Union*, but shall apply from the date of entry into force of the Regulation on the European Union patent. Since the substantive legal provisions applicable for the EU patent as a European intellectual property title would be governed by the EU Patent Regulation, but the translation arrangements applicable for these patents would be regulated by the present proposal, the two legislative instruments would have to be applied jointly.

6.2. Accompanying measures to be established together with the creation of the EU patent

Translations for the provision of patent information

Necessary arrangements shall be made between the European Union and the EPO to make machine translations of patent applications and patent specifications available in all official languages of the European Union without additional costs for the applicants. Such translations should be available on demand, online and free of charge on publication of the patent application. They would be provided for purposes of patent information and would not have legal effect. This would be made clear to users through an appropriate disclaimer. Contrary to the current practice where translations are provided several months after grant – when they are less needed and rarely consulted - their early availability could significantly improve the dissemination of patent information, in particular for individual inventors, researchers and innovative SMEs. The machine translation programme will aim to deliver high quality translations based on technical standards including electronic dictionaries with vocabulary linked to the international patent classification system.

High quality machine translations have already been developed by the EPO in a limited number of languages. The Commission is also supporting a project for machine translations (Patent Language Translations Online, PLuTO)¹⁹, which involves developing translation software on the basis of patent documentation covering all official languages of the EU Member States over the next five years. The creation of the EU patent would necessitate the acceleration of work and the roll-out of such a programme covering all EU languages. The implementing provisions applicable to the machine translation system would have to be established by the Select Committee of the Administrative Council of the EPO composed of representatives of the EU and all Member States.

Reimbursement of costs

European patent applications may be filed in any language in accordance with Article 14(2) of the EPC. Where the language of filing is not an official EPO language, a translation of the application into one of the official languages of the EPO must be provided, within a prescribed time period, so that the application can be processed by the EPO. Under the current Implementing Regulations of the EPC²⁰, applicants filing in a language not in common with

¹⁹ Information available at http://cordis.europa.eu/home_en.html.

²⁰ Article 14(4) EPC; Rule 6(1) of the Implementing Regulations.

official languages of the EPO are eligible for a partial reimbursement of the translation costs at various stages of the procedure before the EPO by way of a fee reduction. This would also apply to EU patents. However, with respect to applicants for EU patents based in EU Member States, necessary arrangements shall be made to provide not only for a partial, but for a full reimbursement of the translation costs up to fixed ceilings. These additional reimbursements would be financed from the fees of EU patents collected by the EPO. These arrangements would have to be established by the Select Committee of the Administrative Council of the EPO composed of representatives from the EU and of all Member States.

2010/0198 (CNS)

Proposal for a

COUNCIL REGULATION (EU)

on the translation arrangements for the European Union patent

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular second paragraph of Article 118 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament²¹,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) The European Union patent (hereinafter referred to as the "EU patent") has been created by virtue of Regulation xx/xx on the European Union patent²². In accordance with the first paragraph of Article 118 of the Treaty, the Regulation provides for uniform patent protection throughout the European Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.
- (2) Translation arrangements for the EU patent that are cost-effective, simplified and ensure legal certainty should stimulate innovation and should, in particular, benefit Small and Medium-Sized Enterprises (SMEs) and be complementary to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Think Small First" - A "Small Business Act" for Europe²³. Such translation arrangements should make access to the EU patent and to the patent system as a whole easier, less costly and less risky.
- (3) Since the European Patent Office (hereinafter referred to as the "EPO") is responsible for the grant of European patents, including EU patents, the translation arrangements for the EU patent should be built on the current procedure applied by the EPO. Those arrangements should aim at achieving 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.

²¹ OJ C , , p. .

²² OJ C , , p. .

²³ COM(2008) 394.

- (4) In case of a dispute concerning an EU patent, it is a legitimate requirement that the patent proprietor provides a full translation of the EU patent into an official language of the Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled. The patent proprietor is also required to provide a full translation of the EU patent into the language of proceedings of the competent court in the European Union at the request of that court. Such translations should be provided at the expense of the patent proprietor.
- (5) In order to facilitate access to the EU patent, in particular for SMEs, applicants who do not have a language in common with one of the official languages of the EPO should be able to file their applications in any other official language of the European Union. As a complementary measure, for applicants obtaining EU patents and having their residence or principal place of business within a Member State which has an official language other than one of the EPO official languages, a system of additional reimbursements of the costs related to the translation from that language into the language of the proceedings of the EPO, beyond what is currently already in place for the European patents, should be established by the time this Regulation applies.
- (6) In order to promote the availability of patent information and the dissemination of technological knowledge, a system of machine translations for EU patent specifications into all official EU languages should be in place by the time this Regulation applies. Such machine translations should serve for information purposes only and should not have any legal effect.
- (7) Since the substantive provisions applicable to the EU patent as a European intellectual property title are governed by Regulation xx/xx on the European Union patent, and they are completed by the translation arrangements provided for in this Regulation, this Regulation should apply from the date of the entry into force of Regulation xx/xx.
- (8) In accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union, the objective of the action to be taken, namely the creation of a uniform and simplified translation regime for the EU patent, can be only achieved at European level. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve this objective.
- (9) This Regulation is without prejudice to the rules governing the languages of the Institutions of the Union established in accordance with Article 342 of the Treaty on the Functioning of the European Union and to Council Regulation 1/1958 determining the languages to be used by the European Economic Community,

HAS ADOPTED THIS REGULATION:

Article 1
Subject matter

This Regulation establishes the provisions on the translation arrangements applicable to a European Union patent.

Article 2
Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (a) "European Union patent", hereinafter referred to as the "EU patent", means a patent as defined in Regulation xx/xx on the European Union patent.
- (b) "EU patent specification" shall include the description, the claims and any drawings.

Article 3
Publication of the EU patent specification

- 1. After the publication of the EU patent specification in accordance with Article 14, paragraph 6, of the Convention on the Grant of the European Patents of 5 October 1973, as amended (hereinafter referred to as the "EPC"), no further translations are required.
- 2. The text of the EU patent in the official language of the European Patent Office referred to as the language of the proceedings in Article 14, paragraph 3, of the EPC shall be the authentic text.

Article 4
Translation in case of a dispute

- 1. In the case of a dispute relating to an EU patent, the patent proprietor shall provide at the request and the choice of an alleged infringer, a full translation of the patent into an official language of the Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled.
- 2. In the case of a dispute relating to an EU patent, the patent proprietor shall provide at the request of the competent court in the European Union in the course of legal proceedings, a full translation of the patent into the language of the proceedings of the court.
- 3. The cost of the translation referred to in paragraphs 1 and 2 shall be borne by the patent proprietor.

Article 5
Report on the implementation of this Regulation

Not later than five years from the date on which this Regulation enters into force, the Commission shall present to the Council a report on the operation of the translation arrangements for the EU patent and where necessary make proposals for amending this Regulation.

Article 6
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [*date of the entry into force of Regulation xx/xx on the European Union patent*].

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the Council
The President

Brussels, 9 November 2010

Preparation for the Competitiveness Council of Ministers, 10 November 2010

An extraordinary session of the EU's Competitiveness Council will meet in Brussels on Wednesday 11 November under the chairmanship of the Belgian Presidency: Mr Vincent Van Quickenborne (Minister for Enterprise and Streamlining Policy). The European Commission will be represented by Commissioner Michel Barnier responsible for the Internal Market and Services.

The Council discussions will be focusing on:

The EU Patent

Ministers are to revisit the issue of an improved EU Patent system. On 1 July 2010, the Commission launched a proposal on translation arrangements for a future EU Patent, which is the final element needed for a single EU Patent to become a reality (see [IP/10/870](#)). Obtaining a patent in Europe currently costs ten times more than in the US. This situation discourages research, development and innovation, and undermines Europe's competitiveness. The Commission believes that Europe needs to act so that innovators can protect their inventions at an affordable cost with a single patent covering the entire EU territory with minimum translation costs and without needing to validate that patent at national level as they currently have to do. The draft regulation seeks to ensure translation arrangements for the EU patent are cost-effective, simplified and ensure legal certainty. The new proposal is an extension of the European Patent Office's (EPO) successful trilingual system and, if adopted, would drastically reduce existing translation costs. The Commission hopes to see Member States move towards a unanimous agreement Wednesday.

More information:

http://ec.europa.eu/internal_market/indprop/patent/index_en.htm

**Towards a
EUROPEAN UNION PATENT COURT?**



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 7 December 2009

17229/09

**PI 141
COUR 87**

NOTE

from:	General Secretariat of the Council
to:	Delegations
No. prev. doc.:	16114/09 ADD 1 PI 123 COUR 71
Subject:	Enhanced patent system in Europe - Council conclusions

Delegations will find in Annex, for information, the conclusions adopted by the Council (Competitiveness) on 4 December 2009 on an enhanced patent system in Europe.

75

COUNCIL CONCLUSIONS

on

AN ENHANCED PATENT SYSTEM IN EUROPE

THE COUNCIL OF THE EUROPEAN UNION,

1. RECALLING that enhancing the patent system in Europe is a necessary prerequisite for boosting growth through innovation and for helping European business, in particular SMEs, face the economic crisis and international competition;
2. CONSIDERING that such an enhanced patent system is a vital element of the Internal Market and that it should be based on two pillars, i.e. the creation of a European Union patent (hereafter "EU patent") and the setting up of an integrated specialised and unified jurisdiction for patent related disputes thus improving the enforcement of patents and enhancing legal certainty;
3. ACKNOWLEDGING the considerable amount of work accomplished so far by the Council's preparatory bodies on the legal instruments needed to establish the above-mentioned two pillars;
4. AGREES that the following conclusions on the main features of the European and EU Patents Court (I) could form the basis of, while on the EU patent (II) they should form part of the overall final agreement on a package of measures for an Enhanced Patent System in Europe comprising the creation of a European and EU Patents Court (EEUPC), an EU patent, including the separate regulation on the translation arrangements referred to in point 36 below, an Enhanced Partnership between the European Patent Office and central industrial property offices of Member States and, to the extent necessary, amendments to the European Patent Convention;

76

5. STRESSES that the following conclusions are without prejudice to the request for an opinion of the European Court of Justice¹ as well as to Member States' individual written submissions and are conditional on the opinion of the European Court of Justice ;
6. TAKES NOTE of the Draft Agreement on the European and Community Patents Court in document 7928/09 of 23 March 2009 (below the Draft Agreement), acknowledges that some elements of the envisaged agreement are under particular discussion;
7. STRESSES, that the system here envisaged should be established with due regard to the constitutional provisions of the Member States and is without prejudice to the request for an opinion of the European Court of Justice; and that the establishment of the EEUPC would be based on an agreement, the ratification of which by the Member States would have to take place in full compliance with their respective constitutional requirements;
8. AGREES that the decision on the seat arrangements for the EEUPC should be taken as part of the overall final agreement referred to in point 4 above and shall be in accordance with relevant EU acquis;
9. RECOGNISES that some Member States have fundamental legal concerns concerning the creation of the EEUPC and its envisaged overall architecture as reflected in these conclusions, which would have to be revisited in the light of the opinion of the European Court of Justice.

I. MAIN FEATURES OF THE EUROPEAN AND EU PATENTS COURT

THE EUROPEAN AND EU PATENTS COURT

10. The EEUPC should have exclusive jurisdiction in respect of civil litigation related to the infringement and validity of EU patents and European patents.

¹ OPINION 1/09, European Court of Justice.

11. As outlined in the Draft Agreement, the EEUPC should comprise a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance should comprise a central division as well as local and regional divisions.
12. The European Court of Justice shall ensure the principle of primacy of EU law and its uniform interpretation.

THE COMPOSITION OF THE PANELS

13. In order to build up trust and confidence with users of the patent system and to guarantee the high quality and efficiency of the EEUPC's work, it is vital that the composition of the panels is organised in a way which makes best use of experience of patent litigation among judges and practitioners at national level through pooling of resources. Experience could also be acquired through theoretical and practical training which should be provided in order to improve and increase available patent litigation expertise and to ensure a broad geographic distribution of such specific knowledge and experience.
14. All panels of the local and regional divisions and the central division of the Court of First Instance should guarantee the same high quality of work and the same high level of legal and technical expertise.
15. Divisions in a Contracting State where, during a period of three successive years, less than fifty cases per year have been commenced, should either join a regional division with a critical mass of at least fifty cases per year or sit in a composition whereby one of the legally qualified judges is a national of the Contracting State concerned and two of the legally qualified judges, who are not nationals of the Contracting State concerned, come from the pool of judges to be allocated to the division on a case by case basis.

16. Divisions in a Contracting State where, during a period of three successive years, more than fifty cases per calendar year have been commenced should sit in a composition whereby two of the legally qualified judges are nationals of the Contracting State. The third legally qualified judge, who would be of a different nationality, would be allocated from the pool of judges. The legally qualified judges from the pool should be allocated on a long term basis where this is necessary for the efficient functioning of divisions with a high work load.
17. All panels of the local and regional divisions should comprise an additional technical judge in the case of a counterclaim for revocation or, in the case of an action for infringement, when requested by one of the parties. All panels of the central division should sit in a composition of two legally qualified judges and one technically qualified judge. The technically qualified judge should be qualified in the field of technology concerned and be allocated to the panel from the pool of judges on a case by case basis. Under certain conditions to be defined in the Rules of Procedure and with the agreement of the parties, cases in the First Instance may be heard by a single legally qualified judge.
18. The allocation of judges should be based on their legal or technical expertise, linguistic skills and relevant experience.
19. The provisions regarding the composition of the panels and the allocation of judges should ensure that the EEUPC is an independent and impartial tribunal within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union.²

² OJ C 303, 14.12.2002, p. 1.

JURISDICTION IN RESPECT OF ACTIONS AND COUNTERCLAIMS FOR REVOCATION

20. In order to ensure that local and regional divisions work in an expeditious and highly efficient way, it is vital that the divisions have some flexibility on how to proceed with counterclaims for revocation.

- (a) Direct actions for revocation of patents should be brought before the central division.
- (b) A counterclaim for revocation can be brought in the case of an action for infringement before a local or regional division. The local or regional division concerned may;
 - (i) proceed with the counterclaim for revocation; or,
 - (ii) refer the counterclaim to the central division and either proceed with the infringement action or stay those proceedings; or,
 - (iii) with the agreement of the parties, refer the whole case for decision to the central division.

LANGUAGES OF PROCEEDINGS

21. The Draft Agreement, the Statute and the Rules of procedure should provide for arrangements which would guarantee fairness and predictability of the language regime for the parties. Furthermore, any division of the EEUPC should provide translation and interpretation facilities in oral proceedings to assist the parties concerned to the extent deemed appropriate, in particular when one of the parties is an SME or a private party.

22. The language of proceedings of the local and regional divisions should in general be the language(s) of the Contracting State(s) where they would be established. Contracting States may however designate one or more of the official languages of the European Patent Office as language of proceedings of the local or regional division they host. The language of proceedings of the central division should be the language of the patent. The language of proceedings of the Court of Appeal should be the language of the proceedings at the First Instance.
23. Any subsequent decisions which would in any way affect the arrangements regarding the language of proceedings under the Agreement on the EEUPC should be adopted by unanimity.

THE TRANSITIONAL PERIOD

24. The transitional period should not last longer than five years after the entry into force of the Agreement on the EEUPC.
25. During the transitional period, proceedings for infringement or for revocation of a European patent may still be initiated before the national courts or other competent authorities of a Contracting State having jurisdiction under national law. Any proceedings pending before a national court at the end of the transitional period should continue to be subject to the transitional regime.
26. Unless proceedings have already been initiated before the EEUPC, holders of European patents or patent applications granted or applied for prior to the entry into force of the Agreement on the EEUPC should have the possibility to opt out of the exclusive jurisdiction of the EEUPC, if the opt out is notified to the Registry no later than one month before the end of the transitional period.

REVISION CLAUSE CONCERNING THE COMPOSITION OF PANELS AND COUNTERCLAIMS FOR REVOCATION

27. The Commission should closely monitor the functioning, the efficiency and the implications of the provisions regarding the composition of the panels of the First Instance and the jurisdiction in respect of actions and counterclaims for revocation, see points 15, 16 and 20 above. Either six years after the entry into force of the agreement on the EEUPC or after a sufficient number of infringement cases, approximately 2000, have been decided by the EEUPC, whichever is the later point in time, and if necessary at regular intervals thereafter, the Commission should, on the basis of a broad consultation with users and an opinion of the EEUPC, draw up a report with recommendations concerning the continuation, termination or modification of the relevant provisions which should be decided by the Mixed Committee.
28. The Commission should in particular consider alternative solutions that would reinforce the multinational composition of the panels of the local and regional divisions and that would make a referral to the central division of a counterclaim for revocation, or the whole case, subject to agreement of both parties.

PRINCIPLES ON THE FINANCING OF THE EEUPC

29. The EEUPC should be financed by the EEUPC's own financial revenues consisting of the court fees, and at least in the transitional period referred to in point 24 as necessary by contributions from the European Union (hereafter "EU") and from the Contracting States which are not Member States.
30. A Contracting State setting up a local division should provide the facilities necessary for that purpose.

31. The court fees should be fixed by the Mixed Committee on a proposal by the Commission which should include an assessment by the Commission of the expected costs of the EEUPC. The court fees should be fixed at such a level as to ensure a right balance between the principle of fair access to justice, in particular for SMEs and micro-entities, and an adequate contribution of the parties for the costs incurred by the EEUPC, recognising the economic benefits to the parties involved, and the objective of a self-financing court with balanced finances. Targeted support measures for SMEs and micro-entities might also be considered.
32. The EEUPC should be organised in the most efficient and cost effective manner and should ensure equitable access to justice, taking into account the needs of SMEs and micro-entities.
33. The EEUPC costs and financing should be regularly monitored by the Mixed Committee, and the level of the court fees should be reviewed periodically, in accordance with point 31 above.
34. At the end of the transitional period, on the basis of a report from the Commission on costs and financing of the EEUPC, the Mixed Committee should consider the adoption of measures aimed at the objective of self-financing.

ACCESSION

35. Initially, accession by Contracting States of the European Patent Convention who are not Member States of the EU should be open for Contracting Parties to the European Free Trade Agreement. After the transitional period, the Mixed Committee could by unanimity decide to invite Contracting States of the European Patent Convention to adhere if they have fully implemented all relevant provisions of EU law and have put into place effective structures for patent protection.

II. THE EU PATENT

TRANSLATION ARRANGEMENTS

36. The EU Patent Regulation should be accompanied by a separate regulation, which should govern the translation arrangements for the EU patent adopted by the Council with unanimity in accordance with Article 118 second subparagraph of the Treaty on the Functioning of the European Union. The EU Patent Regulation should come into force together with the separate regulation on the translation arrangements for the EU patent.

THE RENEWAL FEES

37. The renewal fees for EU patents should be progressive throughout the life of the patent and, together with the fees due to be paid during the application phase, cover all costs associated with the granting and administration of the EU patent. The renewal fees would be payable to the European Patent Office, which would retain 50 percent of the renewal fees and distribute the remaining amount among the Member States in accordance with a distribution key to be used for patent-related purposes.
38. A Select Committee of the Administrative Council of the European Patent Organisation should, once the EU Patent Regulation enters into force, fix both the exact level of the renewal fees and the distribution key for their allocation. The Select Committee should be composed only of representatives of the EU and all the Member States. The position to be taken by the EU and the Member States in the Select Committee would need to be determined within the Council, at the same time as the EU Patent Regulation is adopted. The level of the renewal fees should in addition to the above mentioned principles be fixed with the aim of facilitating innovation and fostering the competitiveness of European business. It should also reflect the size of the market covered by the EU patent and be similar to the level of the renewal fees for what is deemed to be an average European Patent at the time of the first decision of the Select Committee.

39. The distribution key should be fixed taking into account a basket of fair, equitable and relevant criteria such as for instance the level of patent activity and the size of the market. The distribution key should provide compensation for, among other things, having an official language other than one of the official languages of the European Patent Office, for having disproportionately low levels of patent activity and for more recent EPC-membership.
40. The Select Committee should periodically review its decisions.

THE ENHANCED PARTNERSHIP

41. The aim of the Enhanced Partnership is to promote innovation by enhancing the efficiency of the patent granting process through avoiding duplication of work, with the goal of more rapid delivery of patents which will increase speed of access to market for innovative products and services and reduce costs for applicants. Enhanced Partnership should both make use of central industrial property offices' existing expertise and strengthen their capacity to enhance the overall quality of the patent system in future.
42. Enhanced Partnership should enable the European Patent Office to make regular use, where appropriate, of the result of any search carried out by central industrial property offices of Member States of the European Patent Organisation on a national patent application the priority of which is claimed in a subsequent filing of a European patent application. Such a result should be available to the European Patent Office in accordance with the Utilisation Scheme of the European Patent Office.³

³ EPO documents CA/153/09 and CA/PL 8/09.

43. Central industrial property offices can play a vital role in fostering innovation. All central industrial property offices, including those which do not perform searches in the course of a national patent granting procedure, can have an essential role under the Enhanced Partnership, advising potential applicants including SMEs, disseminating patent information and receiving applications.
44. Enhanced Partnership should fully respect the central role of the European Patent Office in examining and granting European patents. Under the Enhanced Partnership the European Patent Office would be expected to consider but not be obliged to use the work provided by participating offices. The European Patent Office should remain free to carry out further searches. The Enhanced Partnership should not restrict the possibility for applicants to file their application directly at the European Patent Office.
45. Enhanced partnership would be subject to periodic reviews, adequately involving views of the users of the patent system. In addition, regular feed back from the European Patent Office to the participating offices on how search reports are utilised at the European Patent Office would be essential for the enabling of the fine-tuning of the search process to the benefit of the optimal utilisation of resources.
46. Enhanced partnership should be based on a European Standard for Searches (ESS), containing criteria for ensuring quality. The ESS should in addition to searches include standards on inter alia training, tools, feedback and assessment.
47. At the same time as the EU Patent Regulation is adopted, the position to be taken by the EU and the Member States on the implementation of the Enhanced Partnership, including the ESS, should be determined within the Council and then be implemented within the context of the European Patent Network (EPN)⁴, in particular, the Utilization Scheme⁵ and the European Quality System⁶, within the policy of the European Patent Organisation.

⁴ EPO documents CA/120/06 and CA/PL 8/09.

⁵ EPO document CA/153/09 and CA/PL 8/09.

⁶ EPO document CA/122/06 and CA/PL 8/09.

48. The participation of central industrial property offices in an Enhanced Partnership should be voluntary but open to all. In the spirit of facilitating the utilization and pooling of all available resources, regional cooperation should be encouraged. In addition the possibility of limiting the participation of a central industrial property office to one or more specific technical fields should be further analysed, tested and evaluated.
49. The steps now taken should be without prejudice to any future development of the Enhanced Partnership, including future models for improving the partnership between the European Patent Office and the central industrial property offices. Against this background, the European Patent Office and Member States should give a comprehensive evaluation of the functioning and the further development of the Enhanced Partnership, based on experience gained through the implementation and the performance achieved by central industrial property offices in meeting the ESS.

AMENDMENTS TO THE EUROPEAN PATENT CONVENTION AND ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN PATENT CONVENTION

50. In order for the EU patent to become operational, to the extent necessary, amendments would be made to the European Patent Convention (EPC). The EU and its Member States should take any necessary measures and put them into force, including those for the accession of the EU to the EPC. Amendments to the EPC deemed necessary in this regard should not imply any revision of substantive patent law, not related to the creation of the EU patent.

Jochen Pagenberg*

The ECJ on the Draft Agreement for a European Community Patent Court – Hearing of May 18, 2010

A. The Arguments of Member States and EU Institutions

1. Procedural Situation

On May 18, 2010, the European Court of Justice¹ held a hearing in the proceedings for an Opinion under Art. 300(6) EC (now Art. 218(11) TFEU²) concerning the compatibility of the Draft Agreement for a European and Community Patent Court with the legislative powers of EU institutions.³ The request for an Opinion was filed by the Council of the European Union on July 9, 2009.

Twenty countries had intervened and submitted written pleadings, in addition to the European Parliament and the European Commission. Fourteen countries⁴ plus the Commission regarded the Draft Agreement as compatible with the provisions of the Treaty (Czech Republic, Denmark, Finland, France, Estonia, Germany, Netherlands, Poland, Portugal, Romania, Slovenia, Sweden, United Kingdom, Belgium); and seven countries plus the Parliament regarded the Draft Agreement as incompatible with the provisions of the Treaty (Cyprus, Greece, Ireland, Italy, Lithuania, Luxembourg, Spain). In addition, Spain and the European Parliament pleaded that the request was inadmissible, arguing that it was “premature and incomplete” in view of the uncertainty surrounding the legal context in which the proposed Agreement is to operate. The assertion that 14 countries were in favor must, however, be taken with some reservation, since their reasoning was very diverse and contradictory, as some of the governments rejected the legal basis in favor of compatibility, while others had chosen Article of the Treaty as the sole possibility.

The Council, Commission, Parliament and the Member States had the opportunity for oral presentations of the usual 15 minutes, according to the rules of the ECJ. The ECJ had asked the parties in writing before the hearing to concentrate on three topics:

- (i) admissibility of the request, particularly with respect to the reasons against admissibility submitted by the Parliament;

* Dr. jur.; Attorney-at-Law, Munich/Paris; President, European Patent Lawyers Association.

1 Case 1/09. The sitting was in full court with all 27 judges present.

2 The Lisbon Treaty is referred to as the Treaty on the Functioning of the European Union (TFEU).

3 Doc. st7928/09 of March 23, 2009.

4 Belgium apparently did not submit a written brief but joined the “pro” group in its oral pleadings.

- (ii) effects of the entry into force of the Lisbon Treaty on the Agreement in view of the amended rules of the Treaty; and
- (iii) how the provisions proposed in the Draft Agreement fit and can be integrated into the legal structure of the court system under the Treaty.

The representatives of the parties dealt with the topics by mostly repeating the arguments from their written submissions.

2. Admissibility

The European Parliament, as well as some Member States, argued that the request for an Opinion is not only premature and inadmissible because the European Parliament has yet to approve the Draft Regulation on the Community Patent,⁵ but also because national parliaments may need to decide whether the discussed texts are in conformity with their national constitutions in view of the fact that court jurisdiction and competence would shift from national courts to international courts.⁶

3. Effects of the Lisbon Treaty

With respect to the effects of the entry into force of the Lisbon Treaty (TFEU)), most Member States agreed that the new rules dealing with industrial property rights and the jurisdiction in this field have not decisively changed or extended the powers of the EU or the competence of the ECJ.

The significance of Art. 118 TFEU⁷ was discussed by most speakers, but primarily in relation to the intended improvement of the competitive situation by the Agreement “*within the internal market*”, which could mean that it only applies to the *EU patent* but would leave jurisdiction over national and EP patents in the hands of the Member States.

However, in the light of the later oral questions of the Court, this second topic might have aimed at a more precise point, namely whether Art. 118 *obliges* the EU to set up “centralised Union-wide authorisation, coordination and *supervision arrangements*.”

This topic was not discussed by the Member States, however, which primarily dealt with the question whether the internal market, for its own development, needs an international agreement with third parties.⁸

⁵ Doc. st16113/09 of November 27, 2009.

⁶ The discussion turned around the interpretation of Art. 218(11) TFEU as to whether the Agreement was “*envisaged*”: “11. The ... Council ... may obtain the opinion of the Court of Justice as to whether an agreement *envisaged* is compatible with the Treaties.”

⁷ Article 118 TFEU reads in its relevant part: “In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.”

4. The Question of Compatibility

a) Some of the Member States that *denied* the compatibility of the Draft Agreement with the Treaty stated that the Agreement would significantly change the Community legal order by depriving national courts of the jurisdiction that they today enjoy to hear and determine private party actions in cases of patent infringement. Others limited these doubts to the jurisdiction over EP patents, for which they challenged the competence of the Union and denied the applicability of Art. 118 TFEU for the establishment of an international court system that goes beyond EU intellectual property rights, since Art. 118 speaks only of the *internal market*.

b) But even among the Member States that *affirmed* the compatibility of the Agreement, the reasoning could not have been more controversial. If my counting is correct, *seven* Member States proposed Art. 308 EC (now Art. 352 TFEU⁹) as an argument for compatibility, *two* of them with reservations as to EP patents. Those that were against the application of Art. 352 TFEU argued that it does not confer competence on the EU to conclude agreements which fall within the competence of the *Member States*. *Four* Member States relied on Art. 229a EC (now Art. 262 TFEU) – this however was wholly rejected by *five* others, although it was accepted by another *four*, but only for EU patents. Those that rejected Art. 262 TFEU as a legal basis argued that, according to its text, “to confer jurisdiction ... on the Court of Justice [pertaining to] acts which create *European intellectual property rights*,”¹⁰ Art. 262 only specifies the possibility of conferring jurisdiction on the Court of Justice in respect of disputes relating to *EU patents*, but not in respect of disputes relating to *EP patents*. Others argued that Art. 262 is *not* an obstacle, without discussing whether they meant only EU patents or also EP patents. *Four* did not suggest any legal basis at all and only gave general explanations why they were in favor and that they did not find a provision speaking *against* the Agreement.

8 Doubts were raised whether there is evidence that such a shift of competence and jurisdiction is indispensable if the present rules on jurisdiction also have satisfactory results and a uniform Common Market is achieved by the creation of a uniform IP right for which special courts exist. Not one Member State mentioned, in this context, their experience with the Community trademark for which no shift of jurisdiction from the national courts to international courts outside the EU has taken place. Cf. also for this question, JAEGER, HILTY, DREXL & ULLRICH, “Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the 2009 Commission Proposal for the Establishment of a Unified European Patent Judiciary,” 40 IIC 817, 824 (2009), at No. 14.

9 Art. 308 EC required that the act must be “necessary ... in the course of the operation of the common market,” whereas Art. 352 speaks of “necessary ... within the framework of the policies defined in the Treaties.”

10 The text of the former Art. 229a EC Treaty spoke of “Community industrial property rights.”

c) While the necessity for the establishment of a uniform patent right for the Community was affirmed by the majority of Member States, the distinction between the compatibility of the proposed Agreement with the EU legal order for *EU patents* and its lack of competence for *EP patents* was also made by a number of Member States, who generally spoke in favor of compatibility as such. It was not surprising that the question whether and how to include EP patents in the Agreement was again the subject of considerable controversy. A few supported combined jurisdiction for EP and EU patents, arguing that one cannot duplicate the patent courts. However, these same countries had voted in favor of a Revision Clause in December 2009 which, if accepted, would end the jurisdiction of national courts which would act as local chambers six years after the entry into force of the Agreement.

d) For some countries, the geographic location of courts sitting in non-Member States played a decisive role for denying the compatibility of the Agreement if those foreign courts could decide on the application of intellectual property rights with effect *in the internal market*. Their argument was that preservation of the autonomy of Community law requires that the validity of patents covering the entire European Union cannot be decided by courts sitting in non-Member States.¹¹ It was indeed a colorful picture of legal controversy.¹²

B. Result of the Oral Presentations

1. Although there were a number of valid arguments that would speak against the *admissibility* of the request as being premature based on prior case law, it is unlikely that the Court will see a problem here despite the number of open questions about the legal framework.

2. The effects of the entry into force of the *Lisbon Treaty* primarily concern further handling of the Regulation for the EU patent by the EU Parliament, and not the Agreement. However, evidence would still be needed that the existence of identical courts for EU and EP patents would be indispensable for the internal market to function. Experience with the Community trademark shows otherwise. The clear answer of some Member States, therefore, was that "such a construction [of international courts] does not fit" into the Community legal order and is contrary to the intent and purpose of Art. 118 TFEU, which only applies to internal IP rights. Although it will certainly not

11 This argument, if it is accepted by the ECJ, might force the Commission to reconsider the inclusion of EP patents within the jurisdiction of the EU court system, thus leaving bundle patents with the national courts, since the shift of jurisdiction from the Member States might require a modification of the Treaty.

12 Other provisions were discussed as well, such as Art. 225 a EU (now Art. 257 TFEU), which mentions the creation of a specialized *Community* court but not of an international judicial body. Articles 133 EC (now Art. 207 TFEU) and 95 EC (now Art. 115 TFEU), in conjunction with Directive 2004/48 EC, were rejected as an insufficient legal basis.

be easy to overcome these legal obstacles, in fact the real problems lie in the core question of compatibility.

