

The Constitutional Implications of the EU Patent

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Council Decision of March 2011 to authorize enhanced co-operation as regards unitary patent protection – Proposed Regulations implementing enhanced co-operation in this area – Proposed treaty concerning patent litigation – Challenges to the validity of the decision authorizing enhanced co-operation – Incompatibility of the patent litigation treaty with EU law – EU external competence concerning intellectual property and civil jurisdiction issues

INTRODUCTION

On 10 March 2011, the Council for the second time authorized ‘enhanced co-operation’ – the decision to negotiate European Union (EU) measures in which only some of its member states participate.¹ Unlike the first such authorization, which concerned conflict-of-law rules in divorce (known in practice as the ‘Rome III’ rules),² the second authorization, concerning a form of unitary patent protection (previously known as the ‘Community patent’, and then the ‘EU patent’), is highly controversial, and has been challenged by the two non-participating member states (Spain and Italy) before the Court of Justice.³

Furthermore, almost simultaneously, on 8 March 2011 the related plans for EU participation in the negotiation of an international treaty relating to patent litigation were thwarted, by a ruling of the Court of Justice of the European Union (the ‘Court of Justice’) that the EU’s participation in the treaty in question

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¹ *OJ* [2011] L 76/53.

² *OJ* [2010] L 189/12, implemented by Reg. 1259/2010, *OJ* [2010] L 343/10. Fourteen member states participate in this measure. See generally S. Peers, ‘Divorce, European Style: The First Authorization of Enhanced Cooperation’, 6 *European Constitutional Law Review* (2010) p. 339–358.

³ Cases C-274/11 *Spain v. Council* and C-295/11 *Italy v. Council*, pending. For the arguments in these cases, see Council Docs. 12500/11 and 12502/11, both 5 July 2011. Conversely, as regards Rome III, neither the Decision authorizing enhanced cooperation or the Reg. implementing it were challenged in the Court of Justice. Despite the non-participation of two member states, this paper will continue to refer to ‘the EU patent’ for the sake of simplicity.

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would be incompatible with EU law.⁴ The question now arises how this incompatibility might be cured.

Since these two issues are closely interconnected in practice, the future development of an EU patent likely depends upon agreeing upon an alternative system for patent litigation that is both compatible with EU law and meets the needs of practitioners. But the prospects for agreement on any alternative system for patent litigation are complicated by the decision to proceed with the EU patent by way of enhanced co-operation. Furthermore, both the decision to authorize enhanced co-operation in this area and the Court of Justice's judgment on the incompatibility of the proposed patent litigation treaty raise fundamental questions of their own regarding the constitutional law of the EU.

This paper sets out the complex background to these linked issues, then examines in turn the separate questions raised by the two recent developments and the future of the EU patent in light of the latest developments.

BACKGROUND

For several decades, the EU has been attempting to adopt rules on the creation of an EU patent, which would be integrated into the system of 'European patents' established by the European Patent Convention (EPC). The development of the EU patent can only be understood by first setting out the legal framework of the European Patent Convention, followed by the history of attempts to create an EU patent, in the context of other EU measures relevant to patents.

The European Patent Convention

The starting point as regards the protection of patents in Europe is the European Patent Convention, an intergovernmental agreement among 38 European states, including all 27 EU member states, but not including the EU itself.⁵ This Convention, signed in 1973 and amended in 2000,⁶ establishes a procedure for obtaining a 'European patent', following a single application to the European Patent Office (EPO) established by the Convention. The patent application can be made in any language, but must be translated into one of the official languages of the EPO (English, French and German). For those not filing in an official language, in practice there is a partial reimbursement of the translation cost by means of a fee

⁴ *Opinion 1/09*, judgment of 8 March 2011, not yet reported.

⁵ For the text of the EPC (1065 UNTS 199) and further information, see the EPC website: <www.epo.org>.

⁶ The original EPC was opened for signature on 5 Oct. 1973 and entered into force on 7 Oct. 1977; the amendments (*OJ* EPO 2007, 4th Spec. Ed.) were opened for signature on 29 Nov. 2000 and entered into force on 13 Dec. 2007.

reduction. National patent systems still co-exist with European patents, as applicants are free to apply for national patents only.

However, the European patent is generally referred to a 'bundle of national patents', because the patent granted by the EPO is only valid as regards the states for which it is granted,⁷ and the patent in question must then be validated in each of the states in which protection is sought. A state may require full translation of the entire patent into the language of that state, and this cost discourages applicants from designating a large number of countries in their application.⁸

It is possible for a group of EPC Contracting States to provide by means of a 'special agreement' that a European patent will have a 'unitary character' throughout their territories; they 'may provide' that European patents 'may only be granted jointly in respect of all of those States.'⁹ The procedure for amending the Convention provides for amendments to enter into force once ratified by three-quarters of the Contracting States; if the remaining states have not also ratified the amendments concerned by a time limit to be set, their membership is terminated. However, it is also possible to amend certain provisions of the Convention by means of a simplified procedure, in particular to adapt it to developments in EU legislation.¹⁰

The 2000 amendments to the EPC *inter alia* inserted a new provision expressly providing for further possible 'special agreements' among some or all EPC Contracting Parties, 'such as, in particular' a common European patent court, or an agreement waiving some or all of the translation requirements in the Convention.¹¹

Taking advantage of this possibility, in order to address translation costs, the 'London Agreement' of 2000,¹² ratified by some (but not all) Contracting Parties to the EPC, and only a minority of EU member states,¹³ requires its parties to dispense with translation requirements if they have a language in common with the EPO; otherwise the states concerned can (and do) still insist that at least the patent claims must be translated into their own language. Furthermore, in order

⁷ Art. 64 EPC.