3. The controversy among the Member States that argue in favor of compatibility with the Treaty – some insisting on Art. 308 EC (now Article 352 TFEU) as the only legal basis,¹³ others relying only on Art. 229a EC (now Art. 262 TFEU) and rejecting Art. 308 EC because of its vague text – left an impression of total legal uncertainty. None of the representatives examined the question why all the rules cited by the different Member States contained an express limitation to the territory of the internal market. None analyzed the legal context and purpose of Art. 308 EC or explained how the limitation introduced by the apparently clear language of this provision, with its reference to “the course of the operation of the *common market*,”¹⁴ might be circumvented.

One observer in the audience, after having listened to the diversity of the oral presentations by the Member States, remarked during a break that it was difficult to understand how they had come to a *unanimous* acceptance of the Conclusions on December 4, 2009, in view of the drastic differences among them.

There were a number of other issues discussed by the Member States, which however cannot be included within the framework of this report.¹⁵

C. Questions by the Court and the Advocate General After the Oral Pleadings

1. Lack of Unanimity Among the Member States

The *Juge Rapporteur* must have had the same impression as to the diverse legal evaluations of the underlying concepts among the Member States, since her *first question* to the Council concerned the degree of unanimity¹⁶ in the

13 Article 352 reads: “If action by the Community should prove *necessary* to attain, *in the course of the operation of the common market*, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

14 Art. 308 EC: “If action by the Community should prove necessary to attain, *in the course of the operation of the common market*, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”; Art. 352 TFEU now reads in the underlined part: “*within the framework of the policies defined in the Treaties*.”

15 Some discussion turned around Art. 48 of the Agreement and the limited power of the Court of Appeal to refer questions of Community law to the ECJ for preliminary ruling; see for recommendations concerning this question, JAEGER, 2010 CML Rev. 93, No. 6.3.3, notes 192, 193, who recalls that the ECJ itself has accepted a limitation of such references under the doctrines of *acte clair* and *acte éclairé*. Cf. also JAEGER, HILTY, DREXL & ULLRICH, *supra* note 8, at 828 *et seq.*

Council among the Member States on the issue of compatibility, given the many footnotes in the Draft Agreement. The Council representative admitted that there were differences of opinion among the Member States on this point, but refrained from being more specific.

Subsequent requests for further clarification by the Court and the Advocate General directed to the Council, the Commission and, in part, to the Parliament, also showed their dissatisfaction with what they had heard so far and put the main actors on the defensive.¹⁷

2. Necessity of Enactment of the EU Patent Regulation

With her *second question*, the *Juge Rapporteur* asked the Council whether the enactment of the Regulation on the EU Patent was a prerequisite for the conclusion of the Agreement, which the Council confirmed. This will involve the Parliament before the court system can be finalized and might delay further work on the Agreement.

3. Significance of Art. 118 TFEU – Lack of EU Court Control over the EPO Granting and Opposition Process

The following questions by the Court and the Advocate General all focused on legal control and supervision by the EU legal system over the granting process for EU patents once this has been entrusted to the EPO.

a) *The Juge Rapporteur* addressed the first question to the Commission on the significance of Art. 118 TFEU for the outcome of the Opinion. From the follow-up discussion it became clear that the judges were touching upon one of the core questions of judicial power. Would power over the grant of EU patents remain with the EU or would it be bestowed on the EPO instead? And most important: Would it be necessary to provide legal recourse against final decisions of the EPO concerning EU patents?

The representative of the Commission may have understood the question in a more theoretical or dogmatic sense and responded that the request for an Opinion was not concerned with the legal foundation of jurisdiction. This was surprising in view of the long debates on this question in the written and oral pleadings of different parties, and the fact that the Agreement is all about the court structure and the jurisdiction of the EU or international courts.

b) Since the Commission refrained from offering any further clarification of this question, the judge became more specific and wanted to know whether transferring power over the EU granting process to an authority outside the

¹⁶ Both Art. 262 and Art. 352 require unanimity as a possible authorization.

¹⁷ For the sake of coherence, the following citations of questions and answers are not textual transcripts or translations but draw on the entire discussion. This may facilitate the understanding of the legal problems. The comments in italics constitute a personal analysis by the author of the questions and answers.

Community would not be in conflict with the powers of the Court. Again, the Commission's answer was evasive, asserting that it was not the act of grant, but the future validity of the patent that was decided by the EPO. No explanation of this curious proposition was given.

The representative of the Commission did not touch upon the underlying problem that the Court was interested in, namely, whether it was in conformity with the EU legal order that no Community instance has jurisdiction and control over the act of grant or refusal; or more precisely, whether there is a court in the Community that an applicant could call upon if his application were rejected in the granting phase or his patent were invalidated in an opposition proceeding.¹⁸

c) That this was the topic the Court particularly wanted to discuss became clear from the next question, this time from the Advocate General. She was interested in whether the EU would have to accept a positive or negative decision of the EPO, i.e. whether the EU would be willing to give full powers to the EPO without reservation of its own decisional power.

Comment: Patent practitioners are aware that, in the granting and opposition phase of the EPO, the patent applicant or patent owner can file an appeal against the Examination Divisions or the Opposition Division, respectively, but that there is no court above the Boards of Appeal to correct legal errors, severe violations of procedural rules or an infringement of Community law.¹⁹ While, in case of the grant of an EP patent, third parties who did not succeed in invalidating the patent in an opposition or had not filed an opposition can turn to the national courts for a revocation action, no such remedy is available to an unsuccessful patent applicant.

This is one of the weaknesses of the EPO procedural system, which has been widely ignored – or generally accepted – by the Member States of the European Patent Organisation. Although there had been a discussion some years ago over the need to transform the Boards of Appeal into an independent court, it did not lead to any concrete steps.²⁰

18 Former versions of the Community Patent Regulation provided for court control of EPO decisions, cf. JAEGER, 2010 CML Rev. 83, No. 5.3, note 129.

19 If EU law is therefore applied by non-EU courts, or even an administrative institution like the EPO, the ECJ must have the last word on validity and interpretation, which also includes questions of validity of EU acts; see JAEGER, 2010 CML Rev. 106 *et seq.*, No. 6.6.3, with further references to ECJ case law in note 259. This applies all the more if it is an act of a non-EU institution like the EPO, which acts by delegation of power of the EU for the granting of EU patents.

20 At the national level, Germany founded the Federal Patent Court 50 years ago in order to ensure that an act of expropriation, like the invalidation or rejection of a patent, would always be ordered or controlled by a judge. It was therefore not surprising that the ECJ saw a problem with the present structural organization of the EPO if applied to EU patents.

d) In their answers to this question, the Council and the Commission contradicted each other. The Council regarded such a delegation of power as unproblematic. The representative of the Commission even took the view that there would be no delegation of power and alleged that the EU would still have control of the granting process, since the EPO would grant an EP patent which the EU would then “transform” into an EU patent. He did not explain how this was going to work in practice.

Comment: These answers did not give a convincing clarification of the envisaged procedure. Although a text for the accession agreement with the EPO must still be drafted, it must be assumed that EPO examiners will act under the rules laid down in Art. 142 EPC,²¹ i.e. by an act of delegation of powers. After the accession agreement with the EU is concluded, the applicant would choose what kind of patent he wishes. If he ticks the box for the “EU,” he will obtain an EU patent; if he ticks “Switzerland, France and Norway,” he will receive a bundle of patents for three countries. In the granting procedure for EU patents as part of the accession conditions of the EU, the EPO would have to apply the substantive patent law of the EU as laid down in the EU Patent Regulation, which could differ from the practice and interpretation of the EPO.²²

Such specific granting rules already existed in the past for a number of EPO member countries which, at the time of joining the EPO, did not allow the patenting of chemical compounds. As a result, process claims were granted for those countries, whereas compound claims were granted for the other countries.²³ If one takes the view of the Commission representative that an EP patent would first be granted and then “transformed” or “converted” into an EU patent, one must also explain by whom. The EU has no examiners, so who could force an EPO examiner to grant a claim if he feels that it should be refused? And what legal remedies are available after the request to grant an EP patent has been dismissed? Will there be somebody (in the EPO?) to revive the invalidated EP patent in the form of a valid EU patent? The Court would have liked to have answered this in the context of the discussion of Art. 118 TFEU (“the Council ... shall establish ... supervision arrangements”).

21 Article 142 – “Unitary patents: (1) 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.”

22 At present, this could be the case for biotech inventions. Such a possibility is already foreseen in the EPC organisational rules, see Art. 143 EPC – “Special departments of the European Patent Office – (1) The group of Contracting States may give additional tasks to the European Patent Office. (2) Special departments common to the Contracting States in the group may be set up within the European Patent Office in order to carry out the additional tasks.”

23 JAEGER, *supra* note 12, at 102, No. 6.5.3.

e) That the Court was not interested in a virtual granting construction became clear when the Advocate General again pressed for precise answers as to whether indeed no judicial EU instance is foreseen to control the granting process of EU patents, and whether the EU Council does not see a problem concerning the jurisdiction of the EU legal system and the Court. The President of the Court was also obviously concerned about the lack of legal review and judicial control by the EU over adverse decisions by the EPO, since he expressly called this an important question.²⁴ When the representative of the Commission answered that an appeal was possible (within the EPO, namely to the Appeal Board) and, as an alternative, that the Boards of Appeal could be given the right to refer questions on interpretation of EU law to the Court, the President found this “a little surprising.”²⁵

Comment: The concerns of the Advocate General and the Court are very real indeed, if no court exists to control and possibly correct the refusal of an application by the EPO. The fact that the Member States have accepted this situation over many decades does not mean that the lack of court control must be acceptable to users today,²⁶ particularly if this situation must be acceptable within the EU legal system.²⁷ Cases in which clear violations of basic procedural rules, e.g. the right to be heard, were at issue have, in fact, left patent owners helpless before the EPO after all other legal avenues were exhausted. It is therefore understandable that the ECJ judges were surprised that the EU representatives did not see a problem here.

One example is the Lenzing case,²⁸ where an EPO Board of Appeal invalidated the patent based on a piece of prior art that a member of the Board

24 The comment of the President of the ECJ was telling, when he called the answer by one of the EU representatives that he had no problem with the lack of judicial control “rather strong.”

25 In view of this remark, the question whether the EPO Boards of Appeal can be regarded as “courts” for the application of Art. 267 TFEU would apparently be decided by the Court in the same way as with respect to the Boards of Appeals of OHIM, namely that they are instances of the granting authority and not courts or tribunals.

26 The Member States of the EPO had consciously renounced any intention to provide a court instance for such review cases, see VAN EMPEL, “The Granting of European Patents,” No. 521 *et seq.* (Leyden 1975).

27 JAEGER, *supra* note 12, at 105, No. 6.6.3, calls it “a central condition that the Agreement does not interfere with the principles and the functioning of the EU legal order,” with references to several former Opinions of the ECJ, in note 256. Same opinion, JAEGER, HILTY, DREXL & ULLRICH, *supra* note 8, at 831, ii.: “decisions of the EPO in application of a future Community patent regulation must be subject to some form of review by a Community court”; and at 833, c.: “Exempting EPO decisions in application of the Community Patent Regulation from the possibility of review by the ECJ ... is a rupture of the complete system of remedies under the EC Treaty. Since, therefore, the lack of review of EPO decisions on Community patents is incompatible with Community law, a method of review must be introduced.”

28 Cf. File No. J 0003/98 concerning application No. 89890209.3.

had searched for and found after the hearing and which had never been discussed before. One cannot imagine a clearer case of a violation of the right to be heard.²⁹ Lenzing challenged the decision on several grounds before the EPO with requests for self-correction, reinstatement etc.,³⁰ followed by a complaint before the German Constitutional Court and finally even before the Court of Human Rights³¹ – all without success.³²

The fact that the Commission would be willing to treat the EPO Boards of Appeal as courts in order to satisfy the requirements of Art. 19(3) TEU or Art. 267 TFEU would open up another discussion, this time between the Commission and the Parliament. The latter has always regarded the EPO Boards as being mere administrative bodies and has therefore refused – to the distress of the Commission – to accept its members as technical judges in the future EU patent court system, which does not leave many technically trained patent experts to fill these jobs in Europe.

29 This author took over the case for the German proceedings after the ominous decision had been issued. There was, in fact, a parallel case in the EPO with very similar facts, which came up at approximately the same time, the *ETA* case, Decision of the Enlarged Board of Appeal of December 10, 1999, G 1/97, 2000 OJ EPO 322. The official statement of the President of the EPO before the Enlarged Board of Appeals in this case was: “The EPC does not provide for any procedure for reviewing decisions of the boards of appeal (Article 106(1) EPC), which therefore become final as soon as they are issued. Only Rule 89 EPC can be applied, allowing the correction of linguistic errors, errors of transcription and obvious mistakes in decisions, but not the correction of legal errors.”

30 Among others, Art. 122(1) (Reinstatement); Arts. 101(2), 113(1) (Hearing opportunity for parties); Art. 125 (Application of procedural rules of member states); (all Article numbers are according to the texts prior to EPC 2000).

31 See European Court of Human Rights, *Lenzing v. Germany*, No. 39025/97, and *Lenzing v. UK*, decisions of September 9, 1998. These two cases were cited in a recent case, *Rambus v. Germany*, June 16, 2009, again against an alleged violation of the right to be heard by the EPO, where the Court repeated its belief that: “The European Patent Convention provides for equivalent protection as regards the Convention [for the Protection of Human Rights]” – a surprising opinion for a situation where no court control exists.

32 Lord Justice Jacob’s comment on this problem in the parallel English case was in this author’s view more political than legal when he said: “This country has agreed with the other State members of the EPC that the final arbiter of revocation under the new legal system is to be the Board of Appeal of the EPO. Other States would be justly entitled to complain if we in this country were to ignore such a final decision ... The suggested course would be to: ‘hijack an organisation to which [one sovereign State] and other States had given birth and subject it (contrary to the treaty terms) to its own domestic jurisdiction....’ One can put the matter another way: the EPO has an internal legal system of its own. This follows inherently as a matter of course from its own structure as an international organisation.” The comment of the IPKat Blog (Jeremy Philips) on November 23, 2004, put a finger on the point; while showing understanding for the concerns of Lord Jacob about possible misuse by delaying strategies, Jeremy Philips nevertheless was surprised about the result: “It seems anomalous that the national patent laws of Europe’s various nations must all operate in accordance with principles of human rights while no such check is placed upon the operations of the European Patent Office itself.”!

Nevertheless, none of the representatives of the EU institutions – Council, Commission or Parliament – were ready to jump on the train that the President and the Reporting Judge tried to put on track, namely the establishment of an independent EU court instance for remedies against decisions of the EPO.³³ It was astonishing that the representative of the Commission did not even offer to examine this question, all the more so, since not the Commission, but the Member States of the EPO are responsible for this problem. Now it can be hoped that the ECJ itself will give an appropriate answer in order to bring more justice to the EPO procedure.

4. Language of Proceedings

a) The Advocate General questioned whether it was fair that a defendant would have to defend himself in a court language that he does not speak, and which might be the plaintiff's native language.

b) The Commission, Council and Parliament were unspecific in their answers by stating that this is in conformity with the law today. It was not clear whether the Court was satisfied with this answer.

Comment: The response concerning the present legal situation is in conformity with practice under Regulation 44/2001 and common procedure in everyday life: if a German tourist has an accident during a vacation in Spain, he has to defend himself before a Spanish court in Spanish, if necessary with the help of a Spanish attorney. Translations are not normally provided by the courts for defendants in civil cases; they have to be organized by the parties themselves. If one wants to change this in the future and introduce translations in all fields of law, one should be aware that this would increase litigation costs enormously.

Yet patent cases are the least problematic, anyway, since translations in court rooms are already organized by the parties themselves or their attorneys, which does not require a change of the language of proceedings. In contrast to a tourist in a traffic accident, companies that can organize sales abroad usually have trading partners where they do business and should therefore be able to defend their interests in court. Of course, the situation of the plaintiff should also be considered. Why should a small entity whose patent is infringed in its home country be expected to enforce its rights before a court in a different language? It follows that the rule concerning the language of proceedings need not and should not be changed.

33 This could very well be the EEUPC, namely its central chamber, which would have jurisdiction for revocation cases, but one could also consider the Court of Appeal; for similar considerations, JAEGER, HILTY, DREXL & ULLRICH, "Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the 2009 Commission Proposal for the Establishment of a Unified European Patent Judiciary," 40 IIC 817, 834 (2009).

Conclusion

What can be expected from the Opinion of the ECJ? A clear affirmative answer in favor of compatibility of the present Agreement is highly improbable in view of the persistent questions and serious doubts concerning the lack of judicial EU control over the EPO granting procedure. Beyond this, the controversy among the Member States over the legal basis of the court system as a whole, particularly with respect to the combined jurisdiction for EU and EP patents, will most probably be addressed by the Court and is unlikely to be resolved to the satisfaction of all Member States.

What then? If an EU patent is still desired by a large part of European industry,³⁴ then one should concentrate on finalizing the EU Patent Regulation first. Only afterwards – since the Parliament apparently wishes to discuss a number of questions about the Regulation – will it be worthwhile to consider an approach by which the court system could be “downsized” to real needs, namely to provide a uniform answer within the internal market in case of infringements of an EU patent. While the functioning of this system and the interest of the users are being tested, *things should remain as they are with respect to EP patents*. These patents can continue to be litigated before the national courts, with an option also to use the new EU courts, if the ECJ can show how this can be done without violating the Treaty. Yet there must be an option, particularly for SMEs, to continue using the familiar, less complex and probably less expensive national courts.³⁵ It

34 This is becoming more and more uncertain after several announcements from the pharmaceutical industry that companies will reconsider their filing policy and go back to national patent filings in order to prevent central attacks on their valuable patents. See also such doubts by JAEGER, *supra* note 12, at 72, No. 3.2.

35 JAEGER, *id.*, overstates the financial advantages for SMEs in the belief that the EU system will offer a cost level for litigation at about the German level. In reality, practitioners predict that the cost will be *three to five times* the German level. The estimates in a number of publications are based on doubtful assumptions: (1) The alleged 20% duplication of cases is far too high and in reality lies between 5 and 8% on average in the EU according to practitioners, so the alleged savings are greatly exaggerated; (2) German cases, as to output and cost, cannot be counted only by the number of *infringement* proceedings: a) an infringement court in the first instance can handle four cases per hearing day, but a revocation case before the Federal Patent Court or in the second instance before the Federal Supreme Court requires a full day, which reduces efficiency in a combined system by a factor of four; b) costs in a revocation case are generally as high as in an infringement case, so costs for a combined case must be *doubled* (in Germany only approximately 25% of infringement cases are countered by a revocation action, whereas in a combined system this is above 90%); (3) the German system has a limitation for reimbursable costs, according to which court fees and attorneys' fees are determined on the basis of a litigation value fixed by the court for each case; this is so far not foreseen in the EU system; (4) A system with multinational compositions of divisions (even without the ominous “Revision Clause” in the Council Conclusions) will never reach the output figures of today's experienced German courts; present calculations by the Commission assume less than 10% of the German output figures for infringement-only cases.

can be anticipated that many of the surprising contradictions among the Member States on basic legal issues, which were voiced during the hearing, will slowly dissipate once all the parties see that their concerns have been addressed and that one class of users is not placed in a less favourable position than before. For the moment, the “package” in which the Commission has tied together the Regulation and the Agreement at the request of the Member States, has turned out to be too burdensome for a smooth passage along the complicated legal avenues of Community law.³⁶

These few points already show that the calculated savings by the introduction of the EU patent courts are unrealistic, since *each* of the above points, if proven, will multiply cost by 400%! This will have the result that, in addition to the pharmaceutical industry, the largest user group in patent litigation, the SMEs, will also be forced out of the system, not because they can easily afford to file patents in national offices, but to the contrary, because they cannot afford to litigate EP patents before the EU courts, as the financial risk would become too high.

- ³⁶ JAEGER, *supra* note 12, at 115, also sees this problem (“the size of the deal is too big”), and suggests as a solution an immediate adoption of the court system before the Regulation and the language question have been resolved. This author can only agree on the following conditions: (a) the cost discrepancies mentioned in *supra* note 35 must be clarified; (b) the proper functioning of the EU courts must be tested for at least 15 years after their establishment; c) during this period, users, particularly SMEs, must have an option to litigate EP patents before the EU courts or the existing national patent courts.

Translation by SIMMONS & SIMMONS

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**STATEMENT OF POSITION BY THE ADVOCATES GENERAL
Presented on 2nd July 2010¹**

Opinion 1/09

**Request for the opinion of the
Council of the European Union**

"Request for an opinion – Jurisdiction of European Patent and Community Patent –
Compatibility with the treaties of a draft agreement creating a unified system of regulation of litigation in the
matter of patents – disputes between individuals associated with the validity and/or the application of
community patents – guarantees with a view to ensuring the full application of and the rule of Community law
– referral to the Court of Justice under the preliminary ruling procedure – remedies in the case of infringement
of Community law and in the case of failure to comply with the obligation to make a reference for a
preliminary ruling – system of languages – admissibility of the request for an opinion"

"EUROPEAN PATENT AND COMMUNITY PATENT COURT"

Table of Contents

¹ Original language: French

I Introduction

II The Legal Context

III The Draft Agreement

Competences of the JB [Patent Court]

Applicable law

Mechanism for reference for a preliminary ruling

System of languages

IV The request for an opinion

V Analysis by the Advocates General

A On the admissibility of the request for an opinion

1 The degree of detail of the information relating to the content of the agreement

2 Progress of the file within the Council

3 Final observations: the principle of institutional balance

4 Interim conclusion

B On the merits

1 Competence of the Union and the legal basis for conclusion of the agreement

2 Compatibility of the draft agreement with the system of treaties

a) Legality of the creation of the JB as an international court

i) Disputes between individuals

ii) Administrative disputes

iii) Interim conclusion

STATEMENT OF POSITION BY THE ADVOCATES GENERAL – OPINION 1/09

- b) Compliance by the JB with the law of the Union
- i) Application of the law of the Union and compliance by the JB with the primacy of the law of the Union
 - Reference to "directly applicable Community law"
 - Summary
- (ii) Compatibility of the preliminary ruling mechanism with the judicial system of the treaties
- iii) Remedies in the case of infringement of Union law by the JB
- c) The system of languages before the JB
- 3 Conclusion
- VI **Proposed Reply to the Request for an Opinion**

"EUROPEAN PATENT AND COMMUNITY PATENT COURT"

I. Introduction

1. The European Council has referred to the Court a request for an opinion which concerns a draft international agreement, the purposes of which is to establish a European patent court ("JB"). The said agreement would be concluded as a mixed agreement between the European Union, its member states and a number of third countries.
2. This draft agreed is currently presented in the form a simple working document drafted by the Council Presidency within the context of a group of measures in patent matters which are currently being studied at European level, and in particular the possible creation, by the European Union, of a *Community Patent*² as a new title of intellectual property³ and accession of the European Union to the Munich Convention on the *European Patent ("CBE")*⁴. By virtue of the accession of the Union to the CBE, the future Community Patent will become part of the administrative system instituted for the European Patent of which delivery is assured by the European Patent Office ("EPO")⁵
3. The future Patent Court would complete the new measures in patent matters (creation of the Community Patent and accession of the European Union to the CBE) at jurisdictional level. This would put in place a *unified system of jurisdiction*, both for future Community Patents and, more generally, for European Patents within the meaning of the CBE⁶. Constituted as an international body, the JB would not be a specialist court within the "European Union Court of Justice", but a separate body. Its jurisdiction would be limited to *disputes between individuals* only, in particular to actions for counterfeit, revocation proceedings and actions for damages deriving from the protection conferred by a European or Community patent. By contrast, *administrative disputes* relating to decisions of the EPO in matters of the issue of patents would not fall within the scope of competence of the JB; this type of dispute would continue to be dealt with exclusively by the boards of appeal within the EPO itself.

² It seems to us that the term "Community Patent" should be adapted to the new legal terminology as used since the entry into force of the Lisbon Treaty. However, in order to avoid confusion, we will use the term "Community Patent" in this statement of position as it is used in the request for an opinion and in the written observations of the parties.

³ See the proposed Council regulation on the community patent presented by the Commission on 1st August 2000 [document COM (2000) 412 final], and the proposed Council regulation on the provisions relating to translation for the European Union Patent presented by the Commission on 1st July 2010 [press release IP/10/870].

⁴ The CBE was signed in Munich on 5th October 1973 and amended by the review instrument of 29th November 2000. This is an international treaty to which thirty seven states are currently signatories, including all the member states of the European Union. The European Union itself is not currently a party to this convention.

⁵ By virtue of the CBE, a patent granted by the EPO is valid in the signatory states designated in the patent application. Patents granted in this way ("European Patents") constitute either national patents giving national protection or, if the application refers to more than one signatory state, a group of national patents. Thus, if the issuing procedure for the letters patent in question is unique, the resulting European patent is not a unitary title but breaks down into a bundle of national patents, each one deriving from the national law of the states designated by the patent holder. The proposed Community Patent would form part of that bundle of national patents, gathered together under the title of European Patent.

⁶ See the Communication to the European Parliament and to the Council entitled "Improving the system of Patents in Europe", presented by the Commission on 3rd April 2007 [document COM (2007) 165 final].

4. No unique jurisdiction currently exists to deal with disputes relating to European patents which have cross-border dimension or to future Community patents. Actions for counterfeit or revocation proceedings arising out of a European patent are therefore subject to different national laws and procedures.

II - The Legal Context

5. Although the request for an opinion was introduced on the basis of the Union law which arose out of the Treaty of Nice, the Advocates General are of the view that the application should be examined under the auspices of the new provisions of the treaties as they arise out of the Treaty of Lisbon. In effect, the court is asked to take a position on a draft agreement which may be negotiated in future and which would then be mandatorily concluded on the basis of the EU and FEU treaties in their valid form since 1st December 2009.

6. The procedure for providing an opinion is based on article **218 paragraph 11 TFEU** (formerly article 300 paragraph 6 EC), which is worded as follows:

"A member state, the European Parliament, the Council or the Commission may seek the opinion of the Court of Justice on the compatibility of a proposed agreement with the treaties. In the event that the opinion of the Court is negative, the proposed agreement may not enter into force unless it is amended or the treaties are revised.

7. Article **118 TFEU**, which is a new provision introduced by the Treaty of Lisbon, provides as follows:

"Within the framework of the establishment or the functioning of the internal market, the European Parliament and the Council, ruling in accordance with ordinary legislative procedure, are establishing measures relating to the creation of European titles which ensure uniform protection of intellectual property rights within the Union, and to the putting in place of systems of centralised authorisation, co-ordination and control at the level of the Union.

The Council, ruling in accordance with a special legislative procedure, establishes the system of languages applicable to such European titles by means of regulations. The Council rules unanimously after consultation with the European Parliament."

8. In terms of article **216 paragraph 1 TFEU**:

"The Union may conclude an agreement with one or more third countries or international organisations where the treaties so provide or where the conclusion of an agreement is either necessary to realise any of the objectives of the treaties within the framework of Union policies, or is provided within a binding legal instrument of the Union, or even where it has the potential to affect or alter the scope of common rules".

9. Article **262 TFEU** (formerly article 229A EC) provides as follows:

"Without prejudice to the other provisions of the treaties, the Council, ruling unanimously in accordance with a special legislative procedure, and after consultation with the European Parliament, may enact provisions with a view to attributing to the European Union Court of Justice, to an extent which it will determine, jurisdiction to rule on disputes relating to the application of acts adopted on the basis of treaties which create European intellectual property titles. These provisions will enter into force following approval by the member states in accordance with their respective constitutional rules".

10. Article **344 TFEU** (formerly article 292 EC) contains the following provision:

"The member states undertake not to submit any dispute relating to the interpretation or the application of the treaties to a method of regulation other than those provided therein."

11. Under the terms of article **352, paragraph 1 TFEU** (formerly article 308 EC):

"If an action by the Union appears to be required within the framework of the policies defined by the treaties in order to achieve the objectives of the treaties, and the treaties make no provision for the [type of] action required for that purpose, then the Council, ruling unanimously upon a proposal by the Commission and following approval by the European Parliament, will adopt the appropriate provisions. Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it will also rule unanimously upon proposal by the Commission and following approval by the European Parliament."

III - The Draft Agreement in Question

12. As we have previously mentioned, the JB would be an international law organisation. According to the draft agreement submitted to the Court, it would incorporate a double degree of jurisdiction with two bodies, namely a "court of first instance" ("JB-TPI") and a "court of appeal" ("JB-CA"), the latter having jurisdiction to hear appeals against decisions made by the JB-TPI; the third body of the JB would be a registry.

13. The JB-TPI would be composed of local and regional divisions as well as a central division. All these divisions would form an integral part of a unique jurisdiction and would adopt uniform procedures.

Competences of the JB

14. With respect to the competence *ratione materiae*, clause 15 paragraph 1 of the draft agreement lists the eight areas of competence exclusive to the JB impacting on both the European Patent and the future Community Patent. By virtue of paragraph 2, the national courts of the contracting states will continue to have jurisdiction over appeals relating to Community and European Patents which are not the exclusive jurisdiction of the JB.

15. The territorial competences of the different divisions of the JB-TPI are defined in Clause 15b paragraph 1 of the draft agreement:

"The actions referred to in Clause 15 paragraph 1, sub-paragraphs a), b), d) and e) will be brought in:

a) the local division situated in the territory of the contracting state in which the counterfeit or threatened counterfeit was carried out or is likely to be carried out, or in the regional division to which the contracting state belongs; or

b) the local division situated in the territory of the contracting state where the defendant is domiciled or in the regional division to which the contracting state belongs.

Actions brought against defendants domiciled outside the territory of the contracting states will be brought in the local or regional division in accordance with sub-paragraph a).

In the event that there is no local division in the territory of the contracting state and the state does not belong to any regional division, then actions will be brought in the central division."

Applicable law

16. With regard to the law applicable in the JB, clause 14 b of the draft agreement provides as follows:

"1) Where it is to hear a matter referred to it in accordance with the terms of this agreement, the patent court will comply with Community law and base its decisions on the following:

a) this agreement;

b) Community law which is directly applicable, in particular regulations [...] on the Community Patent, and national legislation of the contracting states implementing Community legislation; [...]

- c) The Convention of the European Patent and the national legislation adopted by the contracting states in accordance with that Convention;
 - d) Any provision of international agreement applicable to patents and which are binding on all the contracting parties.
- 2) In the event that the Court bases its decision on the national legislation of the contracting states, the applicable law will be determined by the following:
- a) the directly applicable provisions of Community legislation; or
 - b) in the absence of directly applicable provisions of Community legislation, the international instruments of international private law to which all the contracting parties are party; or
 - c) in the absence of the provisions set out in sub-paragraphs a) and b) above, the national provisions of international private law determined by the patent court.
- 3) A contracting state which is not a party to the agreement on the European Economic Space will implement the necessary legislative, regulatory and administrative provisions in order to comply with Community legislation relating to substantive patent law."

Mechanism for reference for a preliminary ruling

17. The JB-TPI will be authorised to refer to the Court for a preliminary ruling on the interpretation of Community law or on the validity and interpretation of the acts of institutions of the Community. The JB-CA will be obliged to do so. This mechanism for preliminary ruling is set out in clause 48 of the draft agreement, which is worded as follows:
- "1) Where a question of interpretation of the treaty [EC] or the validity and interpretation of the acts adopted by institutions of the European Community is referred to the Court of First Instance it may, if it considers necessary in order to be able give a decision, ask the Court of Justice [...] to rule on the question. Where such a question is referred to the court of appeal, it will ask the Court of Justice [...] to rule on the question.
- 2) The decision given by the Court of Justice [...] concerning the interpretation of the treaty [EC] or the validity and interpretation of acts adopted by the institutions of the European Community will be binding on the court of first instance and the court of appeal."

The system of languages

18. The proposed agreement provides, inter alia, for a specific system of languages which is based on the official language of the state in whose territory the local or regional division of the JB-TPI is situate. Derogations will be possible if the state in question so decides, or if the parties mutually so agree. This system of languages arises out of clause 29 of the draft agreement, which is worded as follows:
- "1) The language of procedure in a local or regional division will be the official language or languages of the member state of the European Union, the official language or languages of other contracting states in the territory in which the division concerned is situate, or the official language or languages designated by contracting states which share a regional division.
- 2) Notwithstanding paragraph 1, the contracting states may designate one or more of the official languages of the European Patent Office as the language of procedure of their local or regional division.

- 3) The parties may agree to use as their language of procedure the language in which the patent was issued, subject to the approval of the competent division. In the event that the division concerned does not approve the choice of the parties, they may apply for the matter to be brought before the central division.
 - 4) [At the request of one of the parties and after having heard the other parties] / [With the agreement of the parties], the competent local or regional division may, for reasons of convenience and equity, decide to use as the language of procedure the language in which the patent was issued.
 - 5) The language of procedure in the central division will be the language in which the patent in question was issued."
19. The system of languages applicable in the JB-CA is set out in clause 30 of the draft agreement:
- "1) The language of procedure in the court of appeal will be the language used in the court of first instance.
 - 2) The parties may agree to use as the language of procedure the language in which the patent was issued.
 - 3) In exceptional cases and to extent it is judged appropriate, the court of appeal may decide to use, for all or part of the procedure, another official language of a contracting state as the language of procedure, subject to the agreement of the parties."

IV - The request for an Opinion

20. The request for the opinion by the Council, submitted to the Court on 6th July 2009, is worded as follows:
- "Is the proposed agreement creating a unified system of dispute settlement in patent matters (currently known as the 'Court of the European Patent and the Community Patent') compatible with the provisions of the treaty which instituted the European Community?"
21. By way of appendices to the request for an opinion, the Council provided the Court with the following three documents, none of which has been adopted to date:
- Council Document 8588/09 of 7th April 2009 relating to the Council's revised proposal for settlement on the Community Patent, prepared by the Presidency of the Council for the attention of the "Intellectual Property (Patent" Group";
 - Council Document 7928/09 of 23rd March 2009 relating to a text revised by the Presidency on a draft agreement on the Court of the European Patent and the Community Patent and on a "draft statute" for the said Court;
 - Council Document 7927/09 of 23rd March 2009 concerning a recommendation by the Commission to the council aimed at authorising the Commission to open negotiations with a view to the adoption of an international agreement between the Community, its member states and a certain number of third countries "creating a unified system of dispute settlement in European and Community patent matters".

V - Analysis by the Advocates General

A - *The admissibility of the request for an opinion*

22. By way of introduction, it should be pointed out that the entry into force of the Treaty of Lisbon has not in any way affected the admissibility of this request for an opinion. At the very most, the request

would have to be reformulated by the Court in order to provide a useful response to the Council taking into account the new denomination and numbering of the treaties: Is "the proposed agreement creating a unified system of dispute settlement in patent matters... compatible with the provisions of the EU and FEU treaties?"

23. It is on another level that the Parliament, Spain, Greece and Ireland are challenging the admissibility of the request for an opinion⁷. Their criticisms, which will be examined below, relate, on the one hand, to the degree of detail of the information relating to the content of the agreement, judged to be insufficient (see below, section 1.); on the other hand, the Council is accused of having presented its request for an opinion prematurely, given the status of the file within that institution (see below, section 2.). Further, this request for an opinion calls for a number of observations by the advocates general with regard to compliance with the principle of institutional balance (see below, section 3.).
1. The degree of detail of the information relating to the content of the agreement
24. The Parliament and Spain assert, first and foremost, that they consider the request for an opinion to be incomplete, since the content of the proposed agreement is not sufficiently specific⁸.
25. In order to appreciate the extent to which the alleged absence of detail as regards content may affect the admissibility of the request for an opinion, case law makes the distinction according to the object of the request⁹: where a request for an opinion relates to the *competency* of the European Union to conclude an agreement, it will suffice for the objective and the heads of terms of the agreement to be known¹⁰; by contrast, where a request for an opinion raises the issue of *compatibility* of the proposed agreement with treaty regulations, the Court must have at its disposal sufficient information not only about the objective but also on the content of the said agreement¹¹.
26. It follows that case law on the admissibility of requests for opinions is clearly more demanding with regard to the compatibility of an agreement with the treaties with regard to the competency of the Union to conclude the agreement in question¹². In this instance, the request for an opinion has a bearing on the compatibility of the proposed agreement with the treaties. It is therefore not sufficient for the object of the proposed agreement (institution of a unified legal system in matters of patents, creation of a patent court) to be known. Rather, the request for an opinion should set out the content of the agreement in sufficient detail.
27. The Advocates General are of the view that this condition has been met.
28. The Council has provided the Court with the full wording of its draft agreement which contains, in particular, provisions for the organisation and financing of the future patent court, its competencies, the different types of appeal, procedure (including the system of languages), applicable substantive

⁷ The Parliament and Spain set out their challenge at the outset of the written procedure. They were joined by Greece and Ireland at the time of the hearing, Ireland having already expressed a number of doubts in its written pleadings.

⁸ Spain underlines, *inter alia*, the absence of agreement within the Council with regard to the system of languages to be applied in the future JB.

⁹ Opinion 2/94 of 28th March 1996 (Rec. p.1-1759, point 8).

¹⁰ Opinion 1/78 of 4th October 1979 (Rec. p. 2871 point 34), Opinion 2/94 (see footnote 9, points 20 to 22) and Opinion 1/03 of 7th February 2006 (Rec. p.I-1145, point 111).

¹¹ See Opinion 2/94 (see footnote 9, points 20 to 22)

¹² See Opinion 2/94 (see footnote 9, points 20 to 22)

111

law, evidences, the effects of decisions of the JB, the judicial costs and the mechanism for reference for a preliminary ruling. The fact that the procedural regulation of the JB is not yet known in full does not mean that the draft agreement overall is insufficiently detailed for the Court to make a decision.

29. The context in which the draft agreement is presented is also pointed out in the request for an opinion: the proposed agreement is part of a group measures relating to patents which currently being examined at European level, in particular the potential creation by the European Union of a Community Patent as a new title of intellectual property, as well as the accession of the European Union to the CBE. Formal adoption of these last measures, in particular the regulations on the Community Patent, does not appear to be crucial to provide a legally sufficient definition of the context of this request for an opinion.
30. In the circumstances, it is appropriate to conclude that the Court has at its disposal sufficient information with regard to the content and context of the proposed agreement to issue an opinion on the compatibility of the agreement with the treaties.

2. Progress of the file within the Council

31. Next, the Parliament, Spain, Greece and Ireland maintain that the decision-making process relating to the agreement has not yet progressed sufficiently to enable the Court to make a decision on its compatibility with the treaties.
32. As the Council itself admits, the wording of the proposed agreement is not final. All the wordings submitted to the Court take the form of working documents of the Council Presidency. None of these wordings has been adopted by the Council, nor been submitted to the Parliament within the framework of the applicable decision-making procedures.
33. The question therefore arises of whether the draft agreement in question may be considered as a *proposed agreement* within the meaning of article 218 paragraph 11 TFEU¹³
34. In this respect, it is appropriate to recall that the Court may, at any time, receive a request for an opinion on the basis of article 218 paragraph 11 TFEU, provided that the consent of the European Union to be bound by the agreement in question has not yet been finally given¹⁴. This type of request for an opinion can be introduced even before the international negotiations on the proposed agreement have begun¹⁵. It follows that any uncertainties with regard to the realisation of a draft agreement necessarily characterise the opinion procedure and cannot, by themselves, justify a declaration of inadmissibility against a request for an opinion¹⁶.
35. Of course, the procedure instituted by article 218 paragraph 11 TFEU cannot be used abusively by the petitioner in order to obtain an advisory opinion from the Court on purely hypothetical questions. The opinions procedure is a procedure of co-operation between the Court on the one hand, and the

¹³ Article 300 paragraph 6 EC at the time of the introduction of the request for an opinion

¹⁴ Opinion 1/94 of 15th November 1994 (Rec. p.I-5267, point 12) and Opinion 3/94 of 13th December 1995 (Rec. p. I-4577, points 13 and 14).

¹⁵ Opinion 2/94 (see note 9 above, point 16)

¹⁶ Similarly, the Court considers, in opinion 1/78 (see note 10 point 34 above) that a request for an opinion is not premature merely because, at the time of its referral to the Court, the wording of the agreement under negotiation contains still a number of undecided alternatives and discrepancies in the wording of certain clauses.

institutions and member states concerned on the other. It aims to forestall any potential complications which may arise from legal challenges based on the compatibility of an international agreement with the treaties¹⁷. Consequently, a response by the Court to the question submitted will only be justified if it appears that the request for an opinion is based on sufficiently consistent and cogent evidence that there is a willingness and an intention to conclude an international agreement.

36. The Advocates General are of the view that this is the case here.
37. Firstly, it is a matter of record that the project to create a unified legal system in relation to patents, as described in the texts submitted to the Court, is being examined by the Council. Further, the fact that the Council has engaged the procedure set out in article 218 paragraph 11 TFEU presupposes that it does envisage the possibility of negotiating and concluding such an international agreement¹⁸.
38. Secondly, article 218 paragraph 11 TFEU does not require the draft agreement submitted to the Court to have been formally adopted by the Council, and even less that the opening of negotiations should have been authorised. Quite the reverse, the concept of a "proposed agreement" is sufficiently wide to incorporate a draft agreement prepared by the Council Presidency and discussed within that institution, as in this instance. According to case law, it will suffice for any potential conclusion of an international agreement to be the subject of examination and be on the Council agenda for it to be referred to as a proposed agreement¹⁹.
39. Thirdly, the fact that the draft agreement or certain draft legislative measures closely linked to it do not, for the time being, have the unanimous support of the Council²⁰ is irrelevant to the admissibility of this request for an opinion. In effect, the introduction of a request for an opinion is not subject to the rules of procedure as the final decision of the Council authorising signature of or concluding an international agreement. The request for an opinion could be validly introduced by the Council in application of the ordinary law procedure, that is to say, following a simple majority vote²¹, even though conclusion of the final agreement may require a unanimous vote²², in the same way as the adoption of certain other elements forming part of the accompanying legislative package²³.

¹⁷ Opinion 1/75 of 11th November 1975 (Rec. p. 1355, 1360-1361), opinion 3/94 (see note 14 above, points 16 and 17) and opinion 1/08 of 30th November 2009 (not yet published in the Recueil, point 107).

¹⁸ Opinion 2/94 (see note 9 above, point 14).

¹⁹ See, in that sense, opinion 2/94 (see note 9 above, point 14).

²⁰ The Council itself sets out, in its request for an opinion that, "[the/a] majority of Council members consider that the proposed agreement constitutes a legally acceptable means of realising the objectives". For its part, Spain highlights the fact that there is no unanimity on the future Community Patent or on the [proposed] system of languages.

²¹ Article 205 paragraph 1 EC (applicable regulation at the time of the introduction of the request for an opinion in question, that is to say, prior to the entry into force of the Lisbon Treaty; it should be noted, in passing, that since the entry into force of the Lisbon Treaty a qualified majority is required, see article 16 paragraph 3 TEU).

²² This would be the case, in particular, if article 352 paragraph 1 TFEU (alone or in combination with other provisions) were chosen as the legal basis for the conclusion of the agreement in question.

²³ This is the case, for example, for the system of languages applicable to the future Community Patent (article 118, second paragraph, TFEU).

40. Fourthly, there is nothing to prevent the Council from referring a request for an opinion to the Court before associating the Parliament with the decision-making process relating to the proposed agreement or with legislative measures closely linked with it, such as the draft regulation on the Community Patent. In effect, by virtue of article 218 paragraph 11 TFEU, the Council is to be applauded for introducing a request for an opinion by acting independently (although the same right is granted to the Parliament, the Commission and each member state), without consulting in any way with other institutions and without awaiting the final outcome of related legislative procedure. Article 218 paragraph 11 TFEU does not, therefore, presuppose any definitive agreement between all the interested parties as a condition precedent for a request for an opinion. Similarly, the fact that the final agreement cannot be adopted until after consultation with the Parliament, even after approval by that institution²⁴, and that the adoption of any internal measures will be subject to a legislative procedure²⁵, is irrelevant to the possibilities opened up by the Council on the basis of the opinion procedure²⁶.
41. Furthermore, the mere fact that the Council referred a request for an opinion to the Court is not in itself likely to negatively affect Parliamentary prerogatives. In particular, the opinion which the Court will give with regard to the compatibility of the draft agreement with the treaties will be without prejudice to the political and constitutional role of the Parliament, both in the decision-making process preceding the conclusion of an international agreement and in the legislative procedure for the adoption of any accompanying measures, such as the regulation on the Community Patent. This request by the Council will only ensure that the latter will take on the risk of having sought the opinion of the Court on a draft agreement which not be approved internally by the Parliament or externally by the international partners of the European Union.
42. For all of these reasons, the Advocates General are of the view the draft agreement submitted to us does indeed constitute a "proposed agreement" within the meaning of article 218 paragraph 11 TFEU, and that the Council was entitled to submit it, in its current form, for appraisal by the Court.
3. Final observations: the principle of institutional balance
43. It should be added that the Council's motives in referring to the Court are irrelevant to the question of whether this request for an opinion is admissible. Of course, it may be that the Council sought the opinion of the Court because of a political *impasse*, in order to clarify whether purely legal considerations could validly be relied on in challenging the project to create a unified legal system in the matter of patents. Such considerations, which may have a role to play where an institution or a member state refers a request for an opinion to the Court, cannot be primarily dismissed as unlawful and do not justify the Court refusing to answer the question put to it. For as long as this question relates to a proposed agreement within the meaning of article 218 paragraph 11 TFEU, the Court is, in principle, bound to make a judgment on its compatibility with the treaties.
44. However, in giving its response to the request for an opinion, the Court should ensure compliance with the principle of institutional balance, which means that each of the institutions should exercise its competencies whilst respecting those of the others²⁷. In the opinion of the Advocates General, in this instance, this would have two consequences.

²⁴ See article 218 paragraph 6 TFEU

²⁵ See article 118 first paragraph TFEU with regard to the introduction of a Community Patent.

²⁶ This is without prejudice to the discretion set out in paragraph 46 of this statement of position.

²⁷ Decision of 22nd May 1990, Parliament/Council ("Chernobyl" C-70/88, Rec. 1990 p. I-2041, point 22).

45. In the first place, the Court should refrain from providing the Council with indications which go beyond what is strictly necessary for the purposes of the evaluation of the compatibility of the draft agreement in its current form with the treaties. It is incumbent on the Commission and the Council to update the details of the draft agreement in compliance with the treaties and the general principles of Union law. Any political choices to be made in order to render the draft agreement compatible with the treaties cannot be delegated to the Court²⁸.
46. Second, it will be appropriate to ensure compliance with Parliamentary prerogatives in the decision-making and legislative processes relating to the different measures proposed in matters of patents. With regard to the implementation of the project for a Community Patent, for example, the Council may not present the Parliament with a *fait accompli* by concluding the proposed agreement on the Patent Court at international level in advance.
4. Interim conclusion
47. In view of the above considerations, the Advocates General consider that the request for an opinion is admissible. However, in formulating its response to the question, the Court should ensure compliance with the principle of institutional balance.

B – On the merits

48. With regard to the merits of the question submitted for the assessment of the Court, a distinction should be made between the competence of the Union and the legal basis for concluding the agreement contemplated (see section 1 below) on the one hand and the compatibility of the draft agreement with the treaty system (see section 2 below) on the other.

1. Competence of the Union and legal basis for concluding the agreement

49. Although the Council does not expressly ask for the Court's opinion either on the competence of the Union for concluding the agreement contemplated or on the appropriate legal basis, the Advocates-General believe that these points should be examined briefly, as also demonstrated by numerous written and verbal observations submitted to the Court in these proceedings²⁹. In fact, the draft agreement would not be declared "compatible with the treaties" if the Union were not competent and did not have an appropriate legal basis for participating in the mixed agreement in question. The compatibility of an agreement with the provisions of the treaties should be assessed bearing in mind all the rules of the treaties, i.e. both the rules determining the extent of the competence of the institutions and the basic rules³⁰. The question of compatibility with the treaties therefore necessarily incorporates that of competence and the legal basis.

50. Within the scope of an examination of possible competence and legal bases, one should take into account however the state of progress of the draft agreement as submitted to the Court. Since the Commission and

²⁸ As we will see below, it will be necessary to provide additional guarantees in order to ensure compliance of the JB with Union law. The choice of whether to seek a further appeal, an appeal in the interest of the law or a mechanism for re-examination will be incumbent on the political bodies, and the Council in particular, not on the Court.

²⁹ We recall that certain Member States (particularly Ireland, Italy and Luxembourg) contest the existence of any legal basis in treaties for the conclusion of the agreement contemplated.

³⁰ Opinion 1/75 (mentioned above in note 17, page 1360); see also in this connection opinion 1/78 (mentioned in note 10, point 30) where the Court affirms that "the judgment on the compatibility of an agreement with the treaty may depend not only on the provisions of substantive law, but also on those concerning competence...", as well as opinion 2/91 of 19 March 1993 (Coll. p. I-1061, point 3) where the question of competence of the Community is treated as forming part of the compatibility of the agreement contemplated with the treaty.

the Council have not yet contemplated a specific legal basis for this agreement and since the Parliament has not yet been involved, it will not be up to the Court to select it in their place. The inter-institutional balance would be opposed to the Court substituting the political authorities of the Union in that way.

51. In order to be able to give a useful answer to the question of knowing whether the draft agreement is, in its current state, compatible with the treaties, the Court need simply ensure that a competence of the Union and a legal basis in the treaties *for participating in a mixed agreement*, as is currently under study, *are clearly not lacking*. However, it is not necessary to determine the exact scope of the respective competences of the Union and the Member States³¹.

52. As indicated by most of the observations submitted to the Court, two legal bases in particular may be contemplated: firstly, article 216 paragraph 1 TFEU, read together with article 118 TFEU, and, secondly, article 352 paragraph 1 TFEU³². Neither legal basis seems clearly inapplicable at this stage.

53. Article 216 paragraph 1 TFEU contains a coding of the "AETR" case law³³, allowing the Union to conclude an international agreement, particularly when such an agreement is necessary to achieve one of the objects contemplated by the treaties within the scope of the Union policies or when such an agreement is provided for in a restricting legal act of the Union. The introduction of a standardized patent judicial system falls within the context of the creation of an intellectual property title within the meaning of article 118 TFEU, i.e. the Community patent. Such a judicial system is also mentioned in the draft regulation on the Community patent, as currently under study within the Council³⁴.

54. Article 352 paragraph 1 TFEU allows the Council to adopt appropriate measures when an action of the Union seems necessary within the scope of the policies defined by the treaties, to achieve one of the objects contemplated by the treaties, without their having stipulated the powers of action required for that purpose.

55. Whether based on articles 216 TFEU and 118 TFEU or on article 352 TFEU, a connection with the objects and policies defined by the treaties constitutes, in any event, the key factor of the analysis. It should be noted in this connection that, at first sight, the creation of a standardized patent judicial system seems to fall within the scope of the policies of the Union, particularly within that of the establishment and correct functioning of the internal market³⁵.

56. In the opinion of the Advocates-General, these considerations are sufficient to conclude, at the current stage, that a competence of the Union and a legal basis for participating in a mixed agreement such as that contemplated by the Council are clearly not lacking.

2. Compatibility of the draft agreement with the treaty system

57. The compatibility of the draft agreement with the treaty system was contested in several respects, particularly by Cyprus, Ireland, Greece, Spain, Italy, Lithuania and Luxembourg. We will firstly deal with the question of the legality of creating the PC with regard to international jurisdiction (see sub-section a below)

³¹ See in this connection opinion 2/00 of 6 December 2001 (Coll. p. I-9713, points 15-19).

³² A combined application of articles 118 and 352 TFEU was also discussed by some.

³³ This case law, which dates back to the judgment of 31 March 1971, of the Commission/Council ("AETR", 22/70, Coll. 1971, p. 263) was stipulated more recently in opinion 1/03 (mentioned above in note 10, points 114-133).

³⁴ Revised draft Council Regulation on the Community patent (document no. 8588/09 of the Council, annexed to the request for an opinion), whereas clause 7.

³⁵ Article 3 paragraph 3 TEU and article 26 paragraph 1 TFEU.

and then the question of observance of Union law by the PC (see sub-section b below), before finishing with a few remarks on the linguistic system faced by the PC (see sub-section c below).

a) Legality of the creation of the PC as an international court

58. With regard to the legality of creating the PC as an international court, situated outside the judicial system of the European Union and enjoying sole competence for certain types of appeal, one should first recall that Union law is not in principle opposed to an international agreement providing for its own judicial system³⁶.

59. That being the case, the legality of creating the PC was called into question by several Member States, particularly with regard to the following provisions: article 19 EU, article 262 TFEU, article 263 TFEU and article 344 TFEU. The common substance of these criticisms consists in stating that the creation of the PC would change the nature of the European Union judicial system as established by the treaties; according to this argument, the Union judge would have sole competence to hear disputes concerning intellectual property titles created by the European Union.

60. We should first point out that it is not the competences of the future PC concerning the *European patent* that pose a problem here: in fact, judicial competences concerning the European patent have always been exercised by the national courts; the Member States are therefore free to assign them to an international body, created by mutual consent and having the vocation of being "their" common court. However, the question of knowing whether and to what extent that same international body can also be assigned certain judicial competences concerning the future *Community patent* is more delicate and deserves to be examined more carefully. It is on this latter aspect that we will concentrate below. We will deal with it both from the point of view of disputes between individuals and from that of administrative proceedings.

i) Disputes between individuals

61. We should first examine whether the European Union judicial system, as resulting from the treaties, prohibits assigning to the future PC sole competence to hear certain disputes between individuals in the Community patent field.

62. The Advocates-General do not believe that that is the case.

63. Firstly, disputes between individuals do not fall within the competence of the European Court of Justice. It is the national courts that are always called to hear disputes between individuals, whether or not they raise questions of Union law, even when the validity, interpretation or infringement of a European intellectual property title is at stake³⁷. This definition of judicial competences reflects the principle of assignment³⁸, according to which any competence not assigned to the Union in the treaties belongs to the Member States³⁹.

³⁶ See opinion 1/91 of 14 December 1991 (Coll. p. I-6079): in point 40 of the aforesaid opinion, the Court confirms that the conclusion of an international agreement providing for a judicial system such as that of the EEA Court is "in principle, compatible with Community law"; in point 70 of that same opinion, the Court also states that "an international agreement which provides for a judicial system having a competent court for interpreting its provisions is not, in principle, incompatible with Community law".

³⁷ That is the case, for example, with regard to disputes between individuals over Community trade marks; see articles 91 to 103 of Council Regulation (EC) no. 40/94, of 20 December 1993, on the Community trade mark (OJ L 11, p. 1), and in particular article 96 of the aforesaid Regulation, concerning counterclaims for revocation or for invalidity.

³⁸ Article 5, paragraphs 1 and 2, TEU and article 19, paragraph 3, TEU.

³⁹ Articles 5, paragraph 2, TEU and 4, paragraph 1, TEU.

64. Given that the Union courts are not competent to hear disputes between individuals, the creation of the PC as an international body would not be perceived as an infringement of the competences of the European Court of Justice. One cannot take away from the Union judge competence which he does not have.

65. Secondly, article 262 TFEU is not opposed to the creation of the PC as an international body situated outside the institutional scope of the Union. It is true that this provision would allow the Union judge, where appropriate in the form of a specialist tribunal within the meaning of article 257 TFEU, to be assigned some of the powers it is planned to assign to the PC⁴⁰. However, the channel opened by article 262 TFEU is not the only conceivable channel for creating a European patent court. Article 262 TFEU does not aim to establish a monopoly of the Union courts in this field. It does not predetermine the choice of judicial scope which may be established for disputes over European intellectual property titles⁴¹. As pointed out by several institutions and Member States during the course of the opinion procedure before the Court, article 262 TFEU only provides for a right to extend the competence of the Union judge by including certain disputes between individuals, without requiring the Council to proceed in that way. The Council is free to choose other channels, in this particular case that of creating an international body situated outside the institutional scope of the European Union.

66. Therefore, the establishment of the PC could not be considered to be a way of skirting round article 262 TFEU, all the more so as the PC will actually be a *standardized* judicial system which will cover both the Community patent and the European patent.

67. Thirdly, the creation of the PC does not conflict with article 344 TFEU. This latter provision certainly requires Member States not to submit a dispute concerning the interpretation or application of treaties to a method of settlement other than those provided for by the treaties. However, this provision only concerns disputes between Member States, unlike disputes in which individuals participate⁴². Given that the powers of the future PC will only include disputes between individuals, there is no fear that the agreement contemplated infringes article 344 TFEU⁴³.

ii) Administrative proceedings

68. Secondly, one should check whether it would not have been necessary to include in the competences of the future PC a section on administrative proceedings. These proceedings concern in particular appeals

⁴⁰ It should be recalled that the Commission's initial proposal to the Council was specifically to create such a specialist tribunal ("Community patent tribunal") pursuant to articles 229 A EC and 225 A EC, which became articles 262 TFEU and 257 TFEU [see documents CMO(2003) 827 end and COM(2003) 828 end].

⁴¹ See declaration no. 17 concerning article 229 A EC, annexed to the final deed of the intergovernmental conference adopting the Treaty of Nice (OJ 2001, C 80, p. 80): "The Conference considers that article 229 A does not predetermine the choice of judicial scope which may be established for dealing with disputes over the application of acts adopted based on the Treaty establishing the European Community creating Community industrial property titles."

⁴² See in this connection the judgment of 30 May 2006, Commission / Ireland (C-459/03, Coll. p. I-4635, point 128); see also opinion 1/91 (mentioned above in note 36, points 35 and 39) where the Court only declared the competence of the EEA Court concerning disputes between Member States and/or "contracting parties" (including those involving the EEA mixed Committee) incompatible with the treaty.

⁴³ That being the case, it should be noted that the agreement contemplated lacks a judicial system allowing disputes between contracting States to be settled. Consequently, any dispute concerning the aforesaid agreement and involving a State that is a third party to the agreement may be examined by the International Court of Justice (see, by analogy, ICJ press release no. 2009/36 of 22 December 2009 concerning a petition filed by Belgium against Switzerland with regard to a dispute over the interpretation of the Lugano Convention).

against the EPO filed by companies making unsuccessful applications for the granting of patents, as well as appeals filed by third parties unsuccessfully opposing the granting of a patent⁴⁴.

69. We should recall that Community patents will be granted by the EPO according to the applicable rules under the EPC for the granting of European patents⁴⁵. The hearing before the Court showed how this administrative technique may be classified in two different ways:

- The *theory of delegation*: according to the Parliament and the Council, administrative powers will be delegated to the EPO by the European Union; the EPO will grant Community patents instead of and in the place of a European Union agency⁴⁶.
- The *theory of transformation*: according to the Commission, the EPO will not act on behalf of the European Union and will actually only grant a European patent pursuant to the EPC; this European patent will only be transformed in the Union's legal system, to become a Community patent, automatically, solely through the effect of the Community patent regulation.

70. For the purpose of this opinion, it is neither necessary nor advisable to determine which of these two theories carries conviction⁴⁷. Whatever the legal classification of the method of granting of future Community patents (theory of delegation or theory of transformation), it does not pose a problem from the point of view of actual judicial protection⁴⁸ or the correct and uniform application of Union law.

71. In fact, the decisions of the EPO concerning patents can only currently be reviewed by the internal chambers of appeal created within the EPO, excluding any judicial appeal before an external court. There is no possibility of the European Court of Justice ensuring the correct and uniform application of Union law to proceedings taking place before the chambers of appeal of the EPO⁴⁹. On this important point, the legal

⁴⁴ Article 106 of the EPC.

⁴⁵ Article 2 paragraph 1 of the draft regulation on the Community patent and whereas clauses 2 and 2 *bis* of the aforesaid draft regulation.

⁴⁶ It should be recalled that the European Union's accession to the EPC is deemed to allow the European Union to benefit from the experience and administrative structures of the EPO (see whereas clause 2 of the draft regulation on the Community patent) without having to create a new agency along the lines of the Office for Harmonization in the Internal Market (OHIM) which grants the Community patent.

⁴⁷ The question of knowing whether a possible delegation of powers to an international body such as the EPO would be compatible with the treaties or not may also be left in abeyance [see in particular in this connection the criteria drawn by the Court in its judgment of 13 June 1958, *Meroni/Haute Autorité*, 9/56, Coll. 1958 p. 9 (40)]. This question cannot be answered in the absence of further information on the scope and procedures of such a delegation.

⁴⁸ Article 47, first and second paragraphs, of the Charter of Fundamental Rights of the European Union (see also article 6, paragraph 1, of the European Convention on the Protection of Human Rights and Fundamental Freedoms).

⁴⁹ At the moment, these chambers of appeal are not considered to be "national courts" competent for reference of a preliminary question to another court for a ruling [EPO, decision of the Great Chamber of Appeal of 25 November 2008, case G 2/02, *Wisconsin Alumni Research Foundation*, published in Official Journal of the EPO no. 5/2009, p. 306 (pp. 317 to 321), available on the following website: http://archive.epo.org/epo/pubs/oj009/05_09/05_3069.pdf].

situation concerning Community patents is therefore fundamentally different from that concerning Community trade marks⁵⁰.

72. The European Union should not either delegate powers to an international body or transform into its legal system acts issued by an international body without ensuring that effective judicial control exists, exercised by an independent court that is required to observe Union law and is authorized to refer a preliminary question to the Court of Justice for a ruling, where appropriate⁵¹.

73. These requirements can certainly be satisfied in different ways. A possible extension of the competences of the future PC to include administrative proceedings against decisions of the EPO is just one of the options that may be contemplated. Another option that may be contemplated is the creation of an administrative patent court⁵² which should be authorized, unequivocally, to refer to the European Court of Justice for a ruling on a preliminary question. Under the principle of institutional balance, it is not up to the Court to indicate which of these different options should be given preference, within the scope of this opinion.

74. However, according to the information available to the Court within the scope of this opinion, administrative proceedings against decisions of the EPO are not dealt with by any of the different measures currently being studied with regard to patents. Administrative proceedings do not appear to play a role either in the draft agreement setting up the EC or within the scope of the European Union's accession to the EPC.

75. Under these conditions, it should be noted that, in its current state, the draft agreement, read in the light of all the measures contemplated with regard to patents, does not satisfy the requirement of effective judicial control over the granting of patents or the desire for a correct and uniform application of Union law.

iii) Intermediate conclusion

76. In the light of the foregoing considerations, the Advocates-General consider that the creation of the PC as an international court does not conflict with the objections of principle drawn from the provisions of the treaties on the European Union judicial system. However, the decisions of the EPO on patents may form the subject of an effective judicial appeal before an independent court within whose scope a correct and uniform application of Union law will be assured.

b) Observance of Union law by the PC

77. With regard to observance of Union law by the future PC, several intervening parties before the Court assert that the guaranteed contained in the draft agreement in this connection are insufficient. In the light of these criticisms, it is appropriate to examine whether the draft agreement may ensure that Union law is effectively applied by the PC [see sub-section i) below], whether the European Court of Justice can contribute towards a correct and uniform application of Union law in cases falling within the competence of the PC [see

⁵⁰ With regard to Community trade marks, the decisions of the OHIM are certainly first reviewed by the internal chambers of appeal, but a judicial appeal before the Court of the European Union is subsequently opened (article 63 of Regulation no. 40/95), with the possibility of the Court being referred to within the scope of an appeal.

⁵¹ On delegation, see the Merono/Haute Autorité judgment (mentioned in note 46, p. 40); with regard to transformation, see the judgment of 3 September 2008, Kadi and Al Barakaat International Foundation/Council and Commission (C-402/05 P and C-415/05 P, Coll. p. I-6351, points 284 and 285).

⁵² A draft revision of the EPC providing for the transformation of the current chambers of appeal into a "European Patent Court of Appeal" is currently being studied within the European Patent Organization (see the draft proposal concerning the revision of the EPC with a view to the organizational autonomy of the chambers of appeal of the European Patent Office within the European Patent Organization, CA/46/04, available on the EPO website: http://www.epo.org/patents/law/legislative-initiatives/autonomy_fr.html).

sub-section ii) below] and whether sufficient remedies exist for a possible infringement of Union law by the PC [see sub-section iii) below]. The same applies to the protection of the autonomy of the Union's legal system⁵³.

i) Application of Union law and observance of its pre-eminence by the PC

78. The law applicable in legal proceedings before the PC is governed by article 14 *bis*, paragraph 1, of the draft agreement. It should be pointed out that the PC "observes Community law"⁵⁴ and also that it "bases its decision", *inter alia*, on "directly applicable Community legislation"⁵⁵.