⁸ Art. 65 EPC. The Court of Justice has ruled that this does not constitute a barrier to trade between member states: Case C-44/98 *BASF* [1999] ECR I-6269.

⁹ Art. 142(1) EPC. In that case, the provisions of Part IX EPC (Arts. 142-149a) apply (*see* Art. 142(2)).

¹⁰ Art. 33 EPC.

¹¹ Art. 149a EPC.

¹² Agreement on the application of Art. 65 EPC, *OJ* EPO 2001, 550. The Agreement was opened for signature on 17 Oct. 2000 and entered into force on 1 May 2008.

¹³ The Agreement has been ratified by eleven EU member states: France, Germany, the United Kingdom, Luxembourg, Denmark, Hungary, The Netherlands, Sweden, Latvia, Lithuania and Slovenia. It has also been ratified by five non-member states: Switzerland, Liechtenstein, Croatia, Monaco and Iceland.

to address the cost and complexity of litigation concerning European patents,¹⁴ a number of contracting parties to the EPC attempted during the last decade to negotiate a 'European patent litigation agreement' (EPLA), which would have provided for a common court with jurisdiction over the key aspects of litigation regarding European patents.¹⁵

There are, of course, a number of other international treaties regarding (*inter alia*) patents, in particular the Paris Convention for the Protection of Industrial Property,¹⁶ the Council of Europe's Strasbourg Convention on the unification of certain elements of patent law,¹⁷ the Patent Law Treaty,¹⁸ the Patent Cooperation Treaty,¹⁹ and within the World Trade Organization (WTO), the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).²⁰ With the exception of TRIPs,²¹ these treaties do not seem (at least for now) to raise major issues as regards the development of an EU patent, and so there is no need to examine them further.

The EU patent

There is a lengthy history of unsuccessful attempts to harmonize patent law in the EU, beginning in the 1950s and 1960s.²² Eventually in 1976, after agreement on the EPC, the EU member states agreed an intergovernmental Convention establishing a Community patent (the Luxembourg Convention), but this was not ratified.²³ In 1989, EU member states agreed an amendment to this Convention, which *inter alia* added a Protocol concerning litigation, but this was not ratified either, due to concerns about translation costs and the litigation regime, which would have given power to national judge to rule (albeit subject to a possible ap-

¹⁴ See further the section on 'EU Civil Law' *infra*.

¹⁵ For information on the EPLA and the draft text of the agreement, see: <www.epo.org/law-practice/legislative-initiatives/epla.html>. On the question of whether the EPLA falls (at least partly) within the scope of the EU's exclusive external competence, see the 'Future of the EU Patent' section *infra*.

¹⁶ Signed 20 March 1883, in force 6 July 1884 (828 *UNTS* 305).

¹⁷ Signed 27 Nov. 1963, in force 1 Aug. 1980 (1249 *ILM* 369).

¹⁸ Signed 1 June 2000, in force 28 April 2005 (39 *ILM* 1047).

¹⁹ Signed 9 June 1970, in force 24 Jan. 1978 (1160 *UNTS* 231).

²⁰ The EU and all its Member states are party to the WTO, and therefore the TRIPs (1869 *UNTS* 299: signed 15 April 1994, in force 1 Jan. 1995), whereas (some of) the member states alone are party to the other treaties.

²¹ See further the 'Other EU rules on patents' section *infra*.

²² On the history, see M. Van Empel, *The Granting of European Patents: Introduction to the Convention on the Grant of European Patents* (A.W. Sijthoff 1973), ch. 1, and R. Jacob, 'Creating the Community Patent and Its Court', in D. Vaver and L. Bently (eds.), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (CU 2004) p. 79.

²³ *OJ* [1976] L 17.

peal to a common appeal court) that a Community patent was invalid across the entire Community.²⁴ Both Conventions would have established the Community patent as a form of European patent, valid uniformly across the territory of the Community.²⁵

A 1997 Green Paper from the European Commission re-launched discussions on this issue,²⁶ arguing that the patent could be established by means of a Regulation adopted pursuant to European Community (EC) law (as it was then), in light of case-law of the Court of Justice confirming that the Community had the competence to harmonize patent law and to create uniform intellectual property rights.²⁷ However, while the former legislation could be adopted pursuant to the EC's internal market powers,²⁸ the latter measures could only be adopted pursuant to the EC's residual powers to adopt legislation where necessary to attain one of the EC's objectives 'in the course of operation of the common market.'²⁹ This distinction was important, since the former 'legal base' entailed the use of 'qualified majority voting' (QMV) in the Council, along with 'co-decision' powers for the European Parliament (EP), but the latter legal base required unanimity in Council with mere consultation of the EP.

Despite these decision-making constraints, the Commission proposed a Regulation establishing a Community patent in 2000 (the '2000 proposal').³⁰ This proposal envisaged (as before) that the Community patent would be granted by the EPO, as a patent valid for all of the member states of the Community; the EC would have acceded to the EPC as a consequence. It would still be possible to apply either for a national patent or for a European patent which was not a Community patent. The proposal included rules on the difficult issue of translation (requiring translation of the patent into one of the three working languages of the EPO, and translation of the claims only into the other two working languages), as well as on patent litigation, proposing a new centralized Community court with jurisdiction over the Community patent. As the Commission recognized, it was

²⁴ OJ [1989] L 401.

²⁵ The alternative idea of absorbing the EPC into the EU legal system has never been taken forward: see O. Bossung, 'A Union Patent Instead of the Community Patent – Developing the European Patent into an EU Patent', 34 *International Review of Intellectual Property and Competition Law* (2003) p. 1. The Court of Justice has confirmed that the EPC cannot be regarded as an EU act: *Opinion 1/94* [1994] ECR I-5273, para. 103.

²⁶ COM(97)314, 24 June 1997, followed up in COM(1999)42, 5 Feb. 1999.

²⁷ See respectively Case C-350/92 *Spain v. Council* [1995] ECR I-1985 and *Opinion 1/94* (*supra* n. 25), paras. 59 and 104.

²⁸ Initially Art. 100a EEC/EC, then Art. 95 EC as from the entry into force of the Treaty of Amsterdam in 1999.

²⁹ Initially Art. 235 EEC/EC, then Art. 308 EC as from the entry into force of the Treaty of Amsterdam.

³⁰ COM(2000)412, 1 Aug. 2000.

necessary for the EC Treaty (as it then was) to be amended to provide for the possible creation of such a court.

In fact, negotiations were then underway to agree amendments to the EC and EU Treaties. These amendments subsequently took the form of the Treaty of Nice, which entered into force on 1 February 2003. This Treaty inserted into the EC Treaty a new 'legal base', Article 229a EC, which provided for the possible adoption of a measure conferring jurisdiction on the EU courts as regards disputes between private persons as regards EC acts which created 'Community industrial property rights.' But the measures concerned would not only need a unanimous vote in the Council (after consulting the EP) to be adopted, but would also require ratification by national procedures before they could come into force.

Shortly after the Treaty of Nice entered into force, the Council reached a 'common political approach' on the proposal for a Community patent.³¹ However, the translation rules agreed by the Council – which would have required the translation of patent claims into all EC languages – were widely considered to be unworkable due to the likely expense.³² The common approach also included agreement on the creation of an EC patent court for the Community patent, with its judgments subject to appeal to the EU's Court of First Instance (as it was then).

To give effect to the agreement to create an EC patent court, the Commission proposed at the end of 2003 to use Article 229a EC to adopt a decision conferring jurisdiction on the EU courts as regards such disputes,³³ alongside a parallel proposal creating the Community Patent Court as a new lower-tier EU judicial panel.³⁴ The latter proposal had the legal base of Articles 225a and 245 EC, which required unanimity in Council and consultation of the EP, but did not require national ratification. However, these proposals attracted little interest in the Council, because users of the patent system had doubts about the desirability of conferring patent jurisdiction on the EU courts,³⁵ and because of the ongoing work on the EPLA proposal, a draft of which had been tabled shortly before the Commission's proposals.

In light of the continuing deadlocks on all of the issues relating to the planned Community patent, the Commission proposed in 2007 to re-launch the issue

³¹ Council Doc. 7159/03, 7 March 2003, which consists of a list of principles rather than an agreed legislative text. See subsequently the draft of the Reg. in Council Doc. 7119/04, 8 March 2004.

³² For an overview of and commentary on the EU patent proposals, with extensive further references, see T. Jaeger, 'The EU Patent: *Cui Bono et Quo Vadit?*', 47 *Common Market Law Review* (2010) p. 63-115.

³³ COM(2003)827, 23 Dec. 2003. See also the earlier working paper: COM(2002)480, 30 Aug. 2002.

³⁴ COM(2003)828, 23 Dec. 2003.

³⁵ See Jaeger *supra* n. 32, at p. 79-83.

(again),³⁶ in particular suggesting a merger of the planned EPLA and the proposed measure to establish an EU court with jurisdiction regarding EU patents.³⁷

Discussions were duly re-launched in 2008-2009, and a draft treaty between the EU, its member states and some third states to create an international court with jurisdiction over both the Community patent and European patents was drawn up.³⁸ Due to doubts about the possible incompatibility of this treaty with EU law, the Council decided to request an opinion from the Court of Justice on this issue.³⁹ Work continued also on the proposal for a Regulation establishing a Community patent.