- Reference to "directly applicable Community legislation"

79. Firstly, it is the reference to "directly applicable Community legislation" [article 14 *bis*, paragraph 1, b), of the draft agreement] that poses problems in this particular case, for two reasons.

80. On the one hand, it is established that Union law does not consist solely of a "legislation", i.e. written rules of *derived law*, but it also contains rules of *primary law*, whether written or not. These rules bear a certain importance in disputes between individuals concerning patents. Fundamental rights⁵⁶, the general principles of Union law⁵⁷ and the freedom of movement of goods⁵⁸ will simply be mentioned here.

81. On the other hand, the relevant Union law for the settlement of disputes between individuals concerning patents is not composed solely of *directly applicable* legislative provisions. There are numerous principles of Union law that may affect the settlement of such disputes. That is the case in particular with principles establishing the fundamental rights and general principles of Union law. The same applies to the provisions contained in directives⁵⁹, even if such provisions do not have a direct horizontal effect⁶⁰. All these principles

⁵³ On the need to preserve the autonomy of the Union's legal system, see opinion 1/91 (mentioned in note 36, point 30) and opinion 1/00 of 18 April 2002 (Coll. p. I-3493, point 11).

⁵⁴ Introductory part of article 14 *bis*, paragraph 1, of the draft agreement (for the future, read "Union law" instead of "Community law").

⁵⁵ Article 14 *bis*, paragraph 1, b), of the draft agreement.

⁵⁶ See, in particular, article 3, paragraph 2, c) and d) and also articles 13, 15, 16 and 17 of the Charter of Fundamental Rights of the European Union, which now has the same legal value as the treaties (article 6, paragraph 1, TEU; see also the judgments of 19 January 2010, *Kücükdeveci*, C-555/07, not yet published in the Collection, point 22, and of 1 July 2010, *Knauf Gips/Commission*, C-408/88 P, not yet published in the Collection, point 91). Article 47 of the Charter of Fundamental Rights may also play a role in legal proceedings before the PC. According to established precedents of the Court, the observance of fundamental rights constitutes a condition of the legality of Community acts and measures incompatible with the observance thereof cannot be admitted in the Community (*Kadi and others/Council and others* judgment, mentioned above in note 51, point 284).

⁵⁷ For example, the principle of proportionality and protection of legitimate interests.

⁵⁸ Articles 34 TFEU and 35 TFEU. See, *inter alia*, judgments of 14 July 1983, *Merck* (187/80, Coll. 1981, p. 2063) and of 21 September 1999, *BASF* (C-44/98, Coll. P. I-6269). See also article 10 of the draft regulation on the Community patent; this provision governs the Community exhaustion of the rights granted by the Community patent, i.e. a question having strong implications on the freedom of movement of goods.

⁵⁹ See, in particular, the provisions of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ L 213, p. 13).

and provisions must be taken into account, at least for an interpretation and application of the national legislation and international agreements referred to in article 14 *bis*, paragraph 1, b) and d) of the draft agreement⁶¹.

82. In its current wording, article 14 *bis*, paragraph 1 b) of the draft agreement therefore risks creating the impression that the future PC will not be required to take into account, in its judgments, either the treaties or the fundamental rights and general principles of Union law, or even the relevant directives on the matter.

83. The European Union would not consent to the creation of a competent international patent court when the rules of operation of that court are at least ambiguous with regard to its obligation to take into account all Union law. In particular, the Union would not elude its obligation to observe the fundamental rights guaranteed by the European legal system by participating in a standardized judicial system in which the application of such rights does not appear to be guaranteed.

84. The observance of all Union law, including the fundamental rights and fundamental values on which the European Union is based, is of significant importance with regard to patents. In fact, although the dispute in this field seems, at first sight, to be a fairly technical matter, it should be noted that it may sometimes give rise to ethical problems of prime importance, particularly in the fields of medicine and biotechnology⁶². Patent law may also have significant implications on the freedom of enterprise and the competition law.

85. It could certainly be asserted that the gaps that have just been noted in article 14 *bis*, paragraph 1 b) of the draft agreement are filled by introductory phrase of that same provision, according to which the PC "shall observe Community law" *quite simply*. However, the Advocates-General consider that the link between the two references to "Community law" – one at the start of article 14 *bis*, paragraph 1 and the other in paragraph 1 b) of that provision, is in turn not without ambiguity.

86. One should therefore not rule out the possibility that the future PC will ignore some of the principles and provisions of Union law mentioned above or that it will not take them into account sufficiently when resolving disputes between individuals concerning patents. This fear is only reinforced by the fact that the provisions of the draft agreement on the training of judges of the future PC⁶³ do not contain any reference to Union law.

87. That is why it is essential for the scope of the PC's obligation to apply Union law to be clarified in the agreement contemplated. Along the lines of the Parliament, the Advocates-General consider that such a clarification should include the obligation to comply with all case law of the European Court of Justice, and not just the obligation to follow the preliminary judgments pronounced under article 48 of the agreement contemplated, following reference of a preliminary question from the PC itself for a ruling.

- Lack of any reference to the pre-eminence of Union law

88. Secondly, it should be noted that the provisions on applicable law contained in article 14 *bis*, paragraph 1, of the draft agreement do not mention the pre-eminence of Union law.

⁶⁰ Judgments of 26 February 1986, Marshall (152/84, Coll. P. 723, point 48) of 14 July 1994, Faccini Dori (C-91/92, Coll. 1994, p. I-3325, point 20), and Küçükdeveci (mentioned above in note 56, point 46).

⁶¹ See, in this connection, judgments of 5 October 2004, Pfeiffer and others (C-397/01 to C-403/01, Coll. P. 8835, point 111) of 15 April 2008, Impact (C-268/06, coll. P. I-2483, point 42) and Küçükdeveci (mentioned above in note 56, point 45).

⁶² A recent case of the Great Chamber of Recourse of the EPO (judgment mentioned above in note 49) essentially concerned the use of embryos and their destruction. This problem of embryos is also at the heart of a preliminary case, filed by the German Bundesgerichtshof, which is currently pending before our Court (case C-34/10, Brüstle).

⁶³ Article 14 of the draft agreement.

89. The principle of the pre-eminence of Union law is certainly not contained in a specific provision of the treaties⁶⁴. However, this principle has long been affirmed by the case law of the Court⁶⁵, and the Union would not conclude an agreement that may jeopardize it.

90. It should be stated that it is not the hierarchy between "Community legislation" and international agreements, referred to in article 14 *bis*, paragraph 1, of the draft agreement⁶⁶ that poses the problem here. In fact, Union law itself recognizes a higher ranking of the international agreements concluded by the Union compared to other acts of Union institutions⁶⁷.

91. The current wording of article 14 *bis*, paragraph 1, of the draft agreement calls for the following observations, however: firstly, the ranking of the *primary law* of the Union over international agreements and "Community legislation" is not clearly established; secondly, the ranking of Union law over the *national legislation* of the Member States is not clear, the two being mentioned without any distinction in article 14 *bis*, paragraph 1 b) of the draft agreement.

92. In view of the importance that Union law, particularly primary law, may have in disputes between individuals concerning patents⁶⁸, the Advocates-General consider that its ranking must be established without ambiguity in the draft agreement. The determination of this ranking should not be left to the free assessment of the future PC.

- Summary

93. In the light of the foregoing considerations, the Advocates-General consider that the guarantees contained in the draft agreement with a view to ensuring the full application and observance of the pre-eminence of Union law by the PC are not sufficient. Given that Union law and the case law of the Union courts will only be compulsory for the future PC through the agreement contemplated, the provisions thereof must be totally lacking in any ambiguity with regard to the scope of the PC's obligation to observe Union law. That is not the case with the current state of the draft agreement.

ii) Compatibility of the preliminary system with the judicial system for treaties

94. Anxious to ensure the uniform interpretation and application of Union law in disputes falling within the competence of the PC, the draft agreement establishes a system for reference of a preliminary question to another court for a ruling in its article 48, which provides for the possibility of the PC referring preliminary petitions to the European Court of Justice.

95. Such a preliminary mechanism is an essential element which allows the Court of Justice to contribute towards a correct and uniform application of Union law.

⁶⁴ There is only one declaration on pre-eminence (declaration no. 17, annexed to the final act of the intergovernmental conference adopting the Treaty of Lisbon, OJ 2007, C 306, p. 256).

⁶⁵ The pre-eminence of Union law has been recognized in established precedents of the Court since the judgment of 15 July 1964, *Costa/ENEL* (6/64, Coll. 1864, p. 1141); see finally the judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C/189/10), not yet published in the Collection, points 52).

⁶⁶ Article 14 *bis*, paragraph 1, of the draft agreement mentions "Community legislation" as well as different international agreements and international conventions to which the European Union will be a party, once the new system is in place.

⁶⁷ This can be deduced from article 216, paragraph 2, TFEU, according to which "agreements concluded by the Union shall be binding on the Union institutions and the Member States".

⁶⁸ See points 80 to 84 above.

96. Member States participating in this opinion certainly raised doubts over the compatibility of the preliminary system provided for in article 48 of the draft agreement with the judicial system for treaties, however.

97. Firstly, several Member States assert that the preliminary proceedings under article 267 TFEU are not open to courts such as the PC in which non-member States participate, including judges originating from non-member States, and which at least partially sit in non-member States.

98. This objection should be ruled out. According to its wording, article 267 TFEU certainly only contemplates a reference to the Court of Justice by national courts of Member States⁶⁹. This provision will not form the legal basis for petitions for a preliminary ruling which the future PC may address to the Court of Justice. References of preliminary questions made by the CP will be based directly on article 48 of the agreement contemplated. The preliminary competences of the Court of Justice will therefore be extended by the effects of an international agreement and will now include a category of petitions for a preliminary judgment not yet provided for by the treaties.

99. In this connection, it should be noted that the creation of such special preliminary proceedings is not unknown in Union law; we will simply mention here the Luxembourg Protocol⁷⁰ which extended the preliminary competences of the Court of Justice to include cases relating to the Brussels Convention⁷¹.

100. Moreover, it does not appear to be ruled out that an international agreement would vest the Court of Justice with a preliminary competence for the purposes of application of Union law in non-member States. In fact, the Court has already decided that it could be referred to for preliminary questions coming from courts other than those of the Member States, provided that the answers it gives are restricting for the courts to which the case is referred⁷². That is the case here, given that the preliminary judgments pronounced by the European Court of Justice would be restricting for the PC Court of First Instance and for the PC Court of Appeal⁷³. Of course, one should also ensure that the preliminary judgments of the Court are applied in their legal and institutional context as defined by all Union law; that is why it is essential to require the PC to observe all Union law (see points 78 to 93 of this position).

101. Secondly, Luxembourg considers that the preliminary mechanism provided for in article 48 of the agreement contemplated is incompatible with article 262 TFEU.

⁶⁹ It will be noted, however, that our case law recognizes that a common court of several Member States, in this case the Benelux Court of Justice, has the right to formulate petitions for a preliminary judgment within the meaning of article 267 TFEU (judgment of 4 November 1997, *Parfums Christian Dior*, C-337/95, Coll. P. I-6013, points 20 to 27). A similar case, relating to the reference of a preliminary question originating from a chamber of appeal of the European schools is current pending before the Great Chamber of the Court (case C-196/09, *Miles and others*).

⁷⁰ Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 concerning judicial competence and the execution of judgments in civil and commercial matters, signed in Luxembourg on 3 June 1971 (OJ 1975, L 204, p. 28).

⁷¹ It should be admitted, however, that such a solution has not been adopted with regard to the Lugano Convention in which not only Member States of the European Union but also non-member States participate.

⁷² Opinion 1/00 (mentioned above in note 53, point 33); see also opinion 1/91 (mentioned above in note 36, points 59 and 61 to 65).

⁷³ See article 48, paragraph 2, of the draft agreement.

102. This objection does not carry conviction either. Article 262 TFEU certainly recommends a system in which the European Court of Justice could be referred to for direct appeals in the field of European intellectual property titles such as the Community patent. As already stated⁷⁴, the application of article 262 TFEU only constitutes a right for the Council. The aforesaid provision does not prohibit the Council from favouring other channels consisting of the creation of a standardized judicial system allowing "indirect" reference to the Court of Justice, through a special preliminary mechanism.

103. Consequently, the preliminary mechanism provided for in article 48 of the draft agreement does not conflict with objections of principle with regard to its compatibility with the judicial system for treaties.

iii) Remedies in the event of infringement of Union law by the PC

104. Certain Member States participating in the opinion consider, however, that the draft agreement does not provide sufficient remedies for the case where the CP infringes its obligation of referring to the Court of Justice preliminarily or, more generally, its obligation to observe Union law. The Parliament has also raised doubts in this connection.

105. The Advocates-General share this point of view.

106. Although the PC Court of Appeal is required to question the Court of Justice preliminarily when a matter of interpretation or validity of Union law is raised before it⁷⁵, no mechanism guarantees observance by the CP Court of Appeal of its obligation of reference and, more broadly, observance by that court of Union law as such.

107. In this connection, the situation in which the future CP will find itself is clearly distinguished from that of the national courts of the Member States of the Union.

108. In fact, when a national court infringes the obligation of reference falling upon it under article 267 TFEU, Union law mainly provides two means of remedying this situation. Firstly, an appeal for omission may be filed against the Member State concerned⁷⁶. Secondly, the aforesaid Member State may be held extracontractually liable⁷⁷. However, the future PC will not be the object of an appeal for omission in the European Union system nor will it be subject to any extracontractual liability according to Union law.

109. Contrary to what the Commission maintains, the possible notice of termination of the agreement establishing the PC in the event of gross and clear infringement of Union law by this international court would not constitute an effective remedy. Notice of termination of an international agreement is a particularly onerous measure having serious consequences, particularly when, as in this particular case, it is an agreement concerning the legal protection of intellectual property rights of individuals. In the opinion of the Advocates-General, it is unrealistic to consider that such a measure can really be contemplated in order to remedy any failings of the PC in individual cases; notice of termination would appear to be totally disproportionate to the aim sought which is not to put an end to the standardized judicial system concerning patents but, on the contrary, to ensure the correct functioning thereof.

110. It is just as unrealistic to assume, along the lines of the Commission, that individuals will file appeals against all the contracting parties to the agreement contemplated in order to bind their collective extracontractual liability for possible infringements of Union law committed by the PC. It is difficult to see

⁷⁴ See points 65 to 66 above.

⁷⁵ Article 48, paragraph 1, of the draft agreement.

⁷⁶ Articles 258 TFEU to 260 TFEU.

⁷⁷ Judgments of 30 September 2003, Köbler (C-224/01, Coll. p. I-10239) and of 13 June 2006, Traghetti del Mediterraneo (C-173/03, Coll. P. I-5177).

which court would hear such collective appeals for damages and under which law, and to a lesser extent what the chances of success would be.

111. The same scepticism is also required of the remedy put forward by the Netherlands: this remedy consists in refusing to execute judgments of the PC in Member States of the European Union if the PC fails to observe Union law. In this connection, it is sufficient to recall that the national judge referred to for a petition for execution is not normally called upon to check the material accuracy of the judgment in question. This judge could at most refuse to execute a judgment of the PC if it were clearly contrary to public order, which may be difficult to establish in all cases of infringement of Union law by the PC.

112. Under these conditions, the introduction of other legal channels to mitigate the possible infringement of Union law and the obligation of reference by the PC is essential.

113. As pointed out by France in particular, a choice of different options would be available in order to guarantee the correct and uniform application of Union law in disputes falling under the competence of the future PC. Consequently, one could consider submitting judgments of the PC Court of Appeal to the control of the European Court of Justice, pursuant to article 262 TFEU. This control could be exercised in different ways: by an appeal on points of law (open to parties to the dispute before the PC Court of Appeal), by an appeal in the interests of the law (open to the Commission and/or to the Member States and/or to the EPO, along the lines of the former article 68, paragraph 3, EC) or even by a re-examination mechanism (along the lines of the provisions of article 256, paragraphs 2 and 3, TFEU).

114. Contrary to what the Commission maintains, the introduction of such additional mechanisms (appeal on points of law, appeal in the interests of the law or re-examination procedure) would not lead to a misinterpretation of the role of the European Court of Justice. The Court of Justice could certainly then be called upon to intervene in two different ways in the same dispute pending before the PC: firstly preliminarily, i.e. under cooperation proceedings, and secondly following an appeal or a petition for re-examination. However, the two types of intervention would not apply simultaneously and would not be combined. They would not necessarily raise the same points of law. Moreover, the preliminary proceedings would remain the rule, while the appeal or re-examination procedures would be the exception; the latter would only arise in the event of infringement of Union law by the PC or following the PC's refusal to apply a preliminary reference or to comply with the preliminary judgment of the Court of Justice.

115. Under the principle of institutional balance, it is certainly not up to the Court to indicate which of these different options constitutes the more appropriate remedy. This falls within the competence of the political authorities of the Union. It need simply be stated, for the purposes of this opinion, that the draft agreement as submitted to the Court is not able to guarantee the correct and uniform application of Union law in disputes falling within the competence of the future PC, since it is limited to introducing a preliminary mechanism without providing for effective remedies in the event of the PC's infringement of its obligation of reference or of Union law in general. The remedies available in the event of the PC's infringement of Union law and in the event of non-observance of its obligation to apply a preliminary reference under article 48 of the draft agreement are therefore not sufficient.

c) Linguistic system faced by the PC

116. Finally, the linguistic system faced by the PC deserves to be examined from the point of view of the rights of defence whose respect is a fundamental principle of Union law⁷⁸. In fact, the obligations imposed by an

⁷⁸ Judgment of 2 October 2003, *Corus UK/Commission* (C-199/99, Coll. P. I-11177, point 19). This principle of respect of the rights of defence is also reflected in article 47, paragraph 2, of the Charter of Fundamental Rights of the European Union ("right to his case receiving a fair hearing") and in article 48 paragraph 2 of the aforesaid Charter.

international agreement would result in affecting the constitutional principles of the treaties, including the principle whereby all acts of the Union must respect fundamental rights⁷⁹.

117. As pointed out by Spain in particular, it is not ruled out that a company may be summoned in law, before a local or regional division of the PC, in a language other than the official language of its country of origin. This aspect was also debated during the hearing before the Court.

118. It should be pointed out in this connection that the linguistic system faced by the PC Court of First Instance depends on the place in which the local or regional division in question is situated.

119. When a dispute is brought before the local division of the PC Court of First Instance established in the defendant's country of origin or before the regional division to which its country of origin belongs, the language of the proceedings is either "the official language or languages" of its country of origin or a language of choice to which its country of origin has given its consent⁸⁰. In such a case, no infringement of the defendant's defence rights should be feared. In fact, the linguistic system applicable to the defendant will have been determined by his country of origin, as is the case, in general, in all disputes brought before the national courts of that country.

120. However, when an action is filed before the local or regional division of the PC Court of First Instance where an infringement or threat of an infringement has occurred or is likely to occur, the linguistic system depends on the country or countries in which the division of the PC Court of First Instance in question is established⁸¹. In this case, it may therefore happen that a company is assigned to a division of the PC Court of First Instance situated outside its country or its region of origin and, consequently, in a language other than that to which the company is accustomed. Such a situation will only occur when the company in question has exercised commercial activities abroad. It may therefore seem lawful for it then to have to sustain the risk of being summoned in law in the country or region where it has carried out business, and in the language applicable in that country or region.

121. The situation is clearly more delicate, however, when the country where a company must be assigned does not participate in any local or regional division of the PC Court of First Instance. In such a case, the dispute would be brought before the central division of the PC Court of First Instance, and the language of the proceedings would be that of the patent⁸², namely German, English or French⁸³. Consequently, a company may be summoned in law in a language in whose choice neither its country of origin nor the country where it carries out its commercial activities has participated. In the absence of any provision in the draft agreement allowing the central division to depart from the rule of the language of the patent⁸⁴ or allowing the defendant

⁷⁹ See in this connection the judgment of *Kadi and others / Council* among others (mentioned above in note 51, points 285).

⁸⁰ Article 29, paragraphs 1 and 2, and article 15, *bis*, paragraph 1 b) of the draft agreement. We would add that the Commission has just proposed a translation system for the future Community patent whereby the holder of a Community patent may be required to produce a copy of that patent translated into the language of an alleged infringer or into the language of the judicial proceedings when it is not that in which the patent has been granted (see article 4 of the proposal and press release IP/10/870 of 1 July 2010).

⁸¹ Article 29, paragraphs 1 and 2, and article 15 *bis*, paragraph 1 a) of the draft agreement. On the system of translation applicable to the patent in question, see note 80 above.

⁸² Article 29, paragraph 5, and article 15 *bis*, paragraph 3 of the draft agreement.

⁸³ See articles 14 and 70 of the EPC.

⁸⁴ The possibility of departure provided for in article 29, paragraph 4, of the draft agreement only applies to local and regional divisions of the PC Court of First Instance.

to obtain translations of procedural documents⁸⁵, this linguistic system appears to be unacceptable with regard to observance of the rights of defence⁸⁶.

122. Within these limits, the Advocates-General consider that the linguistic system faced by the central division of the PC may affect the rights of defence.

3. Conclusion

123. In the light of all the foregoing considerations, the Advocates-General consider that the agreement contemplated is, in its current state, incompatible with the treaties. The reasons for this incompatibility can be summarized as follows:

- The guarantees contained in the draft agreement with a view to ensuring the full application and observance of the pre-eminence of Union law by the PC are insufficient (see points 78 to 93 of this position).
- The remedies available in the event of the PC's infringement of Union law and in the event of non-observance of its obligation to effect a preliminary reference pursuant to article 48 paragraph 1 of the draft agreement are insufficient (see points 104 to 115 of this position).
- The linguistic system faced by the central division of the PC may affect the rights of defence (see points 121 and 122 of this position).
- The draft agreement, read in the light of all the measures contemplated concerning patents, does not satisfy the requirement of ensuring effective judicial control and a correct and uniform application of Union law in administrative proceedings concerning the granting of Community patents (see points 68 to 75 of this position).

VI – Proposed response to the request for an opinion

124. For the reasons stated above, the Advocates-General propose that the Court respond as follows to the request for an opinion submitted by the Council of the European Union:

"In its current state, the agreement contemplated creating a standardized system for the settlement of disputes concerning patents is incompatible with the treaties."

For the Advocates-General
[Signature]
Juliane Kokott
Advocate General

⁸⁵ On the contrary, article 31, paragraph 1, of the draft agreement allows any division of the PC Court of First Instance and the PC Court of Appeal to "ignore", "to the extent considered appropriate", the requirements concerning translation. Moreover, the interpretation during hearings before the PC will only be assured "to the extent considered appropriate" (article 31, paragraph 2, of the draft agreement).

⁸⁶ If there is certainly no other general principle granting each citizen the right to everything that may affect his interests being drawn up in his language in all circumstances (judgment of 9 September 2003, Kik/OHIM, C-361/01 P, Coll. P. I-8283, point 82), no obligations would be created for the citizen or no documents would be filed against him against which he cannot defend himself, owing to a lack of understanding of the content thereof (see in this connection, with regard to the publication of a Community regulation, the judgment of 11 December 2007, Skoma-Lux, C-161/06, Coll. P. I-10841).

I – Introduction.....	3
II – Le contexte juridique.....	4
III – Le projet d'accord en cause.....	5
Compétences de la JB.....	6
Droit applicable.....	6
Mécanisme de renvoi préjudiciel.....	7
Régime linguistique.....	8
IV – La demande d'avis.....	9
V – Analyse des avocats généraux.....	9
A – Sur la recevabilité de la demande d'avis.....	9
1. Le degré de détail des informations relatives au contenu de l'accord.....	10
2. L'état d'avancement du dossier au sein du Conseil.....	11
3. Observations finales : le principe de l'équilibre institutionnel.....	14
4. Conclusion intermédiaire.....	15
B – Sur le fond.....	15
1. Compétence de l'Union et base juridique pour la conclusion de l'accord.....	15
2. Compatibilité du projet d'accord avec le système des traités.....	17
a) Licéité de la création de la JB en tant que juridiction internationale.....	18
i) Les litiges entre particuliers.....	18
ii) Le contentieux administratif.....	20
iii) Conclusion intermédiaire.....	23

b)	Le respect du droit de l'Union par la JB.....	23
i)	L'application du droit de l'Union et le respect de sa primauté par la JB.....	23
-	La référence à la «légalisation communautaire directement applicable».....	23
-	L'absence de référence à la primauté du droit de l'Union.....	26
-	Résumé.....	27
ii)	La compatibilité du mécanisme préjudiciel avec le système juridictionnel des traités.....	27
iii)	Les remèdes en cas de violation du droit de l'Union par la JB.....	29
c)	Le régime linguistique devant la JB.....	31
3.	Conclusion.....	33
VI -	Proposition de réponse à la demande d'avis.....	34

I – Introduction

1. Le Conseil de l'Union européenne a saisi la Cour d'une demande d'avis qui concerne un projet d'accord international visant à établir une juridiction européenne du brevet («JB»). Ledit accord serait conclu comme accord mixte par l'Union européenne, ses États membres et certains États tiers.
 2. Ce projet d'accord nous est présenté actuellement sous la forme d'un simple document de travail élaboré par la présidence du Conseil. Il se situe dans le contexte d'un ensemble de mesures en matière de brevets qui sont en ce moment à l'étude au niveau européen, en particulier l'éventuelle création, par l'Union européenne, d'un *brevet communautaire*² en tant que nouveau titre de propriété intellectuelle³ ainsi que l'adhésion de l'Union européenne à la Convention de Munich sur le *brevet européen* («CBE»)⁴. Du fait de cette adhésion de l'Union à la CBE, le futur brevet communautaire participerait au système administratif institué pour le brevet européen dont la délivrance est assurée par l'Office européen des brevets («OEB»)⁵.
 3. La future juridiction du brevet compléterait ces nouvelles mesures en matière de brevets (la création du brevet communautaire et l'adhésion de l'Union européenne à la CBE) sur le plan juridictionnel. Serait ainsi mis en place un *système juridictionnel unifié*, tant pour les futurs brevets communautaires que, plus généralement, pour les brevets européens au sens de la CBE⁶. Constitué en
- ² – Il nous semble que le terme «brevet communautaire» devra être adapté à la nouvelle terminologie juridique telle qu'elle est utilisée depuis l'entrée en vigueur du traité de Lisbonne. Toutefois, dans un souci d'éviter toute confusion, nous employons dans la présente prise de position le terme «brevet communautaire» tel qu'il a été utilisé dans la demande d'avis et dans les observations écrites des parties.
- ³ – Voir la proposition de règlement du Conseil sur le brevet communautaire, présentée par la Commission le 1^{er} août 2000 [document COM (2000) 412 final], ainsi que la proposition de règlement du Conseil sur les dispositions relatives à la radiation pour le brevet de l'Union européenne, présentée par la Commission le 1^{er} juillet 2010 [communiqué de presse IP/100870].
- ⁴ – La CBE a été signée à Munich le 5 octobre 1973 et modifiée par l'acte de révision du 29 novembre 2000. Il s'agit d'un traité international auquel trente-sept États sont à ce jour parties contractantes, dont tous les États membres de l'Union européenne. L'Union européenne elle-même n'est actuellement pas partie à cette convention.
- ⁵ – En vertu de la CBE, un brevet octroyé par l'OEB est valable dans les États parties à la convention désignés dans la demande de brevet. Les brevets ainsi octroyés («brevets européens») constituent soit des brevets nationaux offrant une protection nationale, soit, si la demande mentionne plusieurs États parties, un ensemble de brevets nationaux. Ainsi, si la procédure de délivrance du titre visé est unique, le brevet européen en résultant n'est pas un titre unitaire mais se décompose en un faisceau de brevets nationaux, relevant chacun du droit interne des États que le titulaire a désignés. Le brevet communautaire envisagé ferait partie de ce faisceau de brevets nationaux, rassemblés sous le chapeau du brevet européen.
- ⁶ – Voir la Communication au Parlement européen et au Conseil, intitulée «Améliorer le système de brevet en Europe», qui a été présentée par la Commission le 3 avril 2007 [document COM (2007) 165 final].

130

tant qu'organisme international, la JB ne serait pas un tribunal spécialisé au sein de l'institution «Cour de justice de l'Union européenne», mais un organisme à part. Ses compétences se limiteraient aux seuls *litiges entre particuliers*, notamment aux actions en contrefaçon, aux actions en nullité et aux actions en dommages-intérêts découlant de la protection conférée par un brevet européen ou un brevet communautaire. En revanche, le *contentieux administratif* relatif aux décisions de l'OEB en matière de délivrance de brevets ne relèverait pas des compétences de la JB ; ce dernier contentieux continuerait en effet à se dérouler uniquement devant les chambres de recours internes créées au sein de l'OEB.

4. À l'heure actuelle, il n'existe pas de juridiction unique qui connaisse des litiges relatifs aux brevets européens ayant une dimension transfrontalière ou aux futurs brevets communautaires. Toute action en contrefaçon ou en nullité visant un brevet européen est donc soumise à différentes législations et procédures nationales.

II – Le contexte juridique

5. Quoique la demande d'avis ait été introduite sur la base du droit de l'Union tel qu'il résultait du traité de Nice, M^{mes} et MM. les avocats généraux estiment qu'il convient d'examiner ladite demande à l'aune des nouvelles dispositions des traités tels qu'ils résultent du traité de Lisbonne. En effet, il est demandé à la Cour de prendre position sur un projet d'accord qui pourrait être négocié à l'avenir et qui serait donc forcément conduit sur la base des traités UE et FUE tels qu'ils sont en vigueur depuis le 1^{er} décembre 2009.

6. La procédure d'avis trouve son fondement à l'article 218, paragraphe 11, TFUE (anciennement article 300, paragraphe 6, CE) qui est ainsi rédigé :

«Un État membre, le Parlement européen, le Conseil ou la Commission peut recueillir l'avis de la Cour de justice sur la compatibilité d'un accord envisagé avec les traités. En cas d'avis négatif de la Cour, l'accord envisagé ne peut entrer en vigueur, sauf modification de celui-ci ou révision des traités.»

7. L'article 118 TFUE, une nouvelle disposition introduite par le traité de Lisbonne, prévoit ce qui suit :

«Dans le cadre de l'établissement ou du fonctionnement du marché intérieur, le Parlement européen et le Conseil, statuant conformément à la procédure législative ordinaire, établissent les mesures relatives à la création de titres européens pour assurer une protection uniforme des droits de propriété intellectuelle dans l'Union, et à la mise en place de régimes d'autorisation, de coordination et de contrôle centralisés au niveau de l'Union.

Le Conseil, statuant conformément à une procédure législative spéciale, établit, par voie de règlements, les régimes linguistiques des titres européens. Le Conseil statue à l'unanimité, après consultation du Parlement européen.»

8. Aux termes de l'article 216, paragraphe 1, TFUE :

«L'Union peut conclure un accord avec un ou plusieurs pays tiers ou organisations internationales lorsque les traités le prévoient ou lorsque la conclusion d'un accord, soit est nécessaire pour réaliser, dans le cadre des politiques de l'Union, l'un des objectifs visés par les traités, soit est prévue dans un acte juridique contraignant de l'Union, soit encore est susceptible d'affecter des règles communes ou d'en altérer la portée.»

9. L'article 262 TFUE (anciennement article 229A CE) énonce ce qui suit :

«Sans préjudice des autres dispositions des traités, le Conseil, statuant à l'unanimité conformément à une procédure législative spéciale, et après consultation du Parlement européen, peut arrêter des dispositions en vue d'attribuer à la Cour de justice de l'Union européenne, dans la mesure qu'il détermine, la compétence pour statuer sur des litiges liés à l'application des actes adoptés sur la base des traités qui créent des titres européens de propriété intellectuelle. Ces dispositions entrent en vigueur après leur approbation par les États membres, conformément à leurs règles constitutionnelles respectives.»

10. L'article 344 TFUE (anciennement article 292 CE) contient la disposition suivante :

«Les États membres s'engagent à ne pas soumettre un différend relatif à l'interprétation ou à l'application des traités à un mode de règlement autre que ceux prévus par ceux-ci.»

11. Aux termes de l'article 352, paragraphe 1, TFUE (anciennement article 308 CE) :

«Si une action de l'Union paraît nécessaire, dans le cadre des politiques définies par les traités, pour atteindre l'un des objectifs visés par les traités, sans que ceux-ci n'aient prévu les pouvoirs d'action requis à cet effet, le Conseil, statuant à l'unanimité sur proposition de la Commission et après approbation du Parlement européen, adopte les dispositions appropriées. Lorsque les dispositions en question sont adoptées par le Conseil conformément à une procédure législative spéciale, il statue également à l'unanimité, sur proposition de la Commission et après approbation du Parlement européen.»