With the entry into force of the Treaty of Lisbon on 1 December 2009, the legal bases for some of the measures concerned changed.⁴⁰ Article 118 of the Treaty on the Functioning of the European Union (TFEU), the new name for the former EC Treaty, confers explicit power to '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, co-ordination and supervision arrangements.' The applicable decision-making rule is now the 'ordinary legislative procedure' (ex-co-decision), including QMV in the Council.⁴¹ However, the second paragraph of Article 118 provides that any rules to 'establish language arrangements for the European intellectual property rights' must be adopted by a form of 'special legislative procedure',⁴² entailing unanimity in the Council, with consultation of the EP.⁴³ The decision-making rules relating to conferring patent jurisdiction on the EU courts did not change,⁴⁴ but the rules concerning the creation of judicial

³⁶ COM(2007)165, 3 April 2007.

³⁷ See further the section on 'Patent Litigation', *infra*.

³⁸ The latest text is Council Doc. 7928/09, 23 March 2009. See also the Commission's request to negotiate this treaty (SEC(2009)330, 20 March 2009).

³⁹ Pursuant to Art. 300(7) EC, which gave the Court jurisdiction to rule on whether an envisaged agreement between the EC and third States was compatible with EC law, on application by the Council, the Commission, the EP or a member state.

⁴⁰ Also, the Treaty of Lisbon merged the EC and the EU (Art. 1 of the Treaty on European Union (TEU), third para.); this paper therefore refers to 'EU law' as regards events which took place after that Treaty entered into force.

⁴¹ The detailed rules on this procedure are set out in Art. 294 TFEU; they do not differ substantially from the previous rules set out in Art. 251 EC.

⁴² On the basic types of legislative procedure, see Art. 289 TFEU.

⁴³ See also Arts. 281 and 342 TFEU, which provide for unanimity as regards other language rules.

⁴⁴ Art. 262 TFEU contains the same decision-making rules as the prior Art. 229a EC, except that the procedure is described as a 'special legislative procedure.' The proposals have not been formally withdrawn. See also the Commission's communication on the change of legal base for its proposals upon the entry into force of the Treaty of Lisbon (COM(2009)665, 2 Dec. 2009, Annex 4).

panels (now called ‘specialised courts’) and the linked changes to the Statute of the Court of Justice can now be amended by means of the ordinary legislative procedure.⁴⁵

Just after the Treaty of Lisbon entered into force, the Council reached agreement on a revised text of the EU patent regulation (the ‘2009 agreement’),⁴⁶ shorn of provisions on translation, which were left aside with the intention of agreeing separate legislation on this issue. At the same time, the Council adopted conclusions on broader issues relating to the EU patent (the ‘2009 conclusions’), which concerned the planned patent court, the role of national patent offices and amendments to the EPC relating to the creation of the EU patent and EU accession to the EPC.⁴⁷ The Commission proposed the legislation on translation in June 2010,⁴⁸ suggesting (in line with its 2000 proposal) that EU patent claims would only have to be translated into the EPO’s languages (English, French and German), although they would also have to be translated into an infringer’s language in the event of a dispute.⁴⁹

However, it proved impossible to find unanimous agreement on this proposal, despite several Council meetings on this subject held during the Belgian Council Presidency in the second half of 2010. In particular, Spain and Italy could not agree to a compromise that apparently commanded the support of all of the other member states, due in particular to concerns about the status of the Spanish and Italian languages.

A number of EU Member states then suggested that the EU consider adopting the proposed measures without the full participation of all member states, pursuant to the rules on enhanced co-operation set out in the EU Treaties.⁵⁰ The Commission proposed such enhanced co-operation shortly afterward,⁵¹ and the Council approved it in March 2011.⁵² Ultimately all member states except Italy and Spain agreed to participate in this enhanced co-operation.

⁴⁵ Arts. 257 and 281 TFEU, amending the prior Arts. 225a and 245 EC. The previous Art. 300(7) EC is now Art. 218(11) TFEU.

⁴⁶ The text of the 2009 agreement is set out in Council Doc. 16113/09 add 1, 27 Nov. 2009. All member states agreed to this text. The 2009 agreement was not formally adopted, pending agreement on translation and litigation issues.

⁴⁷ Council Doc. 17229/09, 7 Dec. 2009.

⁴⁸ COM(2010)350, 30 June 2010.

⁴⁹ For a detailed analysis of the costs issues, see B. van Pottelsberghe and J. Danguy, ‘Economic Costs-Benefit Analysis of the Community Patent’, 7 April 2009, online at: <http://ec.europa.eu/internal_market/indprop/docs/patent/studies/compact-cost%20-benefit-study-final_en.pdf>.

⁵⁰ On enhanced cooperation generally and on the validity of the authorization in this case, see the ‘Authorizing Enhanced Cooperation’ section, *infra*.

⁵¹ COM(2010)790, 14 Dec. 2010.

⁵² *Supra* n. 1.

To implement enhanced co-operation in this area, the Commission swiftly tabled revised proposals for implementing this enhanced co-operation (i.e., revised proposals for the legislation establishing the EU patent) in April 2011.⁵³ By June 2011, the Council had reached a 'general approach' on these proposals,⁵⁴ but the EP had only just begun its discussions of them. It seems possible that the legislation will be formally adopted by the end of 2011 or early in 2012.

However, even if this legislation is adopted (as seems likely) in the near future, there are, as noted above, two significant constitutional issues which have to be resolved before any EU patent system becomes operational. First of all, Spain and Italy challenged the authorization of enhanced co-operation,⁵⁵ and might also decide to challenge the subsequent measures implementing it, if and when they are adopted. Secondly, the objections of the Court of Justice to the planned treaty regarding patent litigation need to be addressed,⁵⁶ because even though the authorization of enhanced co-operation did not concern patent litigation,⁵⁷ it will undoubtedly be necessary to address that issue in order to achieve the objective of creating an EU patent.⁵⁸

Other EU rules on patents

First of all, as regards internal legislation, the development of other EU rules on patents has been consistently controversial.⁵⁹ The EU has adopted legislation on supplementary patent protection for pharmaceutical products and for pesticides,⁶⁰ but the former measure was challenged (unsuccessfully) before the Court of Justice.⁶¹ It has also harmonized national law as regards patent protection for biotech products,⁶² but the initial proposal on this issue was defeated in the EU legislative process,⁶³ and the subsequently adopted measure was also challenged (again unsuccessfully) before the Court of Justice.⁶⁴ A proposal for a Directive on software

⁵³ COM(2011)215 and 216, 13 April 2011.

⁵⁴ Council Doc. 11328/11, 23 June 2011.

⁵⁵ *Supra* n. 3.

⁵⁶ *Supra* n. 4. See the section on 'The Proposed Litigation Agreement', *infra*.

⁵⁷ See Council Doc. 6524/11, 2 March 2011, point 14.

⁵⁸ See the 'Future of the EU Patent' section *infra*.

⁵⁹ On the EU's competence regarding intellectual property, see *supra* n. 27.

⁶⁰ See respectively: Reg. 1768/92, *OJ* [1992] L 182/1, as subsequently codified after amendments (Reg. 469/2009, *OJ* [2009] L 152/1); and Reg. 1610/96, *OJ* [1996] L 198/30.

⁶¹ Case C-350/92 (*supra* n. 27).

⁶² Dir. 98/44, *OJ* [1998] L 213/13.

⁶³ COM(1988)496, 17 Oct. 1988; the EP defeated the proposal in a third-reading vote held on 1 March 1995.

⁶⁴ Case C-377/98 *Netherlands v. Council* [2001] ECR I-7079.

patents was unsuccessful in the legislative process,⁶⁵ as was a proposal for harmonizing national law on utility models (a form of simplified patent).⁶⁶ However, the EU has adopted a Directive on the enforcement of intellectual property rights, including patents,⁶⁷ although a proposal for a Directive on the criminal law enforcement of such rights was not successful.⁶⁸ It is notable that by comparison with patents, other key intellectual property rights have been more intensively harmonized by EU law.⁶⁹

EU free movement law also impacts upon patent issues. For example the 'exhaustion of rights' principle means that a patent holder that has freely marketed its goods in the territory of a member state cannot resist the sale of those goods in another member state.⁷⁰ EU rules on free movement of services also facilitate the provision of patent-related services from one member state to another.⁷¹ Also, EU competition law restricts the use that can be made of patents.⁷²

Secondly, as regards external relations, the EC (now the EU) acceded to the WTO when the latter organization was created in 1995, but at the time the EC only shared competence with its member states as regards the intellectual property rules in the TRIPs, because intellectual property protection did not generally fall within the scope of the Community's common commercial policy (CCP) at the time, and because the EC had only partly harmonized member states' laws as

⁶⁵ COM(2002)92, 20 Feb. 2002. The proposal was rejected by the EP at the second-reading of the co-decision procedure, on 6 July 2005.

⁶⁶ COM(1997)691, 12 Dec. 1997. The proposal did not attract enough support in the Council, and was formally withdrawn in 2006 (*OJ* [2006] C 64/3).

⁶⁷ Dir. 2004/48, *OJ* [2004] L 157/45. The Directive applies to all patents (Art. 2(1)).

⁶⁸ COM(2006)168, 26 April 2006, which had insufficient support in the Council, and was formally withdrawn in 2010 (*OJ* [2010] C 252/7). The proposal would have applied to all patents (Art. 1). However, note that the Commission plans to suggest a new version of this proposal (*see* Annex II to the 2010 work programme: COM(2010)135, 31 March 2010). In light of Art. 83(2) TFEU, which permits the EU to harmonize substantive criminal law only where there has already been a harmonization measure in another field of EU law, the legislation concerned could only address patents to the extent that EU law regulating patents has been adopted.

⁶⁹ In particular, EU legislation has harmonized national law as regards trademarks and design rights, and set up EU-wide systems as regards trademarks, designs and plant variety rights: *see* generally, <http://ec.europa.eu/internal_market/indprop/index_en.htm>, and further H. Ullrich, 'Harmony and Unity of European Intellectual Property Protection', in Vaver and Bentley *supra* n. 20, at p. 20. There is also extensive EU harmonization of copyright law: *see* generally: <http://ec.europa.eu/internal_market/copyright/index_en.htm>. For future plans, *see* COM(2011)287, 24 May 2011.

⁷⁰ *See*, for instance, Case 187/80 *Merck* [1981] *ECR* 2063 and Joined Cases C-267/95 and C-268/95 *Merck and Beecham* [1996] *ECR* I-6285.