III – Le projet d'accord en cause

12. Comme nous l'avons déjà évoqué, la JB serait une organisation de droit international. Selon le projet d'accord soumis à la Cour, elle comprendrait un double degré de juridiction avec deux organes, à savoir un «tribunal de première instance» («JB-TPI») et une «cour d'appel» («JB-CA»), cette dernière étant compétente pour connaître des appels formés contre les décisions rendues par la JB-TPI; le troisième organe de la JB serait un greffe.

13. La JB-TPI se composerait de divisions locales et régionales ainsi que d'une division centrale. Toutes ces divisions feraient partie intégrante d'une juridiction unique et seraient dotées de procédures uniformes.

Compétences de la JB

14. S'agissant de la compétence ratione materiae, l'article 15, paragraphe 1, du projet d'accord énumère les huit domaines de compétences exclusives de la JB portant tant sur le brevet européen que sur le futur brevet communautaire. En vertu de son paragraphe 2, les juridictions nationales des États contractants restent compétentes pour connaître des recours relatifs aux brevets communautaires et aux brevets européens qui ne relèvent pas de la compétence exclusive de la JB.

15. Les compétences territoriales des différentes divisions de la JB-TPI sont délimitées à l'article 15 bis, paragraphe 1, du projet d'accord :

«Les actions visées à l'article 15, paragraphe 1, points a), b), d) et e) sont portées devant :

- a) la division locale située sur le territoire de l'État contractant où la contrefaçon ou la menace de contrefaçon s'est produite ou est susceptible de se produire, ou devant la division régionale à laquelle ledit État contractant participe; ou
- b) la division locale située sur le territoire de l'État contractant où le défendeur est domicilié ou devant la division régionale à laquelle ledit État contractant participe.

Les actions formées contre des défendeurs domiciliés en dehors du territoire des États contractants sont portées devant la division locale ou la division régionale conformément au point a).

Si aucune division locale ne se trouve sur le territoire de l'État contractant et que ce dernier ne participe pas à une division régionale, les actions sont portées devant la division centrale.»

Droit applicable

16. S'agissant du droit applicable devant la JB, l'article 14 bis du projet d'accord prévoit :

«1) Lorsqu'elle a connaissance d'une affaire dont elle est saisie conformément au présent accord, la Juridiction du brevet respecte le droit communautaire et fonde ses décisions sur :

- a) le présent accord;

- b) la législation communautaire directement applicable, notamment le règlement [...] sur le brevet communautaire, et la législation nationale des États contractants mettant en œuvre la législation communautaire; [...]
- c) la Convention sur le brevet européen et la législation nationale adoptée par les États contractants conformément à ladite Convention;
- d) toute disposition des accords internationaux applicables aux brevets et contraignants à l'égard de toutes les parties contractantes.

2) Dans les cas où la Juridiction du brevet fonde ses décisions sur la législation nationale des États contractants, la loi applicable est déterminée :

- a) par les dispositions directement applicables de la législation communautaire; ou,
 - b) en l'absence de dispositions directement applicables de la législation communautaire, par les instruments internationaux de droit international privé auxquels toutes les parties contractantes sont parties; ou,
 - c) en l'absence de dispositions visées aux points a) et b), par les dispositions nationales de droit international privé déterminées par la Juridiction du brevet.
- 3) Un État contractant qui n'est pas partie à l'Accord sur l'Espace économique européen met en vigueur les dispositions législatives, réglementaires et administratives nécessaires pour se conformer à la législation communautaire relative au droit matériel des brevets.»

Mécanisme de renvoi préjudiciel

17. La JB-TPI serait habilitée à saisir la Cour à titre préjudiciel sur l'interprétation du droit communautaire ou sur la validité et l'interprétation des actes des institutions de la Communauté. La JB-CA en aurait l'obligation. Ce mécanisme préjudiciel est énoncé à l'article 48 du projet d'accord qui est ainsi libellé :

«1) Lorsque le tribunal de première instance est saisi d'une question portant sur l'interprétation du traité [CE] ou la validité et l'interprétation d'actes adoptés par les institutions de la Communauté européenne, il peut, s'il le juge nécessaire pour pouvoir rendre une décision, demander à la Cour de justice [...] de statuer sur la question. Lorsque la cour d'appel est saisie d'une telle question, elle demande à la Cour de justice [...] de statuer sur ladite question.

- 2) La décision rendue par la Cour de justice [...] concernant l'interprétation du traité [CE] ou la validité et l'interprétation d'actes adoptés par les institutions de la Communauté européenne est contraignante à l'égard du tribunal de première instance et de la cour d'appel.»

Régime linguistique

18. L'accord envisagé prévoit, en outre, un régime linguistique spécifique qui repose sur la langue officielle de l'État sur le territoire duquel est située la division locale ou régionale de la JB-TPI, des dérogations étant possibles si l'État en question en décide ainsi ou si les parties en conviennent entre elles. Ce régime linguistique résulte de l'article 29 du projet d'accord qui est ainsi rédigé :

«1) La langue de procédure devant une division locale ou régionale est la ou les langues officielles de l'État membre de l'Union européenne, la ou les langues officielles d'autres États contractants sur le territoire desquels est située la division concernée, ou la ou les langues officielles désignées par les États contractants qui partagent une division régionale.

2) Nonobstant le paragraphe 1, les États contractants peuvent désigner une ou plusieurs des langues officielles de l'Office européen des brevets comme langue de procédure de leur division locale ou régionale.

3) Les parties peuvent convenir d'utiliser comme langue de procédure la langue dans laquelle le brevet a été délivré, sous réserve de l'approbation de la division compétente. Si la division concernée n'approuve pas le choix des parties, celles-ci peuvent demander que l'affaire soit portée devant la division centrale.

4) [À la demande d'une des parties et après avoir entendu les autres parties] / [Avec l'accord des parties], la division locale ou régionale compétente peut, pour des raisons de commodité et d'équité, décider d'utiliser comme langue de procédure la langue dans laquelle le brevet a été délivré.

5) La langue de procédure devant la division centrale est la langue dans laquelle le brevet en cause a été délivré.»

19. Le régime linguistique applicable devant la JB-CA est exposé à l'article 30 du projet d'accord :

«1) La langue de procédure devant la cour d'appel est celle qui a été utilisée devant le tribunal de première instance.

2) Les parties peuvent convenir d'utiliser comme langue de procédure la langue dans laquelle le brevet a été délivré.

- 3) Dans des cas exceptionnels et dans la mesure jugée appropriée, la cour d'appel peut décider d'utiliser, pour tout ou partie de la procédure, une autre langue officielle d'un État contractant comme langue de procédure, sous réserve de l'accord des parties.»

IV – La demande d'avis

20. La demande d'avis du Conseil, déposée à la Cour le 6 juillet 2009, est ainsi libellée :

«L'accord envisagé créant un système unifié de règlement des litiges en matière de brevets (actuellement dénommé 'Juridiction du brevet européen et du brevet communautaire') est-il compatible avec les dispositions du traité instituant la Communauté européenne?»

21. En tant qu'annexes à sa demande d'avis, le Conseil a transmis à la Cour les trois documents suivants dont aucun n'a été adopté à ce jour :

- le document 8588/09 du Conseil, du 7 avril 2009, relatif à la proposition révisée de règlement du Conseil sur le brevet communautaire, élaboré par la présidence du Conseil à l'attention du Groupe «Propriété intellectuelle (Brevet)»;
- le document 7928/09 du Conseil, du 23 mars 2009, relatif à un texte révisé de la présidence sur un projet d'accord sur la Juridiction du brevet européen et du brevet communautaire et sur un «projet de statut» de cette juridiction;
- le document 7927/09 du Conseil, du 23 mars 2009, concernant une recommandation de la Commission au Conseil visant à autoriser la Commission à ouvrir des négociations en vue de l'adoption d'un accord international entre la Communauté, ses États membres, et certains États tiers, «créant un système unifié de règlement des litiges en matière de brevets» européen et communautaire.

V – Analyse des avocats généraux

A – Sur la recevabilité de la demande d'avis

22. À titre liminaire, il convient de préciser que l'entrée en vigueur du traité de Lisbonne n'a en rien affecté la recevabilité de la présente demande d'avis. Tout au plus, cette demande devrait-elle être reformulée par la Cour afin de donner une réponse utile au Conseil en tenant compte de la nouvelle dénomination et numérotation des traités : «L'accord envisagé créant un système unifié de règlement des litiges en matière de brevets ... est-il compatible avec les dispositions des traités UE et FUE ?»

23. C'est sur un autre plan que le Parlement, l'Espagne, la Grèce et l'Irlande contestent la recevabilité de la demande d'avis⁷. Leurs critiques, qui seront examinées ci-dessous, concernent, d'une part, le degré de détail des informations relatives au contenu de l'accord, jugé insuffisant (voir infra, section 1.) ; d'autre part, il est fait grief au Conseil d'avoir présenté sa demande d'avis de façon prématurée, vu l'état d'avancement du dossier au sein de cette institution (voir infra, section 2.). Par ailleurs, la présente demande d'avis appelle certaines observations de la part des avocats généraux quant au respect du principe de l'équilibre institutionnel (voir infra, section 3.).

1. Le degré de détail des informations relatives au contenu de l'accord
24. Le Parlement et l'Espagne font valoir, tout d'abord, qu'ils estiment la demande d'avis incomplète, le contenu de l'accord envisagé n'étant pas suffisamment concret⁸.

25. Pour apprécier dans quelle mesure la prétendue absence de précisions quant au contenu d'un accord affecte éventuellement la recevabilité (admissibilité) de la demande d'avis, la jurisprudence distingue selon l'objet de cette demande⁹ : lorsqu'une demande d'avis concerne la *compétence* de l'Union européenne pour conclure un accord, il est suffisant que l'objet et les grandes lignes de cet accord soient connus¹⁰ ; en revanche, lorsqu'une demande d'avis soulève la question de la *compatibilité* de l'accord envisagé avec les règles des traités, la Cour doit disposer d'éléments suffisants, non seulement sur l'objet mais aussi sur le contenu dudit accord¹¹.

26. Il s'ensuit que la jurisprudence sur la recevabilité des demandes d'avis est nettement plus exigeante en ce qui concerne la compatibilité d'un accord avec les traités qu'en ce qui concerne la compétence de l'Union pour conclure ledit accord¹². En l'espèce, la demande d'avis porte sur la compatibilité de l'accord envisagé avec les traités. Il ne suffit donc pas que l'objet de l'accord envisagé (institution d'un système juridique unifié en matière de brevets, création

⁷ – Le Parlement et l'Espagne se sont ainsi exprimés dès la procédure écrite. Ils ont été rejoints par la Grèce et l'Irlande lors de l'audition, l'Irlande ayant déjà exprimé certains doutes dans son mémoire écrit.

⁸ – L'Espagne souligne, entre autres, le défaut d'accord au sein du Conseil quant au régime linguistique applicable devant la future JB.

⁹ – Avis 2/94 du 23 mars 1996 (Rec. p. I-1759, point 8).

¹⁰ – Avis 1/78 du 4 octobre 1979 (Rec. p. 2871, point 34), avis 2/94 (précité à la note 9, points 20 à 22) et avis 1/03 du 7 février 2006 (Rec. p. I-1145, point 111).

¹¹ – Voir l'avis 2/94 (précité à la note 9, points 20 à 22).

¹² – Voir l'avis 2/94 (précité à la note 9, points 8 à 22).

d'une juridiction du brevet) soit connu. Encore faut-il que la demande d'avis expose le contenu de cet accord avec suffisamment de précision.

27. M^{mes} et MM. les avocats généraux estiment que cette condition est remplie.
28. Le Conseil a fourni à la Cour le texte complet de son projet d'accord qui contient, notamment, des dispositions sur l'organisation et le financement de la future juridiction du brevet, sur ses compétences, sur les différents types de recours, sur la procédure (y compris le régime linguistique), sur le droit matériel applicable, sur les preuves, sur les effets des décisions de la JB, sur les frais de justice et sur le mécanisme de renvoi préjudiciel. Le fait que le règlement de procédure de la JB ne soit pas encore pleinement connu n'ôte pas au projet d'accord dans son ensemble son caractère suffisamment précis pour que la Cour puisse se prononcer.

29. Le contexte dans lequel se présente le projet d'accord est également précisé dans la demande d'avis : l'accord envisagé fait partie d'un ensemble de mesures en matière de brevets qui sont actuellement à l'étude au niveau européen, en particulier l'éventuelle création, par l'Union européenne, d'un brevet communautaire en tant que nouveau titre de propriété intellectuelle, ainsi que l'adhésion de l'Union européenne à la CBE. Une adoption formelle de ces dernières mesures, notamment du règlement sur le brevet communautaire, ne paraît pas indispensable pour définir à suffisance de droit le contexte de la présente demande d'avis.

30. Dans ces conditions, il convient de conclure que la Cour dispose de suffisamment d'informations quant au contenu et au contexte de l'accord envisagé pour émettre un avis sur la compatibilité de celui-ci avec les traités.

2. L'état d'avancement du dossier au sein du Conseil

31. Ensuite, le Parlement, l'Espagne, la Grèce et l'Irlande soutiennent que le processus décisionnel relatif au projet d'accord n'a pas encore atteint l'état d'avancement qui serait nécessaire pour permettre à la Cour de se prononcer sur sa compatibilité avec les traités.

32. Ainsi que l'admet le Conseil lui-même, le texte de l'accord envisagé n'est pas définitif. Tous les textes présentés à la Cour prennent la forme de documents de travail de la présidence du Conseil. Aucun de ces textes n'a été adopté par le Conseil ni n'a été soumis au Parlement dans le cadre des procédures décisionnelles applicables.

33. La question se pose donc de savoir si le projet d'accord en question peut être considéré comme un *accord envisagé* au sens de l'article 218, paragraphe 11, TFUE.¹³

34. À cet égard, il convient de rappeler que la Cour peut, à tout moment, être saisie d'une demande d'avis au titre de l'article 218, paragraphe 11, TFUE, pourvu que le consentement de l'Union européenne à être liée par l'accord en question ne soit pas encore définitivement exprimé¹⁴. Une telle demande d'avis peut être introduite avant même que les négociations internationales sur l'accord envisagé ne soient entamées¹⁵. Il s'ensuit que des incertitudes quant à la réalisation d'un projet d'accord caractérisent nécessairement la procédure d'avis et ne sauraient, en tant que telles, justifier une déclaration d'irrecevabilité à l'encontre d'une demande d'avis¹⁶.

35. Certes, la procédure instituée par l'article 218, paragraphe 11, TFUE ne saurait être utilisée abusivement par le demandeur pour obtenir de la Cour un avis consultatif sur des questions purement hypothétiques. La procédure d'avis est une procédure de coopération entre la Cour, d'une part, et les institutions et États membres concernés, d'autre part. Elle vise à prévenir les complications qui résulteraient d'éventuelles contestations en justice relatives à la compatibilité d'un accord international avec les traités¹⁷. Par conséquent, une réponse de la Cour à la question qui lui est posée se justifie uniquement lorsqu'il apparaît que la demande d'avis repose sur des indices convergents et suffisamment probants qu'il existe une volonté de négocier et de conclure un accord international.

36. M^{mes} et MM. les avocats généraux estiment que tel est le cas en l'espèce.

37. Premièrement, il est constant que le projet de créer un système juridictionnel unifié en matière de brevets, tel que décrit dans les textes soumis à la Cour, est à l'étude au sein du Conseil. Par ailleurs, le fait que le Conseil a engagé la procédure de l'article 218, paragraphe 11, TFUE présume qu'il envisageait la possibilité de négocier et de conclure un tel accord international.¹⁸

¹³ – Article 340, paragraphe 6, CE au moment de l'introduction de la demande d'avis.

¹⁴ – Avis 1/94 du 15 novembre 1994 (Rec. p. I-5267, point 12) et avis 3/94 du 13 décembre 1995 (Rec. p. I-4577, points 13 et 14).

¹⁵ – Avis 2/94 (précité à la note 9, point 16).

¹⁶ – D'une manière similaire, la Cour considère, dans l'avis 1/78 (précité à la note 10, point 34), qu'une demande d'avis n'est pas prématurée du seul fait que, au moment de la saisine de la Cour, il subsiste, dans le texte de l'accord en voie de négociation, un certain nombre d'alternatives encore ouvertes et de divergences sur la rédaction de clauses déterminées.

¹⁷ – Avis 1/75 du 11 novembre 1975 (Rec. p. 1355, 1360-1361), avis 3/94 (précité à la note 14, points 16 et 17) et avis 1/08 du 30 novembre 2009 (non encore publié au Recueil, point 107).

¹⁸ – Avis 2/94 (précité à la note 9, point 14).

38. Deuxièmement, l'article 218, paragraphe 11, TFUE ne requiert pas que le projet d'accord soumis à la Cour ait été formellement adopté par le Conseil et moins encore que l'ouverture des négociations ait été autorisée. Au contraire, la notion d'« accord envisagé » est suffisamment large pour englober également le cas d'un projet d'accord élaboré par la présidence du Conseil et discuté au sein de cette institution, comme c'est le cas en l'espèce. Selon la jurisprudence, il suffit que l'éventuelle conclusion d'un accord international fasse l'objet d'études et se trouve à l'agenda du Conseil pour qu'on puisse parler d'un accord envisagé¹⁹.

39. Troisièmement, la circonstance que le projet d'accord ou certains projets de mesures législatives étroitement liées à celui-ci ne trouvent pas pour l'instant de soutien unanime au sein du Conseil²⁰ est sans pertinence pour la recevabilité de la présente demande d'avis. En effet, l'introduction d'une demande d'avis n'est pas soumise aux mêmes règles procédurales que la décision finale du Conseil autorisant la signature ou portant conclusion d'un accord international. La demande d'avis pouvait être valablement introduite par le Conseil en application de la procédure de droit commun, c'est-à-dire à la suite d'un vote à la majorité simple²¹, alors même que la conclusion de l'accord final pourra nécessiter un vote à l'unanimité²², tout comme l'adoption de certains autres éléments du paquet législatif l'accompagnant²³.

40. Quatrièmement, rien ne s'oppose à ce que le Conseil saisisse la Cour d'une demande d'avis avant d'avoir associé le Parlement au processus décisionnel relatif à l'accord envisagé ou à des mesures législatives étroitement liées avec celui-ci, tels que le projet de règlement sur le brevet communautaire. En effet, en vertu de l'article 218, paragraphe 11, TFUE, il est loisible au Conseil d'introduire une demande d'avis en agissant individuellement (le même droit étant par ailleurs accordé au Parlement, à la Commission et à chaque État membre), sans se concerter d'une quelconque manière avec d'autres institutions et sans attendre le résultat final d'une procédure législative connexe. L'article 218, paragraphe 11, TFUE ne présume donc pas un accord définitif entre tous les intéressés comme

¹⁹ – Voir en ce sens l'avis 2/94 (précité à la note 9, point 14).

²⁰ – Le Conseil lui-même expose, dans sa demande d'avis, que « [l]a majorité des membres du Conseil estimant que l'accord envisagé constitue un moyen juridiquement acceptable de réaliser les objectifs visés ». L'Espagne, quant à elle, met en exergue le fait qu'il n'y a pas d'unanimité au sujet du futur brevet communautaire et en ce qui concerne le régime linguistique.

²¹ – Article 205, paragraphe 1, CE (règle applicable au moment de l'introduction de la présente demande d'avis, c'est-à-dire avant l'entrée en vigueur du traité de Lisbonne ; notons au passage que, depuis l'entrée en vigueur du traité de Lisbonne, la majorité qualifiée est requise, voir l'article 16, paragraphe 3, TUE).

²² – Tel serait le cas, notamment, si l'article 352, paragraphe 1, TFUE (seul ou en combinaison avec d'autres dispositions) était choisi comme base légale pour la conclusion de l'accord en question.

²³ – Tel est le cas, par exemple, du régime linguistique applicable au futur brevet communautaire (article 118, deuxième alinéa, TFUE).

135

condition préalable d'une demande d'avis. De même, la circonstance que l'adoption de l'accord final ne pourra intervenir qu'après consultation du Parlement, voire même après approbation par cette institution²⁴, et que l'adoption d'éventuelles mesures internes sera soumise à une procédure législative²⁵, est sans incidence sur les possibilités ouvertes au Conseil au titre de la procédure d'avis²⁶.

41. Par ailleurs, le simple fait que le Conseil ait saisi la Cour d'une demande d'avis n'est pas en soi susceptible de porter atteinte aux prérogatives du Parlement. En particulier, l'avis que la Cour rendra quant à la compatibilité du projet d'accord avec les traités sera sans préjudice du rôle politique et constitutionnel du Parlement, tant dans la procédure décisionnelle précédant la conclusion de l'accord international que dans la procédure législative portant adoption d'éventuelles mesures d'accompagnement, telles que le règlement sur le brevet communautaire. La présente demande du Conseil fera seulement en sorte que ce dernier aura assumé le risque d'avoir sollicité l'avis de la Cour sur un projet d'accord qui pourrait ne pas trouver l'approbation du Parlement sur le plan interne ou celle des partenaires internationaux de l'Union européenne sur le plan externe.

42. Pour l'ensemble de ces raisons, M^{mes} et MM. les avocats généraux sont d'avis que le projet d'accord qui nous est soumis constitue bien un «accord envisagé» au sens de l'article 218, paragraphe 11, TFUE et que le Conseil était en droit de le soumettre, en son état actuel, à l'appréciation de la Cour.

3. Observations finales : le principe de l'équilibre institutionnel

43. Il convient d'ajouter que les motifs pour lesquels le Conseil a saisi la Cour sont sans pertinence pour la question de savoir si la présente demande d'avis est recevable. Certes, il se peut que le Conseil ait sollicité l'avis de la Cour dans une situation d'impasse politique, afin de clarifier si des considérations purement juridiques pouvaient valablement être invoquées à l'encontre du projet de la création d'un système juridictionnel unifié en matière brevets. Or, de telles considérations, qui peuvent jouer un certain rôle lorsqu'une institution ou un État membre saisit la Cour d'une demande d'avis, ne sauraient d'emblée être écartées comme illégitimes et ne justifient pas que la Cour refuse de répondre à la question qui lui est posée. Aussi longtemps que cette question concerne un accord envisagé au sens de l'article 218, paragraphe 11, TFUE, la Cour est en principe tenue de se prononcer sur sa compatibilité avec les traités.

²⁴ – Voir l'article 218, paragraphe 6, TFUE.

²⁵ – Voir l'article 118, premier alinéa, TFUE pour ce qui concerne l'introduction d'un brevet communautaire.

²⁶ – Cela est sans préjudice de l'appréciation exposée au point 46 de la présente prise de position.

44. Toutefois, en apportant sa réponse à la demande d'avis, la Cour doit veiller au respect du principe de l'équilibre institutionnel qui implique que chacune des institutions exerce ses compétences dans le respect de celles des autres²⁷. De l'avis de M^{mes} et MM. les avocats généraux, cela aura deux conséquences en l'espèce.

45. En premier lieu, la Cour devra s'abstenir de fournir au Conseil des indications allant au-delà de ce qui est strictement nécessaire aux fins de l'évaluation de la compatibilité du projet d'accord en son état actuel avec les traités. C'est à la Commission et au Conseil qu'il incombera de mettre au point les détails du projet d'accord, dans le respect des traités et des principes généraux du droit de l'Union. Les éventuels choix politiques à faire afin de rendre le projet d'accord compatible avec les traités ne sauraient être délégués à la Cour²⁸.

46. En second lieu, il conviendra de veiller au respect des prérogatives du Parlement dans les procédures décisionnelles et législatives relatives aux différentes mesures envisagées en matière brevets. S'agissant de la mise en œuvre du projet d'un brevet communautaire, par exemple, le Conseil ne saurait placer le Parlement devant le fait accompli en concluant à l'avance, sur le plan international, l'accord envisagé sur la juridiction du brevet.

4. Conclusion intermédiaire

47. Au vu des considérations qui précèdent, M^{mes} et MM. les avocats généraux estiment que la demande d'avis est recevable. Toutefois, en formulant sa réponse à la question posée, la Cour devra veiller au respect du principe de l'équilibre institutionnel.

B – Sur le fond

48. Quant au fond de la question soumise à l'appréciation de la Cour, il convient de distinguer entre, d'une part, la compétence de l'Union et la base juridique pour conclure l'accord envisagé (voir infra, section 1.) et, d'autre part, la compatibilité du projet d'accord avec le système des traités (voir infra, section 2.).

1. Compétence de l'Union et base juridique pour la conclusion de l'accord

49. Si le Conseil ne demande expressément l'avis de la Cour ni sur la compétence de l'Union pour conclure l'accord envisagé ni sur la base juridique appropriée, M^{mes} et MM. les avocats généraux estiment que ces points doivent être

²⁷ – Arrêt du 22 mai 1990, Parlement/Conseil («Tchernobyl», C-70/88, Rec. 1990 p. I-2041, point 22).

²⁸ – Comme nous le verrons ci-dessous, il sera nécessaire de prévoir des garanties supplémentaires visant à assurer le respect du droit de l'Union par la JB. Le choix à faire entre un pourvoi en cassation, un pourvoi dans l'intérêt de la loi ou un mécanisme de réexamen incombe aux instances politiques, notamment au Conseil, et non pas à la Cour.

brèvement examinés, comme il ressort d'ailleurs de nombreuses observations écrites et orales soumises à la Cour dans la présente procédure²⁹. En effet, le projet d'accord ne saurait être déclaré « compatible avec les traités » si l'Union n'était pas compétente et qu'elle ne disposait pas d'une base juridique appropriée pour participer à l'accord mixte en question. La compatibilité d'un accord avec les dispositions des traités doit être évaluée compte tenu de l'ensemble des règles des traités, c'est-à-dire aussi bien les règles déterminant l'étendue des compétences des institutions que les règles de fond³⁰. La question de la compatibilité avec les traités englobe donc nécessairement celle de la compétence et de la base juridique.

50. Dans le cadre de l'examen des éventuelles compétences et bases juridiques, il convient toutefois de tenir compte de l'état d'avancement du projet d'accord tel qu'il est soumis à la Cour. La Commission et le Conseil n'ayant pas encore envisagé une base juridique déterminée pour cet accord et le Parlement n'ayant pas encore été impliqué, il n'incombait pas à la Cour de le choisir à leur place. L'équilibre interinstitutionnel s'opposerait à ce que la Cour se substitue ainsi aux instances politiques de l'Union.

51. Afin de pouvoir répondre utilement à la question de savoir si le projet d'accord est, en son état actuel, compatible avec les traités, il suffit pour la Cour de s'assurer qu'une compétence de l'Union et une base juridique dans les traités *pour participer à un accord mixte*, tel qu'il est actuellement à l'étude, *ne font pas manifestement défaut*. En revanche, il n'est pas nécessaire de déterminer avec précision l'étendue exacte des compétences respectives de l'Union et des États membres³¹.

52. Ainsi qu'il ressort de la plupart des observations soumises à la Cour, deux bases juridiques en particulier sont susceptibles d'être envisagées : d'une part, l'article 216, paragraphe 1, TFUE lu ensemble avec l'article 118 TFUE et, d'autre part, l'article 352, paragraphe 1, TFUE³². Ni l'une ni l'autre base juridique ne semble, à ce stade, manifestement inapplicable.

²⁹ – Rappelons que certains États membres (notamment l'Irlande, l'Italie et le Luxembourg) contestent l'existence de toute base juridique dans les traités pour la conclusion de l'accord envisagé.

³⁰ – Avis 1/75 (précité à la note 17, p. 1360) ; voir en ce sens également l'avis 1/78 (précité à la note 10, point 30) où la Cour affirme que « le jugement sur la compatibilité d'un accord avec le traité peut dépendre non seulement des dispositions du droit matériel, mais encore de celles qui concernent la compétence ... », ainsi que l'avis 2/91 du 19 mars 1993 (Rec. p. I-1061, point 3) où la question des compétences de la Communauté est traitée comme faisant partie de la compatibilité de l'accord envisagé avec le traité.

³¹ – Voir en ce sens l'avis 2/00 du 6 décembre 2001 (Rec. p. I-9713, points 15 à 19).

³² – Une application combinée des articles 118 et 352 TFUE a également été discutée par certains.

53. S'agissant, tout d'abord, de l'article 216, paragraphe 1, TFUE, il contient une codification de la jurisprudence « AETR »³³ permettant à l'Union de conclure un accord international, et ce notamment lorsque cet accord est nécessaire pour réaliser dans le cadre des politiques de l'Union l'un des objectifs visés par les traités ou lorsque cet accord est prévu dans un acte juridique contraignant de l'Union. La mise en place d'un système juridictionnel unifié en matière de brevets se situe dans le contexte de la création d'un titre de propriété intellectuelle au sens de l'article 118 TFUE, à savoir le brevet communautaire. Un tel système juridictionnel est d'ailleurs mentionné dans le projet de règlement sur le brevet communautaire, tel qu'il est actuellement à l'étude au sein du Conseil³⁴.

54. S'agissant, ensuite, de l'article 352, paragraphe 1, TFUE, il permet au Conseil d'adopter les mesures appropriées lorsqu'une action de l'Union paraît nécessaire dans le cadre des politiques définies par les traités, pour atteindre l'un des objectifs visés par les traités, sans que ceux-ci n'aient prévu les pouvoirs d'action requis à cet effet.

55. Que l'on se fonde sur les articles 216 TFUE et 118 TFUE ou sur l'article 352 TFUE, un lien avec les objectifs et politiques définis par les traités constitue, de toute manière, l'élément-clé de l'analyse. À cet égard, il convient de relever que la création d'un système juridictionnel unifié en matière de brevets semble, à première vue, rentrer dans le cadre des politiques de l'Union, en particulier dans celui de la réalisation et du bon fonctionnement du marché intérieur³⁵.

56. De l'avis de M^{me} et MM. les avocats généraux, ces considérations suffisent pour conclure, au stade actuel, qu'une compétence de l'Union et une base juridique pour participer à un accord mixte tel que celui envisagé par le Conseil ne font pas manifestement défaut.

2. Compatibilité du projet d'accord avec le système des traités

57. La compatibilité du projet d'accord avec le système des traités a été contestée à plusieurs égards, notamment par Chypre, l'Irlande, la Grèce, l'Espagne, l'Italie, la Lituanie et le Luxembourg. Nous aborderons ci-dessous, tout d'abord, la question de la licéité de la création de la JB en tant que juridiction internationale (voir infra, sous-section a) et, ensuite, la question du respect du droit de l'Union par la JB (voir infra, sous-section b)), avant de terminer par quelques remarques sur le régime linguistique devant la JB (voir infra, sous-section c)).

³³ – Cette jurisprudence, qui remonte à l'arrêt du 31 mars 1971, Commission/Conseil (« AETR », 22/70, Rec. 1971 p. 263), a été précisée plus récemment dans l'avis 1/03 (précité à la note 10, points 114 à 133).

³⁴ – Proposition révisée de règlement du Conseil sur le brevet communautaire (document n° 8588/09 du Conseil, annexé à la demande d'avis), considérant 7.

³⁵ – Article 3, paragraphe 3, TUE et article 26, paragraphe 1, TFUE.

137

- a) Licéité de la création de la JB en tant que juridiction internationale
58. S'agissant de la licéité de la création de la JB en tant que juridiction internationale, située en-dehors du système juridictionnel de l'Union européenne et jouissant d'une compétence exclusive pour certains types de recours, il convient de rappeler d'emblée que le droit de l'Union ne s'oppose pas en principe à un accord international prévoyant son propre système juridictionnel³⁶.
59. Cela étant, la licéité de la création de la JB a été remise en question par plusieurs États membres, notamment au regard des dispositions suivantes : l'article 19 UE, l'article 262 TFUE, l'article 263 TFUE et l'article 344 TFUE. Le fond commun de ces critiques consiste à dire que la création de la JB dénaturerait le système juridictionnel de l'Union européenne tel qu'il a été institué par les traités ; selon cette thèse, il reviendrait exclusivement au juge de l'Union de connaître des litiges relatifs aux titres de propriété intellectuelle créés par l'Union européenne.
60. Précisons d'emblée que ce ne sont pas les compétences de la future JB relatives au *brevet européen* qui posent problème ici : en effet, les compétences juridictionnelles relatives au brevet européen ont toujours été exercées par les juridictions nationales ; il est donc loisible aux États membres de les confier désormais à un organisme international, crée d'un commun accord et ayant vocation à être «leur» juridiction commune. En revanche, la question de savoir si et dans quelle mesure ce même organisme international peut se voir attribuer également certaines compétences juridictionnelles relatives au futur *brevet communautaire* est plus délicate et mérite d'être examinée plus attentivement. C'est sur ce dernier aspect que nous nous concentrerons ci-dessous. Nous l'aborderons à la fois du point de vue des litiges entre particuliers et de celui du contentieux administratif.
- i) Les litiges entre particuliers
61. Il convient d'analyser, en premier lieu, si le système juridictionnel de l'Union européenne, tel qu'il résulte des traités, interdit d'attribuer à la future JB la compétence exclusive pour connaître de certains litiges entre particuliers dans le domaine des brevets communautaires.
62. M^{mes} et MM. les avocats généraux sont d'avis que tel n'est pas le cas.