⁷¹ *See* Case C-76/90 *Sager* [1991] *ECR* I-4221.

⁷² *See*, for instance, Joined Cases C-468/06 to C-474/06 *Sot. Lelos kai Sia EE* [2008] *ECR* I-7139.

regards intellectual property.⁷³ However, the CCP (which fell within the EC's exclusive competence, and was subject to QMV in Council), did apply to the issue of enforcement of intellectual property rights by means of customs checks.⁷⁴ The Treaty of Nice subsequently extended the scope of the CCP to cover the 'commercial aspects of intellectual property', subject to the proviso that some competence was still shared with member states, and there was still some prospect of unanimous voting.⁷⁵ It was possible to extend the scope of the CCP to cover other 'international negotiations and agreements on intellectual property', but this option was never taken up.⁷⁶ During this period, the EU adopted legislation to implement a WTO decision relating to compulsory licencing of patents regarding medicine,⁷⁷ and subsequently concluded a Protocol to TRIPs regarding this issue.⁷⁸

Following the entry into force of the Treaty of Lisbon, the CCP still applies to the 'commercial aspects of intellectual property', with no qualification relating to shared competence and fewer requirements relating to unanimous voting.⁷⁹ There is no clarification yet of the scope of the EU's CCP powers as regards intellectual property issues,⁸⁰ but presumably they do not extend to all aspects of the issue, in

⁷³ See *Opinion 1/94 supra* n. 25.

⁷⁴ See currently Reg. 1383/2003, *OJ* [2003] L 196/7; the Commission has proposed a new Reg. to replace it: COM(2011)285, 24 May 2011. The earliest legislation in this area did not apply to patents (Regs. 3842/86, *OJ* [1986] L 357/1 and 3295/94, *OJ* [1994] L 341/8); patents were included as from 1999 (new Art. 1(2)(a), third indent, added by Reg. 241/1999, *OJ* [1999] L 27/1, and now Art. 2(1)(c)(i) of Reg. 1383/2003). The 2011 proposal would also apply to the future EU patent (*see* the proposed Art. 2(1)(m)).

⁷⁵ Art. 133(5) EC. *See* also the limits on EC competence set out in Art. 133(6) EC. On the interpretation of these provisions, *see* Case C-13/07 *Commission v. Council*, opinion of 26 March 2009 (case withdrawn). By analogy with *Opinion 1/08* [2009] ECR I-11129, which ruled that the parallel extension of the CCP to 'trade in services' at least applied to all issues within the scope of the GATS, it is arguable that the scope of the EC's powers at least applied to all issues within the scope of the TRIPs. But note that the EU also includes 'TRIPs-plus' provisions (i.e., provisions on intellectual property protection going beyond the scope of the TRIPs) within some of its external trade agreements: *see* for instance ch. 10 of the EU/Korea free trade agreement (*OJ* [2011] L 127).

⁷⁶ Art. 133(7) EC.

⁷⁷ Reg. 816/2006, *OJ* [2006] L 157/1.

⁷⁸ *OJ* [2007] L 311/35. Due to the prior adoption of EC legislation on this issue, the EC was exclusively competent to conclude this Protocol: *see* COM(2006)175, 27 April 2006.

⁷⁹ Art. 207 TFEU (and *see* Art. 3(1)(e) TFEU). The EU can also now adopt internal legislation on these issues as part of its CCP; the ordinary legislative procedure now applies to the adoption of CCP legislation and the EP now has consent powers over CCP treaties. On unanimous voting, *see* Art. 207(4) TFEU; *see also* the limit on competence set out in Art. 207(6) TFEU. The interpretation of the prior Art. 133(6) EC might be at least partly relevant by analogy for the interpretation of Art. 207(6) TFEU (*see* the opinion in Case C-13/07, *supra* n. 75). It is possible for the EU to delegate its exclusive competences (*see* Art. 2(1) TFEU), but the Commission has only proposed to delegate CCP competence as regards foreign direct investment: *see* COM(2010)344, 7 July 2010.

⁸⁰ The EU (along with its member states) was a participant in the negotiations for an Anti-Counterfeiting Trade Agreement (ACTA), which were concluded in 2010, and the Commission

particular in light of the specific legal base regarding uniform EU intellectual property rights.⁸¹ Moreover, the EU's development policy can also touch on intellectual property issues, as regards encouraging third states to develop intellectual property protection,⁸² and the EU's association agreements can also include provisions on intellectual property protection.⁸³

It should be noted that since the EU is a party to the WTO, the Court of Justice has jurisdiction to interpret the TRIPs, to the extent that such interpretation can be linked to legislation adopted by the EU.⁸⁴ However, as regards patents, the Court implicitly does not have much jurisdiction to interpret the substantive TRIPs rules, as long as the EU legislation on this issue remains limited in scope,⁸⁵ unless those rules can be linked to specific EU patent legislation, in which case the EU legislation must be interpreted in light of those rules.⁸⁶ Furthermore, while WTO rules generally do not confer direct effect in the EU legal order, it is up to Member states to determine the legal effect of those rules where the EU has not yet legislated (i.e., most patent issues).⁸⁷ It is arguable that the Court now has broader power to interpret and rule on the legal effect of TRIPs now that the issue of trade-related intellectual property rights falls within the EU's exclusive competence, but the Court of Justice has yet to rule expressly on this issue.⁸⁸ In any event,

has proposed that the Council (on behalf of the EU) sign and conclude this treaty, pursuant to the EU's CCP competences, except for the provisions on criminal law: COM(2011)379 and 380, 24 June 2011.

⁸¹ Art. 118 TFEU, discussed in the 'EU Patent' section *supra*.

⁸² Case C-268/94 *Portugal v. Council* [1996] ECR I-6177; see now Art. 209 TFEU. This case-law is arguably relevant by analogy to cooperation with non-developing countries (see Art. 212 TFEU).

⁸³ These obligations are enforceable against the member states, at least in infringement proceedings and to the extent that they are within the scope of EU law: Case C-13/00 *Commission v. Ireland* [2002] ECR I-2943.

⁸⁴ See particularly Case C-53/96 *Hermes* [1998] ECR I-3603 and Joined Cases C-300/98 and C-392/98 *Dior* [2000] ECR I-11307.

⁸⁵ See particularly Case C-431/05 *Merck* [2007] ECR I-7001, which does establish that the Court of Justice has jurisdiction to determine whether EU legislation has in fact been adopted within the scope of the relevant provisions of TRIPs.

⁸⁶ Case C-428/08 *Monsanto Technology*, judgment of 6 July 2010, not yet reported. On the issue of the extent of links to EU legislation needed to trigger the Court's jurisdiction over 'mixed agreements' (i.e., agreements concluded by both the EU and its member states), see now Case C-240/09, *Lesoochrannárske zoskupenie*, judgment of 8 March 2011, not yet reported.

⁸⁷ See particularly *Merck supra* n. 85. As The Court of Justice has, however, ruled consistently that since the EU is a party to the WTO, the TRIPs rules have an 'indirect effect', i.e., national legislation must be interpreted in light of the TRIPs rules as far as possible (case-law starting with *Hermes* and *Dior supra* n. 84). It is also possible to argue that an EU act is invalid in light of the TRIPs if it requires member states to breach their TRIPs obligations, while claiming not to: see Case C-377/98 (*supra* n. 64), para. 55.

⁸⁸ The judgment in *Monsanto Technology supra* n. 86) referred to the prior case-law on this point, but failed to consider the possible impact of the Treaty of Lisbon; in any event, the dispute

the adoption of legislation establishing an EU patent would probably result in the conclusion that the Court had jurisdiction to interpret the substance and rule on the legal effect of all of the TRIPs provisions relevant to patents, since any of those provisions could be applicable to the EU patent legislation.⁸⁹ Furthermore, it would also widen the scope of the Court's jurisdiction to interpret and rule on the legal effect of provisions relating to patents in the EU's association agreements and free-trade agreements.⁹⁰

PATENT LITIGATION

The issue of litigation over EU and European patents has two aspects. First of all, it is addressed at present in EU legislation concerning civil jurisdiction. Secondly, in order to address problems stemming from the Court of Justice's interpretation of that legislation, the possible creation of an international court with jurisdiction over such litigation has been mooted. These two aspects of the issue will be considered in turn.

EU civil law measures

The EU has long-standing rules governing civil jurisdiction and the recognition of judgments, originally in the form of the Brussels Convention of 1968 (as subsequently amended),⁹¹ and now (for proceedings brought after March 2002) in the form of Regulation 44/2001 (the 'Brussels Regulation').⁹² The Convention (and now the Regulation) confers exclusive jurisdiction regarding the registration or validity of (*inter alia*) patents on the member state in which the patent was applied for or registered.⁹³ As regards European patents, the courts of each mem-

in that case pre-dated the entry into force of the Treaty of Lisbon. See now the opinion of 29 June 2010 in Case C-135/10, *SCF Consorzio Fonografici*, pending, which also presumes that the pre-Lisbon case-law on the legal effect of the TRIPs remains unchanged.

⁸⁹ The EU would also gain extensive external competence as regards patent treaties (see Art. 3(2) TFEU), although this competence would not be exclusive as long as national patents (and/or the option to apply for national versions of the European patent) still existed. See the discussion in the section on 'Authorizing Enhanced Cooperation', *infra*, on the question of EU accession to the EPC.

⁹⁰ This begs the question as to the extent to which such provisions are already within the scope of the exclusive CCP (and therefore the Court's jurisdiction) following the entry into force of the Treaty of Lisbon. As regards association agreements and free-trade agreements, it must be emphasized that unlike WTO rules (including the TRIPs), their provisions *can* have direct effect in the EU legal order: see for instance Case C-12/86 *Demirel* [1987] ECR 3719. The Court of Justice has not yet addressed whether this is also the case for the intellectual property provisions of such treaties.

⁹¹ For a consolidated text of the Convention, see *OJ* [1998] C 27/1.

⁹² *OJ* [2001] L 12/1. Due to the opt-out from EU Justice and Home Affairs rules for Denmark, these rules apply in that State by virtue of a separate treaty with the EC (as it was then), in force 1 July 2007 (*OJ* [2005] L299/61; *OJ* [2006] L 120/22).