³⁶ – Voir l'avis 1/91 du 14 décembre 1991 (Rec. p. I-6079) : au point 40 dudit avis, la Cour confirme que la conclusion d'un accord international prévoyant un système juridictionnel tel que celui de la Cour EEE est «en principe, compatible avec le droit communautaire» ; au point 70 du même avis, la Cour précise, en outre, qu'«un accord international qui prévoit un système juridictionnel doté d'une Cour compétente pour l'interprétation de ses dispositions n'est pas, en principe, incompatible avec le droit communautaire».

63. Premièrement, les litiges entre particuliers ne relèvent pas de la compétence de la Cour de justice de l'Union européenne. Ce sont les tribunaux nationaux qui ont toujours été appelés à connaître des litiges entre particuliers, qu'ils soulèvent ou non des questions de droit de l'Union, y compris lorsque la validité, l'interprétation ou la violation d'un titre de propriété intellectuelle européen est en jeu³⁷. Cette délimitation des compétences juridictionnelles reflète le principe d'attribution³⁸, en vertu duquel toute compétence non attribuée à l'Union dans les traités appartient aux États membres³⁹.
64. Étant donné que les juridictions de l'Union ne sont pas compétentes pour connaître des litiges entre particuliers, la création de la JB en tant qu'organe international ne saurait être perçue comme une violation des compétences de la Cour de justice de l'Union européenne. On ne peut enlever au juge de l'Union des compétences qu'il ne possède pas.
65. Deuxièmement, l'article 262 TFUE ne s'oppose pas à la création de la JB en tant qu'organe international situé en-dehors du cadre institutionnel de l'Union. Il est certes vrai que cette disposition permettrait de confier au juge de l'Union – le cas échéant sous forme d'un tribunal spécialisé au sens de l'article 257 TFUE – certaines des compétences qu'il est prévu d'attribuer à la JB⁴⁰. Cependant, la voie ouverte par l'article 262 TFUE n'est pas la seule concevable pour créer une juridiction des brevets au niveau européen. L'article 262 TFUE ne vise pas à instaurer un monopole des juridictions de l'Union dans ce domaine. Il ne préjuge pas le choix du cadre juridictionnel qui pourra être mis en place pour les litiges relevant de titres européens de la propriété intellectuelle⁴¹. Comme il a été souligné par plusieurs institutions et États membres au cours de la procédure d'avis devant la Cour, l'article 262 TFUE ne prévoit qu'une faculté d'élargir les compétences du juge de l'Union en y incluant certains litiges entre particuliers, sans pour autant obliger le Conseil à procéder de cette manière. Il reste loisible au
- ³⁷ – Tel est le cas, par exemple, en ce qui concerne les litiges entre particuliers relatifs aux marques communautaires ; voir les articles 91 à 103 du règlement (CE) n° 40/94 du Conseil, du 20 décembre 1993, sur la marque communautaire (JO L 11, p. 1), et notamment l'article 96 dudit règlement, relatif aux demandes reconventionnelles en déchéance ou en nullité.
- ³⁸ – Article 5, paragraphes 1 et 2, TUE et article 19, paragraphe 3, TUE.
- ³⁹ – Articles 5, paragraphe 2, TUE et 4, paragraphe 1, TUE.
- ⁴⁰ – Il convient de rappeler que la proposition initiale de la Commission au Conseil avait précisément pour objet la création d'un tel tribunal spécialisé («tribunal du brevet communautaire») en application des articles 229 A CE et 225 A CE, devenus articles 262 TFUE et 257 TFUE (voir documents COM(2003) 827 final et COM(2003) 828 final).
- ⁴¹ – Voir la déclaration n° 17 relative à l'article 229 A CE, annexée à l'acte final de la conférence intergouvernementale ayant adopté le traité de Nice (JO 2001, C 80, p. 80) : «La Conférence estime que l'article 229 A ne préjuge pas le choix du cadre juridictionnel qui pourra être mis en place pour le traitement du contentieux relatif à l'application des actes adoptés sur la base du traité instituant la Communauté européenne qui créent des titres communautaires de propriété industrielle.»

Conseil de choisir d'autres voies, en l'occurrence celle de la création d'un organisme international situé en-dehors du cadre institutionnel de l'Union européenne.

66. Partant, la mise en place de la JB ne saurait être considérée comme un contournement de l'article 262 TFUE, d'autant que la JB sera, en réalité, un système juridictionnel *unifié* qui couvrira à la fois le volet du brevet communautaire et celui du brevet européen.

67. Troisièmement, la création de la JB ne se heurte pas à l'article 344 TFUE. Cette dernière disposition oblige certes les États membres à ne pas soumettre un différend relatif à l'interprétation ou à l'application des traités à un mode de règlement autre que ceux prévus par les traités. Cependant, cette disposition ne vise que les différends entre États membres, à la différence des litiges auxquels participent des particuliers⁴². Étant donné que les compétences de la future JB comprendront les seuls litiges entre particuliers, il n'est pas à craindre que l'accord envisagé viole l'article 344 TFUE⁴³.

ii) Le contentieux administratif

68. Il convient de vérifier, en second lieu, s'il n'aurait pas été nécessaire d'inclure dans les compétences de la future JB un volet sur le contentieux administratif. Ce contentieux concerne notamment les recours contre l'OEB introduits par des entreprises ayant demandé sans succès qu'un brevet leur soit délivré, ainsi que les recours des tiers ayant fait sans succès opposition contre la délivrance d'un brevet⁴⁴.

69. Rappelons que les brevets communautaires seront délivrés par l'OEB selon les règles applicables en vertu de la CBE pour l'octroi des brevets européens⁴⁵. L'audition devant la Cour a révélé que cette technique administrative peut être qualifiée de deux manières différentes :

⁴² – Voir en ce sens l'arrêt du 30 mai 2006, *Commission/Franda* (C-459/03, Rec. p. I-4635, point 128) ; voir également l'avis 1/91 (présidé à la fois par les juges 36, 35 et 39) où la Cour n'a déclaré incompatibles avec le traité que les compétences de la Cour EBG qui auraient concerné les différends entre États membres et/ou les «parties contractantes» (y compris ceux impliquant le Comité mixte EBG).

⁴³ – Cela étant, il convient de noter que l'accord envisagé manque d'un mécanisme juridictionnel permettant de régler les différends entre les États contractants. Dès lors, tout différend concernant ledit accord et impliquant un État tiers partie à l'accord est susceptible d'être examiné par la Cour internationale de justice (voir, par analogie, communiqué de presse de la CIJ n° 2009/36 du 22 décembre 2009 concernant une demande introduite par la Belgique contre la Suisse au sujet d'un différend portant sur l'interprétation de la convention de Lugano).

⁴⁴ – Article 106 de la CBE.

⁴⁵ – Article 2, paragraphe 1, du projet de règlement sur le brevet communautaire ainsi que considérant 2 et 2 bis dudit projet de règlement.

– La *théorie de la délégation* : selon le Parlement et le Conseil, il s'agira d'une délégation de pouvoirs administratifs, accordée à l'OEB par l'Union européenne ; l'OEB délivrera des brevets communautaires en lieu et place d'une agence de l'Union européenne⁴⁶.

– La *théorie de la transformation* : selon la Commission, l'OEB n'agira pas pour le compte de l'Union européenne et délivrera en réalité uniquement un brevet européen en application de la CBE ; ce brevet européen ne sera que transformé dans l'ordre juridique de l'Union, pour devenir un brevet communautaire, et ce automatiquement, par les seuls effets du règlement sur le brevet communautaire.

70. Aux fins de la présente procédure d'avis, il n'est pas nécessaire ni opportun de déterminer laquelle de ces deux théories emporte la conviction⁴⁷. Quelle que soit la qualification juridique du mode de délivrance des futurs brevets communautaires (théorie de la délégation ou théorie de la transformation), elle pose problème du point de vue de la protection juridictionnelle effective⁴⁸ ainsi que de l'application correcte et uniforme du droit de l'Union.

71. En effet, les décisions de l'OEB en matière de brevets ne sont actuellement susceptibles d'être revues que par les chambres de recours internes créées au sein de l'OEB, à l'exclusion de tout recours juridictionnel devant un tribunal externe. Il n'existe pas de possibilité pour la Cour de justice de l'Union européenne d'assurer la correcte et uniforme application du droit de l'Union dans les contentieux qui se déroulent devant les chambres de recours de l'OEB⁴⁹. Sur ce point important, la

⁴⁶ – Il convient de rappeler que l'adhésion de l'Union européenne à la CBE est censée permettre à l'Union européenne de profiter de l'expérience et des structures administratives de l'OEB (voir considérant 2 du projet de règlement sur le brevet communautaire) sans qu'il y ait besoin de créer une nouvelle agence à l'instar de l'Office de l'harmonisation dans le marché intérieur (OHMI) qui délivre la marque communautaire.

⁴⁷ – Peut également être laissée en suspens la question de savoir si une éventuelle délégation de pouvoirs à un organe international tel que l'OEB serait compatible ou non avec les traités (à cet égard, voir en particulier les critères dégagés par la Cour dans son arrêt du 13 juin 1958, *Meroni/Haute Autorité*, 9/56, Rec. 1958 p. 9 (40)). Il ne saurait être répondu à cette question en l'absence de plus amples informations sur l'étendue et les modalités d'une telle délégation.

⁴⁸ – Article 47, premier et deuxième alinéas, de la Charte des droits fondamentaux de l'Union européenne (voir également l'article 6, paragraphe 1, de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales).

⁴⁹ – Pour l'instant, ces chambres de recours ne se considèrent pas comme des juridictions nationales compétentes pour procéder à des renvois préjudiciels [OEB, décision de la Grande Chambre de recours du 25 novembre 2008, affaire G 2/02, *Wuconslin Alumni Research Foundation*, publiée au Journal Officiel de l'OEB n° 5/2009, p. 306 (pp. 317 à 321), disponible à l'adresse suivante : http://archive-epo.org/epo/pubs/oj009/05_09/05_3069.pdf].

situation juridique en matière de brevets communautaires se distingue donc fondamentalement de celle qui existe en matière de marques communautaires⁵⁰.

72. Or, l'Union européenne ne saurait ni déléguer des pouvoirs à un organe international ni transformer dans son ordre juridique les actes émanant d'un organe international sans s'assurer qu'il existe un contrôle juridictionnel effectif, exercé par un tribunal indépendant qui soit tenu de respecter le droit de l'Union et habilité à saisir, le cas échéant, la Cour de justice d'un renvoi préjudiciel⁵¹.

73. Certes, il peut être satisfait à ces exigences de différentes manières. Un éventuel élargissement des compétences de la future JB pour y inclure également le contentieux administratif contre les décisions de l'OEB n'est qu'une des options envisageables. Une autre option envisageable pourrait être la création d'un tribunal administratif en matière de brevets⁵² qui devrait être autorisé, sans équivoque, à saisir la Cour de justice de l'Union européenne à titre préjudiciel. En vertu du principe d'équilibre institutionnel, il n'incombe pas à la Cour d'indiquer, dans le cadre de la présente procédure d'avis, laquelle de ces différentes options doit être privilégiée.

74. Cependant, selon les informations dont dispose la Cour dans le cadre de la présente procédure d'avis, le contentieux administratif contre les décisions de l'OEB n'est abordé par aucune des différentes mesures actuellement à l'étude en matière de brevets. Ni dans le projet d'accord instituant la JB ni dans le cadre de l'adhésion de l'Union européenne à la CBE, le contentieux administratif ne semble jouer un rôle.

75. Dans ces conditions, il convient de constater que, en son état actuel, le projet d'accord, lu à la lumière de l'ensemble des mesures envisagées en matière de brevets, ne répond pas à l'exigence d'un contrôle juridictionnel effectif en matière de délivrance des brevets et au soul d'une application correcte et uniforme du droit de l'Union.

⁵⁰ – En matière de marques communautaires, les décisions de l'OAMI sont certes d'abord revues par des chambres de recours internes, mais un recours judiciaire devant le Tribunal de l'Union européenne est ouvert par la suite (article 63 du règlement n° 40/94), la Cour pouvant être saisie dans le cadre d'un pourvoi.

⁵¹ – Sur la délégation, voir l'arrêt *Meroni/Heute Autorité* (précité à la note 46, p. 40) ; en ce qui concerne la transformation, voir l'arrêt du 3 septembre 2008, *Kadi et Al Barakat International Foundation/Conseil et Commission* (C-402/05 P et C-415/05 P, Rec. p. I-6351, points 284 et 285).

⁵² – Un projet de révision de la CBE prévoyant la transformation des actuelles chambres de recours en une « Cour d'appel européenne en matière de brevets » est actuellement à l'étude au sein de l'Organisation européenne des brevets (voir le Projet de proposition relative à la révision de la CBE en vue de l'autonomie organisationnelle des chambres de recours de l'Office européen des brevets au sein de l'Organisation européenne des brevets, CA/46/04, disponible sur le site de l'OEB : http://www.epo.org/patents/law/legislative-Initiatives/euiononomy_fr.html).

iii) Conclusion intermédiaire

76. Au vu des considérations qui précèdent, M^{mes} et MM. les avocats généraux estiment que la création de la JB en tant que juridiction internationale ne se heurte pas à des objections de principe tirées des dispositions des traités sur le système juridictionnel de l'Union européenne. Toutefois, les décisions de l'OEB en matière de brevets devront être susceptibles d'un recours juridictionnel effectif devant un tribunal indépendant dans le cadre duquel une application correcte et uniforme du droit de l'Union sera assurée.

b) Le respect du droit de l'Union par la JB

77. S'agissant, ensuite, du respect du droit de l'Union par la future JB, plusieurs intervenants devant la Cour font valoir que les garanties contenues à cet effet dans le projet d'accord sont insuffisantes. C'est à la lumière de ces critiques qu'il convient d'analyser si le projet d'accord est susceptible d'assurer que le droit de l'Union sera effectivement appliqué par la JB [voir sous-section i) ci-dessous], si la Cour de justice de l'Union européenne pourra contribuer à une application correcte et uniforme du droit de l'Union dans les affaires relevant de la compétence de la JB [voir sous-section ii) ci-dessous] et s'il existe des remèdes suffisants pour une éventuelle violation du droit de l'Union par la JB [voir sous-section iii) ci-dessous]. Il en va de la protection de l'autonomie de l'ordre juridique de l'Union⁵³.

i) L'application du droit de l'Union et le respect de sa primauté par la JB

78. Le droit applicable dans les procédures judiciaires devant la JB est régi par l'article 14 bis, paragraphe 1, du projet d'accord. Il convient de relever, d'une part, que la JB « respecte le droit communautaire »⁵⁴ et, d'autre part, qu'elle « fonde ses décisions », entre autres, sur la « législation communautaire directement applicable »⁵⁵.

– La référence à la « législation communautaire directement applicable »

79. En premier lieu, c'est la référence à la « législation communautaire directement applicables » [article 14 bis, paragraphe 1, sous b), du projet d'accord] qui pose problème en l'espèce, et ce pour deux raisons.

80. D'une part, il est constant que le droit de l'Union ne consiste pas uniquement en une « législation », c'est-à-dire en des règles écrites de *droit dérivé*,

⁵³ – Sur la nécessité de préserver l'autonomie de l'ordre juridique de l'Union, voir l'avis 1/91 (précité à la note 36, point 30) et l'avis 1/09 du 18 avril 2002 (Rec. p. I-3493, point 11).

⁵⁴ – Partie introductive de l'article 14 bis, paragraphe 1, du projet d'accord (pour l'avaloir il conviendrait de lire « droit de l'Union » au lieu de « droit communautaire »).

⁵⁵ – Article 14 bis, paragraphe 1, sous b), du projet d'accord.

140

mais qu'il contient également des règles de *droit primaire*, qu'elles soient écrites ou non. Ces règles revêtent une importance certaine dans les litiges entre particuliers en matière de brevets. On ne mentionnera ici que les droits fondamentaux⁵⁶, les principes généraux du droit de l'Union⁵⁷ et la libre circulation des marchandises⁵⁸.

81. D'autre part, le droit de l'Union pertinent pour la résolution de litiges entre particuliers en matière de brevets ne se compose pas uniquement de dispositions législatives *directement applicables*. Nombreux sont en effet les principes du droit de l'Union susceptibles d'influer sur la solution de tels litiges. Tel est notamment le cas des principes établissant des droits fondamentaux et des principes généraux du droit de l'Union. Il en va de même pour les dispositions contenues dans des directives⁵⁹, même si de telles dispositions n'ont pas d'effet direct horizontal⁶⁰. Tous ces principes et dispositions doivent être pris en compte, pour le moins lors de l'interprétation et de l'application de la législation nationale et des accords internationaux visés à l'article 14 bis, paragraphe 1, sous b) et d), du projet d'accord⁶¹.

82. Dans sa rédaction actuelle, l'article 14 bis, paragraphe 1, sous b), du projet d'accord risque donc de créer l'impression que la future JB ne sera pas obligée de tenir compte, dans ses décisions judiciaires, ni des traités ni des droits

⁵⁴ – Voir, en particulier, l'article 3, paragraphes 2, sous c) et d), ainsi que les articles 13, 15, 16 et 17 de la Charte des droits fondamentaux de l'Union européenne qui a désormais la même valeur juridique que les traités (article 6, paragraphes 1, TUE; voir également les arrêts du 19 janvier 2010, Küçükdöverci, C-555/07, non encore publié au Recueil, point 22, et du 1^{er} juillet 2010, Knauf Gips/Commission, C-407/08 P, non encore publié au Recueil, point 91). L'article 47 de la Charte des droits fondamentaux peut également jouer un rôle dans les procédures judiciaires devant la JB. Il ressort de la jurisprudence de la Cour que le respect des droits fondamentaux constitue une condition de la légalité des actes communautaires et que ne sauraient être admises dans la Communauté des mesures incompatibles avec le respect de ceux-ci (arrêt Kadi e.a./Conseil e.a., précité à la note 51, point 284).

⁵⁷ – Par exemple, le principe de proportionnalité et la protection des intérêts légitimes.

⁵⁸ – Articles 34 TFUE et 35 TFUE. Voir, entre autres, arrêts du 14 juillet 1981, Merck (187/80, Rec. 1981 p. 2063), et du 21 septembre 1999, BASF (C-44/98, Rec. p. I-6269). Voir également l'article 10 du projet de règlement sur le brevet communautaire; cette disposition régit l'équipement communautaire des droits conférés par le brevet communautaire, c'est-à-dire une question ayant de fortes implications sur la libre circulation des marchandises.

⁵⁹ – Voir, en particulier, les dispositions de la directive 98/44/CE du Parlement européen et du Conseil du 6 juillet 1998 relative à la protection juridique des inventions biotechnologiques (JO L 213, p. 13).

⁶⁰ – Arrêts du 26 février 1986, Marshall (152/84, Rec. p. 723, point 48), du 14 juillet 1994, Faccini Dori (C-91/92, Rec. 1994 p. I-3325, point 20), et Küçükdöverci (précité à la note 56, point 46).

⁶¹ – Voir, en ce sens, arrêts du 5 octobre 2004, Pfeiffer e.a. (C-397/01 à C-403/01, Rec. p. I-8835, point 111), du 15 avril 2008, Impact (C-268/06, Rec. p. I-2483, point 42), et Küçükdöverci (précité à la note 56, point 45).

fondamentaux et des principes généraux du droit de l'Union, ni d'ailleurs des directives pertinentes en la matière.

83. Or, l'Union européenne ne saurait donner son consentement à la création d'une juridiction internationale, compétente en matière de brevets, dès lors que les règles de fonctionnement de cette juridiction sont pour le moins équivoques quant à son obligation de tenir compte de l'ensemble du droit de l'Union. En particulier, l'Union européenne ne saurait se soustraire à son obligation de respecter les droits fondamentaux garantis par l'ordre juridique européen en participant à un système juridictionnel unifié dans lequel l'application de tels droits ne semble pas garantie.

84. Le respect de la totalité du droit de l'Union, y compris les droits fondamentaux et les valeurs fondamentales sur lesquels l'Union européenne est fondée, revêt une importance non négligeable en matière de brevets. En effet, si le contentieux dans ce domaine semble être, à première vue, une matière assez technique, force est de constater qu'il peut parfois donner lieu à des problèmes éthiques de première importance, notamment dans les domaines de la médecine et de la biotechnologie⁶². En outre, le droit des brevets peut avoir d'importantes implications sur la liberté d'entreprise et le droit de la concurrence.

85. Certes, on pourrait faire valoir que les lacunes qui viennent d'être relevées à l'article 14 bis, paragraphe 1, sous b), du projet d'accord sont comblées par la phrase introductive de cette même disposition, selon laquelle la JB «respecte le droit communautaire *tout court*». Toutefois, M^{mes} et MM. les avocats généraux estiment que l'articulation entre les deux références au «droit communautaire» – l'une au début de l'article 14 bis, paragraphe 1, et l'autre au paragraphe 1, sous b), de cette disposition – n'est à son tour pas dépourvue d'ambiguïté.

86. Il ne saurait donc être exclu que la future JB néglige certains des principes et dispositions du droit de l'Union mentionnés ci-dessus ou qu'elle n'en tienne pas suffisamment compte lors de la résolution de litiges entre particuliers en matière de brevets. Cette crainte n'est que renforcée par le fait que les dispositions du projet d'accord sur la formation des juges de la future JB⁶³ ne contiennent aucune référence au droit de l'Union.

87. C'est pourquoi il est indispensable que l'étendue de l'obligation de la JB d'appliquer le droit de l'Union soit clarifiée dans l'accord envisagé. À l'instar du Parlement, M^{mes} et MM. les avocats généraux estiment qu'une telle clarification devra inclure l'obligation de se conformer à l'ensemble de la jurisprudence de la Cour de justice de l'Union européenne, et non seulement l'obligation de suivre les

⁶² – Une récente affaire de la Grande Chambre de recours de l'OEB (décision précitée à la note 49) concernait, pour l'essentiel, l'utilisation d'embryons et leur destruction. Cette problématique des embryons est également au cœur d'une affaire préjudicielle, introduite par le Bundesgerichtshof allemand, qui est actuellement pendante devant notre Cour (affaire C-34/10, Brüstle).

⁶³ – Article 14 du projet d'accord.

décisions préjudicielles rendues en vertu de l'article 48 de l'accord envisagé, suite à un renvoi préjudiciel émanant de la JB elle-même.

- L'absence de référence à la primauté du droit de l'Union

88. En second lieu, il importe de relever que les dispositions sur le droit applicable contenues à l'article 14 bis, paragraphe 1, du projet d'accord ne mentionnent pas la primauté du droit de l'Union.

89. Certes, le principe de la primauté du droit de l'Union n'est pas contenu dans une disposition spécifique des traités⁶⁴. Toutefois, ce principe a de longue date été affirmé par la jurisprudence de la Cour⁶⁵, et l'Union ne saurait conclure un accord susceptible de le mettre en péril.

90. Il convient de préciser que ce n'est pas la hiérarchie entre la «législation communautaire» et les accords internationaux, visés à l'article 14 bis, paragraphe 1, du projet d'accord⁶⁶ qui pose problème ici. En effet, le droit de l'Union reconnaît lui-même aux accords internationaux conclus par l'Union un rang supérieur par rapport aux autres actes des institutions de l'Union⁶⁷.

91. La rédaction actuelle de l'article 14 bis, paragraphe 1, du projet d'accord appelle cependant les deux observations suivantes : premièrement, le rang du *droit primaire* de l'Union par rapport aux accords internationaux et à la «législation communautaire» n'est pas clairement établi ; deuxièmement, le rang du droit de l'Union par rapport à la *législation nationale* des États membres manque de clarté, les deux étant mentionnés sans distinction aucune à l'article 14 bis, paragraphe 1, sous b), du projet d'accord.

92. Vu l'importance que le droit de l'Union, notamment le droit primaire, peut revêtir dans les litiges entre particuliers en matière de brevets⁶⁸, M^{mes} et MM. les avocats généraux considèrent que son rang doit être établi sans équivoque dans le projet d'accord. La détermination de ce rang ne saurait être laissée à la libre appréciation de la future JB.

⁶⁴ – Il n'existe qu'une déclaration relative à la primauté (déclaration n° 17, annexée à l'acte final de la conférence intergouvernementale ayant adopté le traité de Lisbonne, JO 2007, C-306, p. 236).

⁶⁵ – La primauté du droit de l'Union a été reconnue dans une jurisprudence constante de la Cour depuis l'arrêt du 15 juillet 1964, *Costa/ENEL* (6/64, Rec. 1964 p. 1141) : voir en dernier lieu l'arrêt du 22 juin 2010, *Melti et Abdeli* (C-188/10 et C-189/10, non encore publié au Recueil, point 52).

⁶⁶ – L'article 14 bis, paragraphe 1, du projet d'accord mentionne la «législation communautaire» ainsi que différents accords internationaux et conventions internationales auxquels l'Union européenne sera partie, une fois le nouveau système mis en place.

⁶⁷ – Cela peut être déduit de l'article 216, paragraphe 2, TFUE, selon lequel «[l]es accords conclus par l'Union tiennent les institutions de l'Union et les États membres».

⁶⁸ – Voir les points 80 à 84 ci-dessus.

- Résumé

93. Au vu des considérations qui précèdent, M^{mes} et MM. les avocats généraux considèrent que les garanties contenues dans le projet d'accord en vue d'assurer la pleine application et le respect de la primauté du droit de l'Union par la JB ne sont pas suffisantes. Étant donné que le droit de l'Union et la jurisprudence des juridictions de l'Union ne seront obligatoires pour la future JB que par le biais de l'accord envisagé, les dispositions de celui-ci doivent être dépourvues de toute ambiguïté quant à l'étendue de l'obligation de la JB de respecter le droit de l'Union. Tel n'est pas le cas en l'état actuel du projet d'accord.

- ii) La compatibilité du mécanisme préjudiciel avec le système juridictionnel des traités

94. Dans un souci d'assurer l'interprétation et l'application uniformes du droit de l'Union dans les litiges relevant de la compétence de la JB, le projet d'accord établit, à son article 48, un mécanisme de renvoi préjudiciel qui prévoit la possibilité pour la JB de saisir la Cour de justice de l'Union européenne de demandes préjudicielles.

95. Un tel mécanisme préjudiciel est un élément essentiel permettant à la Cour de justice de contribuer à une application correcte et uniforme du droit de l'Union.

96. Certains des États membres ayant participé à la présente procédure d'avis émettent toutefois des doutes quant à la compatibilité du mécanisme préjudiciel prévu à l'article 48 du projet d'accord avec le système juridictionnel des traités.

97. En premier lieu, plusieurs États membres font valoir que la procédure préjudicielle au titre de l'article 267 TFUE n'est pas ouverte à des juridictions telles que la JB auxquelles participent des États tiers – y compris des juges en provenance d'États tiers – et qui siègent, du moins en partie, dans des États tiers.

98. Cette objection doit être écartée. Certes, d'après son libellé, l'article 267 TFUE n'envisage la saisine de la Cour de justice que par les juridictions nationales des États membres⁶⁹. Or, cette disposition ne constituera pas la base juridique des demandes de décision préjudicielle que la future JB pourra adresser à la Cour de justice. Les renvois préjudiciels opérés par la JB trouveront leur fondement directement dans l'article 48 de l'accord envisagé. Les compétences préjudicielles de la Cour de justice seront donc élargies par les effets d'un accord

⁶⁹ – On notera néanmoins que notre jurisprudence reconnaît à une juridiction commune de plusieurs États membres, en l'occurrence la Cour de justice du Benelux, la faculté de formuler des demandes de décision préjudicielle au sens de l'article 267 TFUE (arrêt du 4 novembre 1997, *Parfums Christian Dior*, C-337/95, Rec. p. I-6013, points 20 à 27). Une affaire semblable, ayant pour objet un renvoi préjudiciel provenant d'une chambre de recours des écoles européennes, est actuellement pendante devant la grande chambre de la Cour (affaire C-196/09, *Miles e.a.*).

international et comprendront désormais une catégorie de demandes de décision préjudicielle non encore prévue par les traités.

99. À cet égard, il convient de relever que la création de telles procédures préjudicielles spéciales n'est pas inconnue en droit de l'Union ; on ne mentionnera ici que le protocole de Luxembourg ⁷⁰ qui a élargi les compétences préjudicielles de la Cour de justice pour y inclure les affaires relatives à la convention de Bruxelles ⁷¹.

100. Par ailleurs, il ne semble pas exclu qu'un accord international investisse la Cour de justice d'une compétence préjudicielle aux fins de l'application du droit de l'Union dans des États tiers. En effet, la Cour a déjà décidé qu'elle pouvait être saisie de questions préjudicielles émanant de juridictions autres que celles des États membres, sous réserve que les réponses qu'elle y apporte aient un caractère contraignant pour les juridictions de renvoi ⁷². Tel est le cas en l'espèce, étant donné que les décisions préjudicielles rendues par la Cour de justice de l'Union européenne seront contraignantes pour la JB-TPI et la JB-CA ⁷³. Bien entendu, il convient de veiller, en outre, à ce que les décisions préjudicielles de la Cour soient appliquées dans leur contexte juridique et institutionnel tel qu'il est défini par l'ensemble du droit de l'Union ; c'est pourquoi il est indispensable d'obliger la JB au respect de l'ensemble du droit de l'Union (voir les points 78 à 93 de la présente prise de position).

101. En second lieu, le Luxembourg considère que le mécanisme préjudiciel prévu à l'article 48 de l'accord envisagé est incompatible avec l'article 262 TFUE.

102. Cette objection n'emporte pas non plus la conviction. Certes, l'article 262 TFUE préconise un système dans lequel la Cour de justice de l'Union européenne pourrait être saisie de recours directs dans le domaine des titres européens de propriété intellectuelle, tels que le brevet communautaire. Or, comme nous l'avons exposé ⁷⁴, l'application de l'article 262 TFUE ne constitue qu'une faculté pour le Conseil. Ladite disposition n'interdit pas au Conseil de privilégier d'autres voies consistant en la création d'un système juridictionnel unifié qui permet une

⁷⁰ – Protocole concernant l'interprétation par la Cour de justice de la convention du 27 septembre 1968 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, signé à Luxembourg le 3 juin 1971 (JO 1975, L 204, p. 26).

⁷¹ – Il convient d'admettre, cependant, qu'une telle solution n'a pas été retenue pour ce qui concerne la convention de Lugano à laquelle participent non seulement des États membres de l'Union européenne mais également des États tiers.

⁷² – Avis 1/00 (précité à la note 53, point 33) ; voir également l'avis 1/91 (précité à la note 36, points 59 et 61 à 65).

⁷³ – Voir l'article 48, paragraphe 2, du projet d'accord.

⁷⁴ – Voir points 65 à 66 ci-dessus.

saisine « indirecte » de la Cour de justice, par le biais d'un mécanisme préjudiciel spécial.

103. Partant, le mécanisme préjudiciel prévu à l'article 48 du projet d'accord ne se heurte pas à des objections de principe quant à sa compatibilité avec le système juridictionnel des traités.

iii) Les remèdes en cas de violation du droit de l'Union par la JB

104. Certains États membres ayant participé à la procédure d'avis estiment toutefois que le projet d'accord ne prévoit pas de remèdes suffisants pour le cas où la JB violerait son obligation de saisir la Cour de justice à titre préjudiciel ou, plus généralement, son obligation de respecter le droit de l'Union. Le Parlement a également émis des doutes à cet égard.

105. M^{mes} et MM. les avocats généraux partagent ce point de vue.

106. Bien que la JB-CA soit tenue d'interroger la Cour de justice à titre préjudiciel quand une question d'interprétation ou de validité de droit de l'Union est soulevée devant elle ⁷⁵, aucun mécanisme ne garantit le respect par la JB-CA de son obligation de renvoi et, plus largement, le respect par cette juridiction du droit de l'Union en tant que tel.

107. À cet égard, la situation dans laquelle se trouvera la future JB se distingue nettement de celle des juridictions nationales des États membres de l'Union.

108. En effet, lorsqu'une juridiction nationale viole l'obligation de renvoi pesant sur elle en vertu de l'article 267 TFUE, le droit de l'Union prévoit principalement deux moyens susceptibles de remédier à cette situation. D'une part, un recours en manquement peut être intenté contre l'État membre concerné ⁷⁶. D'autre part, la responsabilité extracontractuelle dudit État membre peut être engagée ⁷⁷. En revanche, la future JB ne fera pas l'objet de recours en manquement en vertu du système de l'Union européenne ni ne sera soumise à une quelconque responsabilité extracontractuelle selon le droit de l'Union.

109. Contrairement à ce que soutient la Commission, l'éventuelle dénonciation de l'accord instituant la JB en cas de violation grave et manifeste du droit de l'Union par cette juridiction internationale ne saurait constituer un remède efficace. La dénonciation d'un accord international est une mesure particulièrement lourde et grave de conséquences, surtout lorsqu'il s'agit, comme en l'espèce, d'un accord relatif à la protection juridique des droits de propriété

⁷⁵ – Article 48, paragraphe 1, du projet d'accord.

⁷⁶ – Article 258 TFUE à 260 TFUE.

⁷⁷ – Arrêts du 30 septembre 2003, Köbler (C-224/01, Rec. p. I-10239), et du 13 juin 2006, Traghetti del Mediterraneo (C-173/03, Rec. p. I-5177).

143

intellectuelle des particuliers. De l'avis de M^{mes} et MM. les avocats généraux, il est peu réaliste de considérer qu'une telle mesure puisse véritablement être envisagée afin de remédier aux éventuels manquements de la JB dans des cas individuels ; la dénonciation semblerait tout à fait disproportionnée par rapport au but recherché qui ne serait pas de mettre fin au système juridictionnel unifié en matière de brevets mais, bien au contraire, d'en assurer le bon fonctionnement.

110. Il serait tout aussi peu réaliste de supposer, à l'instar de la Commission, que des particuliers intentent des recours contre l'ensemble des parties contractantes de l'accord envisagé afin d'engager leur responsabilité extracontractuelle collective pour d'éventuelles violations du droit de l'Union commises par la JB. On voit mal devant quelle juridiction et en vertu de quel droit de tels recours collectifs en dommages-intérêts devraient être engagés, et moins encore quelles en seraient les chances de succès.

111. Le même scepticisme s'impose par ailleurs face au remède mis en avant par les Pays-Bas : ce remède consisterait à refuser l'exécution des décisions de la JB dans les États membres de l'Union européenne en cas de non-respect du droit de l'Union par la JB. À cet égard, il suffit de rappeler que le juge national saisi d'une demande d'exécution n'est pas normalement appelé à vérifier l'exactitude matérielle de la décision de justice en question. Ce juge pourrait tout au plus refuser l'exécution d'une décision de la JB si celle-ci était manifestement contraire à l'ordre public, ce qui pourra difficilement être établi dans tous les cas de violation du droit de l'Union par la JB.

112. Dans ces conditions, l'introduction d'autres voies de droit pour pallier l'éventuelle violation du droit de l'Union et de l'obligation de renvoi par la JB est indispensable.

113. Comme il a été souligné notamment par la France, un choix de différentes options serait disponible afin de garantir la correcte et uniforme application du droit de l'Union dans les litiges relevant de la compétence de la future JB. Ainsi, on pourrait songer à soumettre les décisions de la JB-CA au contrôle de la Cour de justice de l'Union européenne, en application de l'article 262 TFUE. Ce contrôle pourrait être exercé de différentes manières : par un pourvoi en cassation (ouvert aux parties au litige devant la JB-CA), par un pourvoi dans l'intérêt de la loi (ouvert à la Commission et/ou aux États membres et/ou à l'OEB, à l'instar de l'ancien article 68, paragraphe 3, CE) ou encore par un mécanisme de réexamen (à l'instar de ce qui est prévu à l'article 256, paragraphes 2 et 3, TFUE).

114. Contrairement à ce que soutient la Commission, l'introduction de tels mécanismes supplémentaires (pourvoi en cassation, pourvoi dans l'intérêt de la loi ou procédure de réexamen) n'aboutirait pas à une dénaturation du rôle de la Cour de justice de l'Union européenne. Certes, la Cour de justice pourrait alors être appelée à intervenir de deux façons différentes dans un même litige pendant devant la JB : d'une part à titre préjudiciel, c'est-à-dire en vertu d'une procédure

de coopération, et d'autre part suite à un pourvoi ou à une demande de réexamen. Cependant, les deux types d'intervention ne s'appliqueraient pas simultanément et ne se mélangeraient pas. Ils ne soulèveraient pas forcément les mêmes points de droit. Qui plus est, la procédure préjudicielle resterait la règle, alors que la procédure de pourvoi ou de réexamen serait l'exception ; celle-ci ne se réaliserait qu'en cas de violation du droit de l'Union par la JB ou bien suite au refus de la part de la JB d'opérer un renvoi préjudiciel ou de se conformer à la décision préjudicielle de la Cour de justice.

115. En vertu du principe de l'équilibre institutionnel, il n'incombe certainement pas à la Cour d'indiquer laquelle de ces différentes options constituerait le remède le plus adéquat. Cela relève de la compétence des instances politiques de l'Union. Il suffit de constater, aux fins de la présente procédure d'avis, que le projet d'accord tel qu'il a été soumis à la Cour n'est pas en mesure de garantir la correcte et uniforme application du droit de l'Union dans les litiges relevant de la compétence de la future JB, puisqu'il se borne à mettre en place un mécanisme préjudiciel sans prévoir des remèdes efficaces en cas de violation, par la JB, de son obligation de renvoi ou du droit de l'Union en général. Les remèdes disponibles en cas de violation du droit de l'Union par la JB et en cas de non-respect de son obligation d'opérer un renvoi préjudiciel en vertu de l'article 48 du projet d'accord ne sont donc pas suffisants.

c) Le régime linguistique devant la JB

116. S'agissant, enfin, du régime linguistique devant la JB, celui-ci mérite d'être analysé du point de vue des droits de la défense dont le respect est un principe fondamental du droit de l'Union⁷⁹. En effet, les obligations qu'impose un accord international ne sauraient avoir pour effet de porter atteinte aux principes constitutionnels des traités, au nombre desquels figure le principe selon lequel tous les actes de l'Union doivent respecter les droits fondamentaux⁷⁹.

117. Comme il a été souligné notamment par l'Espagne, il n'est pas exclu qu'une entreprise soit citée en justice, devant une division locale ou régionale de la JB, dans une langue autre que la langue officielle de son pays d'origine. Cet aspect a également été débattu lors de l'audition devant la Cour.

118. Il convient de relever, à cet égard, que le régime linguistique devant la JB-TPJ dépend du lieu où se situe la division locale ou régionale en question.

⁷⁹ – Arrêt du 2 octobre 2003, *Corus UK/Commission* (C-199/99 P, Rec. p. I-11177, point 19). Ce principe du respect des droits de la défense est également reflété aux articles 47, deuxième alinéa, de la Charte des droits fondamentaux de l'Union européenne (« droit à ce que sa cause soit entendue équitablement »), ainsi qu'à l'article 48, paragraphe 2, de ladite Charte.

⁷⁹ – Voir en ce sens l'arrêt *Kadi e.a./Conseil* e.a. (précité à la note 51, point 285).

144

119. Lorsqu'un litige est porté devant la division locale de la JB-TPI établie dans le pays d'origine du défendeur ou devant la division régionale à laquelle son pays d'origine adhère, la langue de procédure est soit «la ou les langues officielles» de son pays d'origine, soit une langue au choix de laquelle son pays d'origine a donné son consentement⁸⁰. Dans un tel cas de figure, aucune violation des droits de la défense du défendeur n'est à craindre. En effet, le régime linguistique qui sera applicable au défendeur aura été déterminé par son pays d'origine, comme c'est le cas, en règle générale, dans tous les litiges portés devant les tribunaux nationaux de ce pays.

120. En revanche, quand une action est introduite devant la division locale ou régionale de la JB-TPI où une contrefaçon ou la menace d'une contrefaçon s'est produite ou est susceptible de se produire, le régime linguistique dépend du pays ou des pays où est établie la division de la JB-TPI en question⁸¹. Dans ce cas, il se peut donc qu'une entreprise soit assignée devant une division de la JB-TPI située en dehors de son pays ou de sa région d'origine et, par conséquent, dans une langue autre que celle à laquelle l'entreprise est habituée. Or, une telle situation ne se produira que lorsque l'entreprise en question aura exercé des activités commerciales à l'étranger. Il peut donc paraître légitime qu'elle doive alors subir le risque d'être citée en justice dans le pays ou la région où elle a fait du commerce, et ce dans la langue qui est d'application dans ce pays ou cette région.

121. La situation est cependant nettement plus délicate lorsque le pays où une entreprise doit être assignée ne participe à aucune division locale ou régionale de la JB-TPI. Dans un tel cas, le litige sera porté devant la division centrale de la JB-TPI, et la langue de procédure sera celle du brevet⁸², à savoir l'allemand, l'anglais ou le français⁸³. Il s'ensuit qu'une entreprise pourra être citée en justice dans une langue au choix de laquelle n'aura participé ni son pays d'origine ni le pays où elle exerce ses activités commerciales. En l'absence de toute disposition dans le projet d'accord permettant à la division centrale de déroger à la règle de la langue du brevet⁸⁴ ou permettant au défendeur d'obtenir des traductions des pièces de

⁸⁰ – Article 29, paragraphes 1 et 2, et article 15 bis, premier alinéa, sous b), du projet d'accord. Ajoutons que la Commission vient de proposer un régime de traduction pour le futur brevet communautaire selon lequel il pourra être exigé du titulaire d'un brevet communautaire qu'il produise une copie de ce brevet traduit dans la langue d'un contrefacteur présumé ou dans la langue de la procédure juridictionnelle lorsqu'elle n'est pas celle dans laquelle le brevet a été délivré (voir article 4 de la proposition et communiqué de presse IP/10/870 du 1^{er} juillet 2010).

⁸¹ – Article 29, paragraphes 1 et 2, et article 15 bis, premier alinéa, sous a), du projet d'accord. Sur le régime de traduction applicable au brevet en cause, voir note 80 ci-dessus.

⁸² – Article 29, paragraphe 5, et article 15 bis, troisième alinéa, du projet d'accord.

⁸³ – Voir les articles 14 et 70 de la CBR.

⁸⁴ – La possibilité de dérogation prévue à l'article 29, paragraphe 4, du projet d'accord ne s'applique qu'aux divisions locales et régionales de la JB-TPI.

procédure⁸⁵, ce régime linguistique paraît inacceptable au regard du respect des droits de la défense⁸⁶.

122. Dans ces limites, M^{mes} et MM. les avocats généraux considèrent que le régime linguistique applicable devant la division centrale de la JB est susceptible de porter atteinte aux droits de la défense.

3. Conclusion

123. Au vu de l'ensemble des considérations qui précèdent, M^{mes} et MM. les avocats généraux estiment que l'accord envisagé est, en son état actuel, incompatible avec les traités. Les raisons de cette incompatibilité peuvent être résumées comme suit :

- Les garanties contenues dans le projet d'accord en vue d'assurer la pleine application et le respect de la primauté du droit de l'Union par la JB sont insuffisantes (voir points 78 à 93 de la présente prise de position).
- Les remèdes disponibles en cas de violation du droit de l'Union par la JB et en cas de non-respect de son obligation d'opérer un renvoi préjudiciel en vertu de l'article 48, paragraphe 1, du projet d'accord sont insuffisants (voir points 104 à 115 de la présente prise de position).
- Le régime linguistique devant la division centrale de la JB est susceptible de porter atteinte aux droits de la défense (voir points 121 et 122 de la présente prise de position).
- Le projet d'accord, lu à la lumière de l'ensemble des mesures envisagées en matière de brevets, ne répond pas au besoin d'assurer un contrôle juridictionnel effectif ainsi qu'une application correcte et uniforme du droit de l'Union dans le contentieux administratif relatif à la délivrance des brevets communautaires (voir points 68 à 75 de la présente prise de position).

⁸⁵ – Bien au contraire, l'article 31, paragraphe 1, du projet d'accord permet à toute division de la JB-TPI et à la JB-CA d'«ignorer», dans la mesure jugée appropriée, les exigences en matière de traduction. Qui plus est, l'interprétation lors des audiences devant la JB ne sera assurée que dans la mesure jugée appropriée (article 31, paragraphe 2, du projet d'accord).

⁸⁶ – S'il n'existe, certes, aucun principe général assurant à chaque citoyen le droit à ce que tout ce qui serait susceptible d'affecter ses intérêts soit rédigé dans sa langue en toutes circonstances (arrêt du 9 septembre 2003, Kik/OHMI, C-361/01 P, Rec. p. I-8283, point 82), on ne saurait créer des obligations pour le citoyen ou lui opposer des documents contre lesquels il ne sait pas se défendre, faute d'en comprendre le contenu (voir en ce sens, en relation avec la publication d'une réglementation communautaire, l'arrêt du 11 décembre 2007, Skoma-Lux, C-161/06, Rec. p. I-10841).

145

VI – Proposition de réponse à la demande d'avis

124. Pour les raisons exposées ci-dessus, M^{mes} et MM. les avocats généraux proposent à la Cour de répondre comme suit à la demande d'avis formée par le Conseil de l'Union européenne :

«En son état actuel, l'accord envisagé créant un système unifié de règlement des litiges en matière de brevets est incompatible avec les traités.»

Pour les avocats généraux,



Juliane Kokott
Avocat général

SIXTH VENICE JUDGES' FORUM (2010)

Prof. Dr. Winfried Tilmann

Introductory comments to the discussion of the Opinion given by the Advocates General on the compatibility of the Draft agreement on the European and Community (E.U.) Patents Court with E.U. law

Introduction

In May of this year, an Oral Hearing has taken place before the ECJ on the EU Council's Request for an Opinion on the Compatibility of the draft-Agreement on a European Patent Court with EU law.

In July the Advocates General have presented a written Statement. According to that Statement the draft-Agreement is not compatible with EU law, and this for four reasons.

Two of these reasons may be easily remedied. One concerns the principle of full application and pre-eminence of EU law to be recognised by the Patent Court. The other concerns the linguistic regime in the procedure before the central division of the Patent Court. I will not deal with these two minor problems to be solved by drafting.

The two other reasons for incompatibility would, however, create major obstacles. They would be very difficult to remedy, if they were true, that means: if the ECJ would follow the Advocates General in these two respects.

I propose to concentrate our debates on these two major problems.

I. Problem 1

I start with the "**Conclusion**" at the end

- *The draft agreement, ((read in the light of all the measures contemplated concerning patents,)) does not satisfy the requirement of ensuring effective judicial control and a correct and uniform application of Union law in administrative proceedings concerning the granting of Community patents (see points 68 to 75 of this position).*

In my own words: the Advocates General say that the administrative decisions of the European Patent Office in granting or not granting a Community Patent (now called: EU Patent) should be subject to a judicial control. Without any change these acts would be controlled only by the Appeal Boards of the EPO.

Now, what are the arguments of the Advocates General? I will cite the main parts of their reasoning:

69. We should recall that Community patents will be granted by the EPO ((according to the applicable rules under the EPC for the granting of European patents)). The hearing before the Court showed how this administrative technique may be classified in two different ways:

- The theory of delegation: ((according to the Parliament and the Council,)) administrative powers will be delegated to the EPO by the European Union; the EPO will grant Community patents instead of and in the place of a European Union agency.

- * The theory of transformation: ((according to the Commission,)) the EPO will not act on behalf of the European Union and will actually only grant a European patent pursuant to the EPC; this European patent will only be transformed in the Union's legal system, to become a Community patent, automatically, solely through the effect of the Community patent regulation.

70. For the purpose of this opinion, it is neither necessary nor advisable to determine which of these two theories carries conviction. Whatever the legal classification of the method of granting of future Community patents (((theory of delegation or theory of transformation))), it does (not) pose a problem from the point of view of actual judicial protection or the correct and uniform application of Union law.

The "not" in 70. has to be deleted (translation error).

I dare to predict that the European Court of Justice will not follow these arguments and their conclusion. I will briefly present my Theses for this prediction which you find on the second paper before you regarding this Problem 1

Of course, we must consider also, how a judicial control over the acts of the EPO would have to be installed and realised, if my prediction is wrong and the ECJ will follow the Advocates General in requiring such a legal control.

Now, what are my arguments?

1. The "theory of transformation" is correct. The EU-Patent Regulation will transform certain European Patents into EU Patents (see Art.142 EPC).

2. It follows from that legal construction that the EPO will not "grant Community Patents". The EPO will continue granting European (bundle) Patents which will be transformed by the EU-Patent Regulation into EU Patents.

3. The EPO is constituted and acting on the level of international law. On that level a principle of "actual judicial protection" does not exist. There are many international agencies rendering administrative acts without judicial control. Think of the UN agencies.

4. The EPO is not part of the Union Structure. Therefore, it is not subject to the general requirement of "correct and uniform application of Union law".

5. However, in one point the AG might be right: the EPO, already presently, is applying certain patenting-rules of EU law (e.g. parts of the BioTech Directive, incorporated into the EPC-Regulations). Even if such rules are not incorporated into the EPC or into its Regulation, it follows from Art. 31 of the Vienna Convention on International Treaties ("later practice" as relevant factor for interpretation) that the EPO must administer these rules in conformity with the decisions of the ECJ.

since the majority of the EPC-member states are bound to observe these decisions in practicing the same EU rule regarding the same patent.

6. And there is another point into the direction of the Advocates General: The Boards of Appeal of the EPO, in my opinion already presently, are able to and obliged to refer interpretation-questions to the EPO. This obligation follows (a) from a correct interpretation of the ratification of the EPC by the EU-member states and (b) from the Vienna Convention.

(a) The EU member states may concentrate their patent-granting activity only together with their obligation to submit questions on the interpretation of EU law to the ECJ.

(b) This obligation is extended to all new EU patenting rules by the Vienna Convention (see nr. 5, above).

I know that the Enlarged Appeal Board of the EPO has denied the possibility of submitting referrals to the ECJ, but the Board was wrong, as I have explained.

Of course, it would be even better to adopt a rule to this effect in the Implementing Rules by a decision of the Administrative Council. The EU-EPC states are obliged to do that, since they cannot escape the obligation to submit referral questions to the ECJ just by centralising their patent-granting procedure staying competent for the after-grant part of the procedure.

The Appeal Boards would be "courts" of a mixed agreement (EU- and non-EU-States) able to refer questions to the ECJ according to its practice. By the way, the German Constitutional Court (Bundesverfassungsgericht) has accepted the quality of the Appeal Boards of the EPO as "courts" under Art. 24 of the German Constitution (Grundgesetz; BVerfG GRUR 2001, 728/729). Also the European Human Rights Court accepts them as an equivalent to Art. 6 Human-Rights-Charter (NJW 1999, 1173)

Only briefly: What would be the possible remedies, if the ECJ would follow the Advocates General in requiring judicial control over the acts of the EPO regarding EU patents?

1. The first suggested remedy (Nr. 73):

Extension of the competences of the future Patent Court to include administrative proceedings against decisions of the EPO.

That means: An appeal against the acts of the EPO to the Patent Court of the Agreement

2. And the second suggested remedy (Nr. 73):

Creation of an administrative patent court which should be authorised...to refer to the European Court of Justice on a preliminary question.

Which means: Creating another international court in addition to the Patent Court to control the acts of the EPO.

Certainly, both suggestions would create huge practical and legal problems. They are not necessary in my opinion.

(Prof. Tilmann then asked the Judges on the podium, Mr. Grabinski and Mr. van Peurse, to present their view regarding this Problem 1 and regarding the solutions proposed by the Advocates General).

II. Problem 2

The **second problem** raised by the Advocates General is defined in the "Conclusions" as follows:

- *The remedies available in the event of the PC's infringement of Union law and in the event of non-observance of its obligation to effect a preliminary reference pursuant to article 48 paragraph 1 of the draft agreement are insufficient (see points 104 to 115 of this position).*

In my own words: the normal rules against national courts not applying EU law correctly and not referring preliminary questions to the ECJ do not work with that new Patent Court.

What are the **arguments of the Advocates Generals**? In summary :

107. *In this connection, the situation in which the future CP will find itself is clearly distinguished from that of the national courts of the Member States of the Union.*

108. *In fact, when a national court infringes the obligation of reference falling upon it under article 267 TFEU, Union law mainly provides two means of remedying this situation. Firstly, an appeal for omission may be filed against the Member State concerned. Secondly, the aforesaid Member State may be held extracontractually liable. However, the future PC will not be the object of an appeal for omission in the European Union system nor will it be subject to any extracontractual liability according to Union law.*

110. *It is just as unrealistic to assume, ((along the lines of the Commission)), that individuals will file appeals against all the contracting parties to the agreement ((contemplated)) in order to bind their collective extracontractual liability for possible infringements of Union law committed by the PC. ((It is difficult to see which court would hear such collective appeals for damages and under which law, and to a lesser extent what the chances of success would be.))*

112. *Under these conditions, the introduction of other legal channels to mitigate the possible infringement of Union law and the obligation of reference by the PC is essential.*

Is that line of argumentation really true and valid?

First: Wouldn't it be possible to install the State of the Seat of the Patent Court as addressee of a treaty-violation action by the Commission and of a damage-claim by the injured party, that State representing all EU States member to the Agreement?

Secondly: Is it allowed under EU law to invent other remedies as those provided for in the Lisbon Treaty?

May I put it this way: The new Patent Court, is it not, seen from the viewpoint of the EU States member to the Agreement, merely a centralised national court? Does the Lisbon Treaty allow for the creation of other remedies than those in place for national courts which means:

- a treaty-violation action by the Commission and
- a damage claim by the injured private party?

Now, what are **the alternatives suggested by the Advocates General**. I cite from their Nr. 113, just adding that, in my opinion, these alternatives are not only unnecessary but also not admissible under EU law:

113. ((As pointed out by France in particular, a choice of different options would be available in order to guarantee the correct and uniform application of Union law in disputes falling under the competence of the future PC. Consequently, one could consider submitting judgments of the PC Court of Appeal to the control of the European Court of Justice, pursuant to article 262 TFEU.)) This control could be exercised in different ways: by an appeal on points of law (open to parties to the dispute before the PC Court of Appeal), by an appeal in the interests of the law (open to the Commission and/or to the Member States and/or to the EPO, along the lines of the former article 68, paragraph 3, EC) or even by a re-examination mechanism (along the lines of the provisions of article 256, paragraphs 2 and 3, TFEU).

(A debate among the Judges followed)

29-30 October 2010

An integrated jurisdictional system for European and EU patents – Does it fit all?

- The practitioner's point of view -

Dr. Jochen Pagenberg, Bardehle Pagenberg, President EPLAW

I. Present Status of the work for the European and EU Patent Court System

1. Summary of developments

The Draft Agreement on the European and Community Patents Court is before the ECJ waiting for the opinion on its compatibility with the Treaties. An unofficial version of the Opinion of the Advocates General has become known some time ago which regards the Draft *incompatible* with the EU Treaties. The Opinion of the ECJ is expected by the end of the year.

2. Status of the preparatory work

The Expert Group of the EU Commission consisting of 5 patent judges and 5 patent litigators from 7 Member States had started off with the aim and corresponding instructions from the Commission to establish a streamline procedure of high quality and affordable cost encouraged by the second Venice Resolution of the Judges' Forum¹,

- with generally a one-day hearing for all pleadings and evidence discussions, and
- a decision by the local and regional chambers within a year from the filing date of an action.

A number of large corporations, also from outside the EU, have continued pressing for a procedure which would allow more extensive evidence trials. Although the principle of proportionality is mentioned in the *Rules* which may allow for exceptions from the one-day hearing rule, it is still open how the aim of an efficient cost-conscious procedure can be defended. The

discussion shows that the interests of small and medium size companies have often been overlooked in the discussion and that *one system might not fit all users*.

3. Cost

a) The EEUPC will not offer a cheap procedure

Cost is a point which is closely related with the length of trials and hearings. For a number of reasons the predictions as to litigation cost published so far are unrealistic. Those who expect that the new EEUPC will be able to offer patent litigation at the cost of the continental systems, in particular of the German courts, seem to overlook a number of issues which do not match and will in fact be considerably different from the German situation of today. Only a few points may be mentioned.

- *There will be no substantial savings due to a reduction of parallel litigation.* Since under the EEUPC local and regional divisions will have competence to grant injunctions for the whole EU – at least for the so-called EU patents -, there is no need for parallel litigation in several countries anymore which allegedly amounts to ca. 20 % of all cases in Europe. All practitioners in the main litigation countries regard this percentage as much too high and assume on the basis of their own experience that a realistic figure is perhaps 5 % to 8 % which reduces the expected savings of about 300 million per year considerably. Furthermore, the great majority of *SMEs will anyway not be the beneficiaries of such savings*, since they often litigate only in their home country and rarely file a case abroad. This shows that the needs of SMEs are indeed often overlooked in the discussion.
- *Combined litigation is more expensive than a bifurcated system.* It has also not been considered that the litigation figures in Germany are calculated on fees before the infringement courts which are not only very experienced, but also, due to their specific working procedure², are used to handling on average *four infringement cases per hearing day*, while under the EU combined system of infringement and revocation *one full*

¹ Published in 38 IIC 826 (2007)

² which is primarily based on written submissions with a hearing at the end of the exchange of arguments of the parties

hearing day per case will be needed. This means that there is a *difference between the output figures*³ of a factor 4 which will, of course, also translate into four times higher costs if one applies the same criteria to it.

- *There will be about three times more revocation actions.* It is furthermore important to mention that the European combined system will lead to more revocation actions. Under the German system, where revocation or nullity actions cannot be filed before the infringement court, but in a separate case before the Federal Patent Court, such actions are only filed in about 25-28% of the infringement cases. Under the new system, where the defendant has the possibility to counter-sue before the same court, one will certainly have a similar practice as one can see it today in countries with a combined system where more than 90 % of defendants in infringement cases counter-sue by way of an invalidity complaint. This does not only considerably *slow down a procedure* in comparison to “pure” infringement cases, but it also brings about an increase in cost, since the increased number of invalidity cases, in comparison to the German practice of today, would need more manpower – and thus require more money⁴.

The result will be that nobody can seriously promise that the future EU courts will offer the same financial conditions to SMEs as they can be found today before the German courts, that is, if the EU system shall be self-financing.

b) Considerably higher cost through central revocation actions

EPO opposition proceedings today can be conducted in the EPO within a reasonably cost frame. Complaints are only raised by users about the length of time the EPO normally needs which often holds up infringement litigation considerably. With centralized jurisdiction of the EEUPC which would include EP patents, defendants in an infringement case will be able to file a *central revocation attack* before a court if they see this

³ EEUPC judges are expected to dispose of ca. 25 cases per year which, if this figure also includes settlements, withdrawals etc., would be too low for an experienced and efficient patent judge in the first instance

⁴ As far as the hearing is concerned, this time is already covered by the one day hearing per case. However, attorneys' time must be added with a factor 3 to 4 in comparison to the German revocation cost, since the number of cases filed will increase from ca. 25 to 28% to more than 90%.

as a strategic advantage in a given case; in fact they can also do this after an EPO opposition has remained unsuccessful.

In such court actions expert opinions on each side, court experts and witness hearings could significantly change the litigation strategies in Europe, and such central attacks with eventually lengthy trials would also hit SMEs which file 50% of the EP patents. Companies with tight budgets might reconsider their filing strategy, if EP patents fall under the exclusive jurisdiction of the EEUPC. If *no option* is foreseen for EP patents to litigate before the national courts⁵ as today - which is a growing request coming not only from SMEs but also from large corporations⁶-, companies might be forced to go back to the national offices and file their patents there⁷. What consequences this may have for the budget of the EPO is still open. But it would certainly not be reasonable to take this risk, which is unnecessary under the circumstances.

The following drawing will show⁸ that only few industry groups need the EPO, while a majority could also switch to national offices without cost disadvantages.

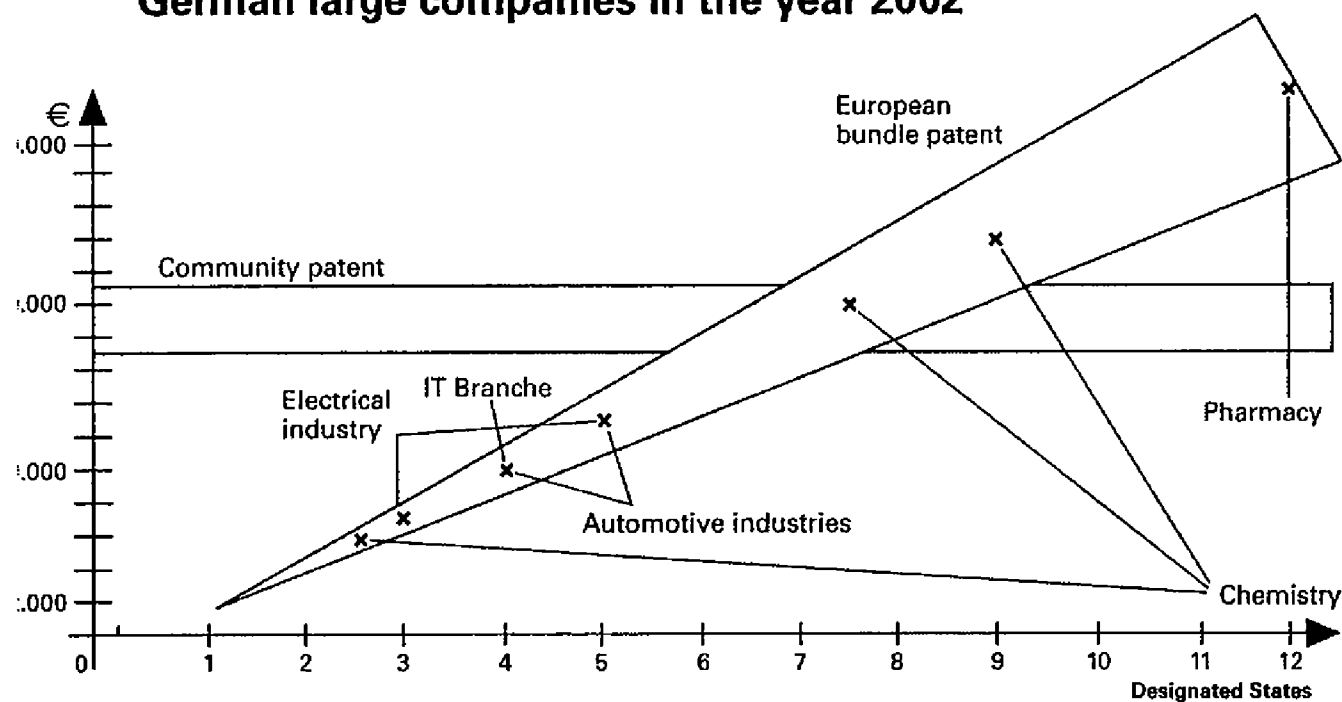
⁵ For "bundle patents" a revocation action must be filed separately in each country, so that no central court attack is possible, and the procedural risks are foreseeable

⁶ A request for an option to litigate EP patents before national courts has also been raised in a paper of the Confederation of British Industry (CBI) of November 2009 submitted to the EU Commission: „We consider strongly that the Court should not have exclusive jurisdiction in relation to European patents ... There should be no withdrawal of the European patent system, which should remain in place and co-exist as should national patents ... Use of the UPLS must be optional and not mandatory in respect of existing European patents“

⁷ To the SMEs must be added a number of large pharmaceutical applicants which fear that a central attack will unnecessarily endanger their valuable patents, so that the national offices are preferable.

⁸ Cited from a study of the Siemens patent department in 2002.

Typical number of Validations per EP application – German large companies in the year 2002



Already before the Opinion of the Advocates General had become known, the Draft Agreement contained a number of uncertainties about the quality, efficiency and cost, and one can assume that there would be no significant difference between SMEs and large corporations in this respect, so that as many as 90 % of proprietors of EP patents might opt out of the system, in order to avoid being “trapped” by the new rules. This concerns also the opt-out possibility under Art. 58 of the Agreement before its entry into force under which more than 500 000 granted patents may be transferred to the national court systems and thereby avoid the above disadvantages and uncertainties of the new court.

c) The Revision Clause

Among other unpredictable implications must be mentioned the *Revision Clause in the Council Conclusions* of December 4, 2009. If implemented this would result in an abolishment of local languages by the establishment of “multinational panels”, which would consist of a mix of nationalities of judges for whom there would exist no requirement to speak the language of the country of the proceeding, so that they would presumably only be able to communicate in English – if at all. SMEs which are accustomed to litigation in their own home countries before their own judges, will hesitate accepting unfamiliar judges, foreign languages and an increase of litigation cost by expensive translations of documents or even interpreters for the judges during hearings. So already the expectation that this change will happen, could be a reason for migration.

It might have been overlooked until today that it was not any of the small and medium companies which had requested the institution of a Community patent and a centralized jurisdiction, since the reason for this request was the allegedly unacceptable situation of parallel litigation and diverging decisions in Europe. Since SMEs have rarely had parallel litigation, there was no request for Community litigation coming from the SMEs. This shows that it would be highly unfair to deprive one part of the users of a procedure which they have used successfully for thirty years only to improve the situation for another group of users which may represent perhaps 10% of the litigating parties.

d) Users need time to test the system.

If there will not be given an option for EP patents from the beginning to continue using the national courts, the proposed transitional periods must definitely be extended, since with only seven or even five years they are unreasonably short. It would not be appropriate to force users into a system which they have no chance to test in practice. If one makes a simple calculation and adds up the (1) *Granting and opposition period* [5 -8 years], (2) the time until *first infringements occur* and the first cases *are decided* after *two instances* [5 – 8 years] and (3) the time until enough *representative cases* by *enough different divisions have become final* in which the key legal questions have been dealt with [another 5 to 8 years], one must calculate at least 20 years to convince users of the quality of the system⁹. It may be recalled that after 1978 the *first litigation* based on an EP patent which reached the German Supreme Court was decided *ten years* after the filing date in the EPO.

It is obvious that one cannot base a filing strategy for the whole EU on one single decision of the highest court. Users would get the impression that by being forced into a system which they have no chance to test they should not be given the time to reflect, because the drafters are not sure about the quality of the system. While it may be understandable that one would like to have large numbers of cases shortly after starting the system, *this goal will not be achieved* because of the uncertainty about quality, cost and financial risks.

⁹ This also shows that the time frame within which the Revisions Clause comes into play is unreasonable as well and proves that it is a purely political clause.

II. The Opinion Proceeding before the Court of Justice

1. Contradictory pleadings of Member States in the Hearing

The major point of uncertainty exists, however, because the further work on the court system will decisively depend on the outcome of the opinion procedure before the European Court of Justice. There was a great deal of controversy between Member States in the hearing in May¹⁰, whether or not the Draft Agreement was compatible with the Treaties, and the Opinion of the Advocates General which has become known a few months ago regards indeed the Draft Agreement as incompatible.

2. Green Light for EPLA?

Apart from the statement of incompatibility for which a lack of ECJ competence in the future patent court system has been given as a main argument, the most interesting recitals are 58, 60 and 63 of the Opinion which should be reproduced here:

58. With regard to the legality of creating the PC as an international court, situated outside the judicial system of the European Union and enjoying sole competence for certain types of appeal, one should first recall that *Union law is not in principle opposed to an international agreement providing for its own judicial system*¹¹...

60. We should first point out that it is not the competences of the future PC concerning the European patent that pose a problem here: in fact, judicial competences concerning the European patent have always been exercised by the national courts; *the Member States are therefore free to assign them to an international body, created by mutual consent and having the vocation of being "their" common court*. However, the question of knowing whether and to what extent that same international body can also be assigned certain judicial competences concerning the future Community patent is more delicate

63. *...Disputes between individuals do not fall within the competence of the European Court of Justice*. It is the national courts that are always called to hear disputes between individuals, whether or not they raise questions of Union law, even when the validity, interpretation or infringement of a European intellectual property title is at stake. This definition of judicial competences reflects the principle of assignment³⁸, according to which any competence not assigned to the Union in the treaties belongs to the Member States

¹⁰ See the report of the Hearing by Pagenberg, 41 IIC 695 (2010)

¹¹ The opinion adds here a footnote which reads: *See Opinion 1/91 of 14 December 1991 (ECR. p. I-6079): in point 40 of the aforesaid opinion, the Court confirms that the conclusion of an international agreement providing for a judicial system such as that of the EEA Court is "in principle, compatible with Community law"; in point 70 of that same opinion, the Court also states that "an international agreement which provides for a judicial system having a competent court for interpreting its provisions is not, in principle, incompatible with Community law"*.

This reads like an official rehabilitation of the members of the EPLA Working Party who during the discussions on EPLA before 2006 had been accused by the representatives of the Commission at that time of having no right and competence to negotiate the EPLA Agreement without the authorization of the EC. Now the AGs take exactly the opposite view, and it will be interesting to see where the ECJ stands.

Outlook

The question will now be – assuming the ECJ argues along the same lines as the AGs – whether the work on EPLA should be resumed, if the political problems as to if and how the ECJ should be involved in the future patent litigation beyond the rules laid down in Art. 47 of the Draft Agreement will be regarded as too complicated or too time-consuming. The lack of trust of the Advocates General¹² towards the future patent judges will not make it easy to find a solution which will be acceptable by the users, namely large corporations and SMEs. More involvement of EU instances, be it the EU Commission, Member States or the courts in Luxembourg would cause enormous problems. The well-known blog IPKat has summarized the views of the users recently as follows:

The possibility of all European patent litigation going to the ECJ will certainly horrify many industry groups who are almost universally opposed to such a prospect.. This has long been regarded by many as a complete deal-breaker because of the Court's record in relation to trade marks, as well as the slow nature of the ECJ process.

Using the EPLA as a testing ground between a smaller number of countries in order to find out whether a multinational patent court systems can properly function and will be accepted by the users, before the larger and presumably more complicated EEUPC will be started, may avoid mistakes which could perhaps not be remedied anymore or only with considerably greater difficulties.

¹² See among others par. 86 of the Opinion: *One should therefore not rule out the possibility that the future PC will ignore some of the principles and provisions of Union law mentioned above or that it will not take them into account sufficiently when resolving disputes between individuals concerning patents....*

AIPPI's work on the Protocol, now "EPLA", and a European Patent Court (question 165) and on the evolution of the discussions as regards the Draft Regulation on Community ("European Union") Patent (question 162)

AIPPI Special Committee Q162
Community Patent Regulation

Annual report of Special Committee Q162 prepared for the
AIPPI Paris Congress October 3-6, 2010

1 Names and Functions of Committee Members

Chairman: Peter-Ulrik Plesner (Denmark)
Co-Chairman: Luc Santarelli (France)
Secretary: Enrique Armijo (Spain)

Members: Geoffrey Bayliss (United Kingdom)
Nanno Lenz (Germany)
Anna Ferreira da Silva (Portugal)
Takashi Ishida (Japan)
Gerald J. Mossighoff (USA)
Luigi Carlo Ubertazzi (Italy)

Reporter General: Jochen Bühling

2 History

The special committee was established for the purpose of studying and preparing an opinion paper expressing the views of AIPPI national and regional groups on the European Commission Proposal for a Community Patent Regulation.

The special committee has prepared a report of 10 June 2002 for the Lisbon EXCO meeting, a report of 30 October 2003 for the Lucerne EXCO meeting, a report of 1 June 2004 for the Geneva Congress, a report of June 2005 for the Berlin EXCO and a report of July 2006 for the Gothenburg Congress, a report of August

2007 for the Singapore EXCO meeting and a report for the Boston Congress meeting of September 2008 and a report for the Buenos Aires ExCo meeting in September 2009.

Neither the EXCO meetings nor the Congress have passed any resolution in relation to the Community Patent.

3 Development since the Buenos Aires ExCo

In relation to the draft Agreement on the European and Community Patent Court and draft statute we refer to the Q 165 report. The latest draft is dated 23 March 2009 - ST07 928.

The Court of Justice of the European Union (CJEU) held its first oral hearing on 18 May 2010 concerning the legality of the proposed Patents Court Agreement and EU-Patent Regulation. The Advocates General has issued an opinion of 2 July 2010, in accordance with which the current draft is not in all aspects in accordance with Community Law.

The court's opinion is expected later this year.

On 4 December 2009 the Council of the European Union adapted a "conclusion on an enhanced patent system in Europe.

Reference is made to
Article 4,

"AGREES that the following conclusions on the main features of the European and EU Patents Court (I)" could form the basis of, while on the EU patent (II) they should form part of the overall final agreement on a package of measures for an Enhanced Patent

System in Europe comprising the creation of a European and EU Patents Court (EEUPC), an EU patent, including the separate regulation on the translation arrangements referred to in point 36 below, and Enhanced Partnership between the European Patent Office and central industrial property offices of Member States and, to the extent necessary, amendments to the European Patent Convention;"

article 36

"The EU Patent Regulation should be accompanied by a separate regulation, which should govern the translation arrangements for the EU patent adopted by the Council with unanimity in accordance with Article 118 second subparagraph of the Treaty of the Functioning of the European Union. The EU Patent Regulation should come into force together with the separate regulation on the translation arrangements for the EU patent."

and article 50

"In order for the EU patent to become operational, to be extent necessary, amendments would be made to the European Patent Convention (EPC). The EU and its Member States should take any necessary measures and put them into force, including those for the accession of the EU to the EPC. Amendments to the EPC deemed necessary in this regard should not imply any revision of substantive patent law, not related to the creation of the EU patent."

The latest proposal for a Council Resolution on the EU Patent is dated 27 November 2009, document 16113/09.

The European Parliament has had its first reading on the proposal of the regulation on the EU-patent. In May 2010 the European Patent Court gave its opinion regarding the EU-Council according to the first consultation procedure, which was made in 2002.

On 30 June 2010 the Commission presented a new proposal for a council regulation on the translation arrangements for the European Union Patent. The proposal is made under the Lisbon treaty, article 118, second paragraph. It shall be adopted by a special legislation procedure with the Council acting unanimously after consulting the European Parliament.

The main points in the draft translation arrangements are as follows:

- The EU-patent will be issued following the same language regime as the EP-Patent, i.e. in one of the official languages of EPO, English, German or French with the claim translated into all 3 languages.
- In the case of a legal dispute the patent proprietor provides at the request and the choice of the alleged infringer a full translation of the EU patent into an official language of the Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled. The patent proprietor shall also provide a full translation of the EU patent into the language of proceedings of the competent court in the European Union at the request of that court. The costs of such translations shall be borne by the patent proprietor.
- Necessary arrangements shall be made between the European Union and the EPO to make machine translations of patent applications and patent specifica-

tions available in all official languages of the European Union without additional costs for the applicants. Such translations should be available on demand, online and free of charge on publication of the patent application. They would be provided for purposes of patent information and would not have legal effect.

- European patent applications may be filed in any language in accordance with Article 14 (2) of the EPC. Where the language of filing is not an official EPO language, a translation of the application into one of the official languages of the EPO must be provided, within a prescribed time period, so that the application can be processed by the EPO. Under the current Implementing Regulations of the EPC²⁰ applicants filing in a language not in common with official languages of the EPO are eligible for a partial reimbursement of the translation costs at various stages of the procedure before the EPO by way of a fee reduction. This would also apply to EU patents. However, with respect to applicants for EU patents based in EU Member States, necessary arrangements shall be made to provide not only for a partial, but for a full reimbursement of the translation costs up to fixed ceilings. These additional reimbursements would be financed from the fees of EU patents collected by the EPO.

4 Comments to the proposal for a Council Resolution on the EU Patent

The Special Committee will mention the following rules in the proposal which we believe could be discussed further:

Article 9; Limitation of the effects of the EU Patent, contains the so-called Bolar exemption. The wording is as follows:

"The rights conferred by the Community patent shall not extend to:

...

(b.1) acts carried out solely for the purpose of conducting the necessary tests and trials in accordance with Article 13 of Directive 2001/82/EC or Article 10 of Directive 2001/83/EC; in respect of any patent covering the product within the meaning of either of the said Directives;"

The proposed wording will give room both for registration of new original products and generic products.

Article 9a; Government use

The proposal is as follows:

"Any provision in the law of a Member State allowing non-commercial use of national patents by or for the government may be applied to EU Patents, but only to the extent that the use is necessary for essential defence or national security."

It seems that this exemption is not restricted to the use of the EU Patent within the specific Member States.

Article 11; Rights conferred by the EU Patent application after publication

The rule concerning compensation in paragraph 2 states:

"In determining the reasonable compensation, the [European and Community Patents Court] shall take into account all relevant aspects, such as the economic consequences to the injured party of the use made of the invention, as well as the undeserved profits made by the person using the invention and the behaviour and the good or bad faith of the parties. The compensation shall not be punitive."

It seems that the compensation is not limited to the actual loss of profit of the patentee, even if the undeserved profit is higher than the actual loss.

Article 13; Process patents: burden of proof

"1. If the subject-matter of a Community patent is a process for obtaining a new product, the same product when produced without the consent of the proprietor shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.

2. The reversal of the burden of proof provided for in paragraph 1 shall apply equally where there is a strong likelihood that the same product was obtained by the process and the holder of the Community patent has not been able, despite reasonable efforts, to determine what procedure has actually been used.

In adducing proof to the contrary, the legitimate interests of the defendant in protecting his/her manufacturing and trade secrets shall be taken into account."

Both alternatives in TRIPS article 34 is thus incorporated.

Articles 15, 16 and 17; Entry of rights in the Register of EU Patents

Article 15 concerning transfer contains a provision that transfer of shares to the extent to which it is verified by such written documents referred to in paragraph 1 shall have effect viz-a-viz third parties only after entry in the Register of EU Patents.

Article 16; Rights in rem and Article 17; Levy of Execution do not contain a similar requirement of registration. Today this is not a requirement in all countries.

The proposed system is thus that both transfer, right in rem and levy of execution shall be entered in the Register of EU Patents in order to be legally binding.

Article 19; Contractual licensing contains the following provisions:

"1. The Community patent may be licensed in whole or in part for the whole or part of the Community. A licence may be exclusive or non-exclusive.

2. The rights conferred by the Community patent may be invoked against a licensee who breaches any restriction in the licensing contract.

3. Article 15(2) and (3) shall apply to the grant or transfer of a licence in respect of a Community patent."

In certain jurisdictions there is an assumption that a licence is a simple licence if it is not explicitly stated that it is exclusive. There can further be an assumption that a simple licensee is not entitled to grant sublicenses. It is a question who is entitled to sue under the patent for infringement, and who can defend the patent in validity proceedings can also be regulated.

Article 21; Grant of compulsory licences

Paragraph 1 concerns a provision in accordance with which a third party can request a compulsory licence in case of lack or insufficient exploitation of a EU Patent.

Article 21.2 contains a provision in accordance with which the proprietor of a national or EU Patent who cannot exploit his/her own patent may without infringing an older EU Patent then request a compulsory licence of this older EU Patent. That is a dependent patent.

Article 28; Grounds for revocation

Article 28 refers to the grounds for revocation mentioned in Article 52 to 57 of the EPC.

Paragraph 1(b) refers to the condition in article 83 EPC. Compliance with Article 84 is not a reason for revocation. It could be considered if this is reasonable.

Article 54; Prohibition of simultaneous protection

In accordance with article 54 it is not possible to have a granted EU Patent and a national patent within the territory of the EU Patent. Today it is in certain jurisdictions possible to have simultaneous protection in form of both an EU Patent and a national patent.

According to Article 28 1. (f) an EU patent may be revoked if the subject-matter of the patent is not new having regard to the content of an earlier national patent application or an earlier national patent made public in a Member State on or after the filing or priority date of the EU patent .

Thus, there is not the possibility of conversion of an EU patent into a national patent in a Member State where the earlier national patent application or patent referred to above would not be a bar to patentability (similar to Article 108 of the Council Regulation (EC) No. 40/94 on the Community Trade Mark).

5 Future work for the Special Committee

The special Committee does not propose a resolution on the proposed Community Patent Regulation for the Paris Congress. The Special Committee Q 162 will continue to follow the developments and report to the Bureau and the next congress.

July 9, 2010

AIPPI Special of Committee Q 165

**Optional Protocol to the EPC with regard to Litigation
Concerning European Patents**

Dr. Jochen Pagenberg
Chairman Q 165

Compostion of Special Committee Q165

Chair: Dr.Jochen Pagenberg (Germany)
Co-Chair: Piet C. Schalkwijk (Netherlands)
Secretary: vacant
Members: Raimondo Galli (Italy)
Thierry Sueur (France)
Raúl Bercovitz (Spain)
Konrad Becker (Switzerland)
Peter Plesner (Denmark)

I. Present Status of the work for the European and EU Patent Court System

1. Summary of developments

This Committee and its work depend to a great extent on political developments which have influenced the subject matter and the course of the discussion to a great extent. New papers and draft statutes have been produced in Brussels each month and came back in revised form within even shorter times. Since the Chairman of this Committee is at the same time a member of the EU Commission's expert group consisting of five judges and five attorneys from 7 different countries, he has attended for about three years the regular discussion meetings of this group in Brussels. These were dealing at first with a number of drafts of the Agreement for what is now called the European and EU Patent Court (EEUPC), and then with the Rules of Procedure, with only a short excursion to the Regulation for the Community Patent, now named EU Patent. All three documents are still not in final form and partly disputed.

The Agreement is before the ECJ waiting for the opinion on its compatibility with the Treaties. An unofficial version of the Opinion of the Advocates General has become known a few

weeks ago which declares the Draft Agreement incompatible with the EU Treaties. The Opinion of the ECJ is expected by the end of the year.

2. Status of the Rules of Procedure

The expert group had started off with the aim and corresponding instructions from the Commission to establish a streamline procedure of high quality and affordable cost encouraged by the second Venice Resolution of the Judges' Forum¹,

- with generally one-day hearings for all pleadings and evidence discussions, and
- decisions by the local and regional chambers within a year from the filing date of an action.

A number of large corporations, also from outside the EU, have continued pressing for a procedure which would allow more extensive evidence trials. Although the principle of proportionality is mentioned in the Rules which may allow for exceptions from the one-day hearing rule, it is still open how the aim of an efficient cost-conscious procedure can be defended. The discussion shows that one system might not fit all users.

3. Cost

a) The EEUPC will not offer a cheap procedure

Cost is a point which is closely related with the length of trials and hearings. For a number of reasons the predictions as to litigation cost published so far are unrealistic. Those who expect that the new EEUPC will be able to offer patent litigation at the cost of the continental systems, in particular of the German courts seem to overlook a number of issues which do not match and will in fact be considerably different from the German situation of today. Only two points may be mentioned.

- The litigation costs in Germany are normally calculated on the costs before the infringement courts which are not only very experienced, but which also, due to their largely different working procedure, are used to handle on average four infringement cases per hearing day, while under the EU combined system of infringement and revocation one hearing day per case will be needed, which is only 25% in comparison to Germany now. This means that there is a difference between the output figures of a factor 4 which will, of course, also translate into four times higher cost if one applies the same criteria to it.

¹ Published in 38 IIC 826 (2007)

- Under the German system, only about 25 to 28% of the infringement cases filed are being answered by a revocation action before the Federal Patent Court. Under the new system, where the defendant has the possibility to counter-sue before the same court, one must expect a similar practice as one can see it today in countries with a combined system where more than 90 % of defendants in infringement cases counter-sue for invalidity or revocation which would need more manpower – and thus more money.

These two points show already that nobody can seriously promise that the future EU courts will offer the same financial conditions as they can be found today before the German courts, if the EU system shall be self-financing.

b) Considerably higher cost through central revocation actions

EPO opposition proceedings today can be conducted in the EPO within a reasonably cost frame. Complaints are only raised by users about the length of time the EPO normally needs which often holds up litigation considerably. With centralized jurisdiction of the EEUPC which will include EP patents, defendants in an infringement case will be able to file a central revocation attack before a court if they see this as a strategic advantage in a given case; in fact they can also do this after an EPO opposition has remained unsuccessful.

Expert opinions on each side, court experts and witness hearings could significantly change the litigation strategies in Europe, and such central attacks with eventually lengthy trials would also hit SMEs which file 50% of the EP patents. Companies with tight budgets might reconsider their filing strategy, if EP patents fall under the exclusive jurisdiction of the EEUPC. If no option is foreseen for EP patents to litigate before the national courts as today² where no central court attack is possible, companies might be forced to go back to the national offices and file their patents there³. What consequences this may have for the budget of the EPO is still open. This concerns also the opt-out possibility under Art. 58 of the Agreement before the entry into force of the Agreement under which more than 500 000 granted patents may be transferred to the national court systems and thereby avoid the above disadvantages of the new court.

² A request for an option to litigate EP patents before national courts has also been raised in a paper of the Confederation of British Industry (CBI) of November 2009 submitted to the EU Commission: „We consider strongly that the Court should not have exclusive jurisdiction in relation to European patents ... There should be no withdrawal of the European patent system, which should remain in place and co-exist as should national patents ... Use of the UPLS must be optional and not mandatory in respect of existing European patents“

³ To the SMEs must be added a number of large pharmaceutical applicants which fear that a central attack will unnecessarily endanger their valuable patents, so that the national offices are preferable.

c) The Revision Clause

Among other unpredictable implications must be mentioned the Revision Clause in the Council Conclusions of December 4, 2009. If implemented this would result in an abolishment of local languages by the establishment of "multinational panels", which would consist of a mix of nationalities of judges for whom there would exist no requirement to speak the language of the country, so that they would presumably only be able to communicate in English – if at all. SMEs which are accustomed to litigation in their own home countries before their own judges, will hesitate accepting unfamiliar judges, foreign languages and an increase of litigation cost by expensive translations of documents or even interpreters for the judges during hearings. So already the expectation that this change will happen, could be a reason for migration.

d) Users need time to test the system.

If there will not be given an option for EP patents from the beginning to continue using the national courts, the proposed transitional periods must definitely be extended, since with only 7 years they are unreasonably short. It would not be appropriate to force users into a system which they have no chance to test in practice. If one makes a simple calculation and adds up the (1) Granting and opposition period [5 -8 years], (2) the time until first infringements occur and the first cases are decided after two instances [5 – 8 years] and (3) the time until enough representative cases by enough different divisions have become final [another 5 to 8 years] in which also the key legal questions have been dealt with, one must calculate at least 20 years to convince users of the quality of the system⁴. It may be recalled that after 1978 the first litigation based on an EP patent which reached the German Supreme Court was decided ten years after the filing date in the EPO. This shows that one cannot base a filing strategy for the whole EU on one single decision of the highest court. Users would get the impression that by being forced into a system which they have no chance to test they should not be given the time to reflect, because the drafters are not sure about the quality of the system.

II. The Opinion Proceeding before the Court of Justice

⁴ This also shows that the time frame within which the Revisions Clause comes into play is unreasonable as well and proves that it is a purely political clause.

1. Contradictory pleadings of Member States in the Hearing

The major point of uncertainty exists, however, because the further work on the court system will decisively depend on the outcome of the opinion procedure before the European Court of Justice. The chairman of Special Committee Q 165 has attended the hearing before the ECJ on May 18, and there was a great deal of controversy between Member States whether or not the Draft Agreement was compatible with the Treaties; a summary of the hearing is attached which will have been published in IIC in a few days from now.

2. Green Light for EPLA?

Apart from the statement of incompatibility for which a lack of ECJ competence in the future patent court system has been given as a main argument, the most interesting recitals are 58, 60 and 63 of the Opinion which should be reproduced here:

58. With regard to the legality of creating the PC as an international court, situated outside the judicial system of the European Union and enjoying sole competence for certain types of appeal, one should first recall that Union law is not in principle opposed to an international agreement providing for its own judicial system⁵...

60. We should first point out that it is not the competences of the future PC concerning the European patent that pose a problem here: in fact, judicial competences concerning the European patent have always been exercised by the national courts; the Member States are therefore free to assign them to an international body, created by mutual consent and having the vocation of being "their" common court. However, the question of knowing whether and to what extent that same international body can also be assigned certain judicial competences concerning the future Community patent is more delicate

63. Disputes between individuals do not fall within the competence of the European Court of Justice. It is the national courts that are always called to hear disputes between individuals, whether or not they raise questions of Union law, even when the validity, interpretation or infringement of a European intellectual property title is at stake³⁷. This definition of judicial competences reflects the principle of assignment³⁸, according to which any competence not assigned to the Union in the treaties belongs to the Member States

⁵ The opinion adds here a footnote which reads: *See Opinion 1/91 of 14 December 1991 (ECR. p. I-6079): in point 40 of the aforesaid opinion, the Court confirms that the conclusion of an international agreement providing for a judicial system such as that of the EEA Court is "in principle, compatible with Community law"; in point 70 of that same opinion, the Court also states that "an international agreement which provides for a judicial system having a competent court for interpreting its provisions is not, in principle, incompatible with Community law".*

This reads like an official rehabilitation of the members of the EPLA Working Party who during the discussions on EPLA before 2006 had been accused by the representatives of the Commission at that time of having no right and competence to negotiate without the authorization of the EC alleging that only the European Community had competence for creating an international court, even if only a few members of the Community were willing to join. Now the AGs take exactly the opposite view, and it will be interesting to see where the ECJ stands.

Outlook

The question for Committee Q 165 will now be – assuming the ECJ argues along the same lines as the AGs – whether the work for EPLA should be resumed while leaving aside the EEUPC for a while, since EPLA might be easier to be accomplished now. Or whether one should at the same time explore parallel avenues around the political stumble stones of the EEUPC, in order not to lose time for the project as a whole. Historically the second alternative has proven very successful when the Strasbourg and the Munich Patent Conventions were discussed in the 1960ies by different teams who succeeded to agree on identical texts of substantive laws which are still valid today.

Dr. Jochen Pagenberg

September 10, 2010

**A centralized court for patent litigation
in Switzerland**

by Peter Heinrich

SWITZERLAND

NEW PATENT LITIGATION COURT FOR ALL OF SWITZERLAND

Switzerland, member of the European Patent Organisation, will have **one first-instance patent court for the whole territory** commencing its activity presumably on January 1, 2012.

The new Swiss Federal Patent Court will replace the present 26 cantonal courts having jurisdiction over patent matters. This concerns **infringement as well as validity actions** (Switzerland continues to have no "bifurcation", i.e. the same court deals with infringement and validity actions or questions).

The Federal Patent Court (Bundespatentgericht, Tribunal fédéral des brevets, Tribunale federale sui brevetti) will consist of judges having a **law degree** and judges with a **scientific or engineering background**. All judges are required to have a sound knowledge of **patent law**. The Federal Patent Court will normally sit in threes, of which at least one judge will have a law degree and at least one a technical background. The president – normally assisted by a technical judge – will decide on preliminary measures.

The Patent Court will have exclusive **jurisdiction** over infringement and validity actions including actions for permanent and preliminary injunction, ascertainment, damages, accounting of profits or compensating unjust enrichment. As regards actions based on licence agreements, transfer of patents, employees' rights in inventions and other matters related to patents, the jurisdiction of the Patent Court is not exclusive.

As regards procedure, the patent court will have the new possibility of a "**saisie descriptive**" (description of products or processes by an expert to be used as a means of proof in future litigation) similar to the French example.

The court may allow the parties to use the **English language** in the proceedings.

Because of the new specialised court and also because Switzerland will have a new **unified Civil Procedure Code** (starting from January 1, 2011), patent litigation in Switzerland is likely to make a considerable leap forward as far as quality and speed are concerned.

Peter Heinrich, Streichenberg Attorneys at law, Zurich

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EPLAW Yearbook 2009 - 2010

Table of content

FOREWORD by our President, Dr. Jochen Pagenberg p. 1

2000-2010 : TEN YEARS OF EPLAW : Pierre Véron speech at the Sixth Venice Judges Forum (29 October 2010) p. 3

CONGRESS of 20 November 2009 in Brussels

One of the topics was limitation; the discussion was prepared by the following presentation :

Limits on limitation – Central national limitations and their effect on national proceedings

By Dr. Jochen Pagenberg p. 7

Another topic was the contemplated rules of procedure of a future European and Community Patent Court, about which several presentations were made; two presentations during the Fifth Venice Judges Forum in Venice (30 October 2009) are also published here. The draft rules of procedure (16 Oct. 2009) referred to are published in our yearbook 2008-2009, pp. 65-110.

Rules of procedure of a Future European and Community Patent Court – Written procedure

By Dr. Klaus Grabinsky p. 23

Jurisdiction, venue, court languages

By Prof. Dr. Winfried Tilmann p. 28

Practical comments

By Edward Nodder p. 31

The oral hearing under the Future UPLS CFI RoP

By Gonzalo Ulloa p. 36

The ‘Judge-rapporteur’ in the European and Community Patents Court	
By Christophe Ronse	p. 41

Interim injunctions	
By Gabriella Muscolo and Pierre Véron	p. 49

EPLA rules on representation	
By Christian Gassauer-Fleissner	p. 56

The COMMUNITY PATENT (now the “EUROPEAN UNION PATENT”)

Proposal for a Council regulation (EU) on the translation arrangements for the European Union patent (Commission’s document COM (2010) 350 final – 2010/0198 of 30 June 2010 – {SEC(2010) 796} and {SEC(2010) 797}	p. 61
---	-------

Press release : Preparation for the Competitiveness Council of Ministers, 10 November 2010 (MEMO/11/551 of 9 November 2010)	p. 73
--	-------

(The unanimous agreement required in the Council was not reached).

(See also, as reproduced hereinafter :

- *Conclusions adopted by the Council on 4 December 2009,*
- *AIPPI’s report Q 162 in Paris).*

Towards a EUROPEAN UNION PATENT COURT ?

(All documents reproduced hereinafter refer to the Working document of the Council of the European Union regarding a Draft Agreement on the European and Community Patents Court and Draft Statute, doc. 7928 / 09 of 23 March 2009, published in our Yearbook 2008-2009, pp. 27-64).

Conclusions adopted by the Council (Competitiveness) on 4 December 2009 on an enhanced patent system in Europe (Council’s document 17229 / 09 of 7 December 2009)	p. 75
--	-------

Jochen Pagenberg, < The ECJ on the Draft Agreement for a European Community Patent Court – Hearing of May 18, 2010 >, IIC, 2010 (with the author’s kind permission)	p. 89
---	-------

Statement of position by the Advocates General, presented on 2 nd July 2010 (English translation by Simmons & Simmons, with the kind permission of Kevin Mooney)	p. 103
---	--------

Original French version : Prise de position des avocats généraux, présentée le 2 juillet 2010, dans l’affaire Avis 1/09 (demande d’avis du Conseil de l’Union européenne)	p. 129
---	--------

Introductory comments to the discussion of the Opinion given by the Advocates General on the compatibility of the Draft agreement on the European and Community (E.U.) Patents Court with E.U. law (Sixth Venice Judges' Forum 29-30 Oct. 2010)

By Prof. Dr. Winfried Tilmann p. 147

An integrated jurisdictional system for European and EU patents – Does it fit all ? – The practitioner's point of view –

By Dr. Jochen Pagenberg p. 152

(See also AIPPI's report Q 165 in this respect, as reproduced hereinafter)

AIPPI's work on the Protocol, now "EPLA", and a European Patent Court (question 165) and on the evolution of the discussions as regards the Draft Regulation on Community ("European Union") Patent (question 162)

(Question 165: see the previous Yearbooks from 2005-2006 for the documents from 2001 to 2008 and our Yearbook 2008-2009, p. 111 for the report 2009 in Buenos Aires)

Report of the **special committee Q 165** in Paris (2010) p. 161

(Question 162 : see our Yearbook 2008-2009, p. 116 for the report 2009 in Buenos Aires)

Report of the **special committee Q 162** in Paris (2010)..... p. 170

OTHER INFORMATION

A centralized court for patent litigation in Switzerland

By Peter Heinrich p. 177

THE OFFICERS OF THE ASSOCIATION 2009 – 2010 p. 179

MEMBERSHIP LIST..... p. 181

HOW TO APPLY FOR MEMBERSHIP..... p. 190

Table of content p. 191