⁹³ Art. 16(4) of the Convention; Art. 22(4) of the Reg., first sub-para.

ber state where the patent was granted have exclusive jurisdiction over such actions, given the nature of such patents as a bundle of separate national patents.⁹⁴ These rules also apply where the validity of the patent is challenged as a counter-claim in infringement proceedings.⁹⁵ Furthermore, a special rule in the EU legislation, allowing for concentration of proceedings in one state where there are multiple defendants and the cases concerned are linked,⁹⁶ does not apply where a European patent is allegedly being infringed in a number of different states, even where the alleged infringements are the result of a common policy of a particular company, because of the distinct territorial nature of each of the national patents comprising the European patent.⁹⁷

The impact of these rules is to complicate and delay proceedings relating to European patents, in particular due to a further rule concerning multiple pending cases (*lis pendens*) that gives priority, at least as regards disputes concerning the application of an agreement containing a choice-of-court rule, to the court first seised with a case, and requires the courts of other Member states seized with a case involving the same dispute between the same parties to stay their proceedings until the first court has decided on its jurisdiction.⁹⁸ If the first court is likely to take a long period to decide on the matter, even where its lack of jurisdiction is clear, the effect (where the first court has been seized with an action by an alleged infringer challenging the validity of the patent) is to stall the process of enforcing the patent by means of an infringement action, at least where holder of the patent seeks to rely on a choice-of court agreement.⁹⁹ This is known informally as a 'torpedo' action.

The various complications and delays lead to considerably increased costs and greater difficulties enforcing European patents.¹⁰⁰ On the first point, since the rule of exclusive jurisdiction does not apply to actions regarding the *infringement* of

⁹⁴ Art. Vd of the Protocol to the Convention; Art. 22(4) of the Reg., second sub-para.

⁹⁵ Case C-4/03 *GAT* [2006] ECR I-6509.

⁹⁶ Art. 6(1) of the Convention and the Reg.

⁹⁷ Case C-539/03 *Roche Nederland* [2006] ECR I-6535. However, note that the Court of Justice has recently been asked to clarify this judgment: Case C-606/10 *Solvay*, pending. See also the doubts about the case-law expressed in the Opinion of 12 April 2011 in Case C-145/10, *Painer*, pending.

⁹⁸ Art. 22 of the Convention; Art. 27(1) of the Reg.

⁹⁹ See, for instance, Case C-116/02 *Gasser* [2003] ECR I-14693. However, the Court of Justice has not ruled expressly on whether the same possibility applies where the Reg. provides for exclusive jurisdiction, *inter alia* as regards patents. Compare para. 45 of the *Gasser* judgment with para. 52 of the Advocate-General's opinion in *Gasser*. It should be noted that an 'anti-suit' injunction to block the torpedo actions is not permissible: see Case C-159/02 *Turner* [2004] ECR I-3565.

¹⁰⁰ For a detailed analysis of the costs issues, see D. Harhoff, 'Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System', online at: <http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf>. See also the Commission's report on the application of Reg. 44/2001 (COM(2009)174, 21 April 2009), section 3.4, and the report by B. Hess, et al., *Report on the Application of Regulation Brussels in the Member States*, online

European patents (the normal rule in the Brussels Regulation, allocating jurisdiction to the domicile of the defendant, applies), the application of the rules on exclusive jurisdiction once the *validity* of the patent is called into question as a defence to the infringement proceedings (which is frequent in practice) divests the court of jurisdiction over an infringement action of its jurisdiction, and paralyzes the infringement proceedings, without any guarantee that the arguments concerning the validity of the patent will be heard in the courts of the state concerned. On the second point, the infringement of a European patent in several countries must be addressed by means of separate proceedings in each state.

It is obviously possible to address these issues by means of amendments to the civil jurisdiction rules. Although in December 2010, the Commission proposed a number of amendments to those rules,¹⁰¹ it did not suggest any changes to the jurisdiction rules as regards patents, even though the Commission's earlier Green Paper on reform of the rules had raised this issue.¹⁰² However, the new proposal would set a time limit of six months in *lis pendens* cases for the first court to decide on its jurisdiction, thereby defusing 'torpedo' actions,¹⁰³ and would clarify a number of relevant issues concerning provisional and protective actions.¹⁰⁴

It should be noted that the current EU civil jurisdiction rules also apply to Norway, Iceland and Switzerland, pursuant to the Lugano Convention of 2007.¹⁰⁵ In fact, the Court of Justice has ruled that the EU has exclusive external competence over civil jurisdiction and recognition of judgments, due to the adoption of the

at: <http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_application_brussels_1_en.pdf>, p. 327-348, which also criticizes the rules relating to provisional and protective actions.

¹⁰¹ COM(2010)748, 14 Dec. 2010. The UK and Ireland have opted in to this proposal. Art. 3 of the EU/Denmark treaty on civil jurisdiction (*supra* n. 92) leaves Denmark free to decide whether or not to apply the amendments, if and when adopted; but if Denmark does not adopt the amendments, the agreement in question will be terminated unless the parties decide otherwise.

¹⁰² COM(2009)175, 21 April 2009, section 4. According to the impact assessment on the 2010 proposal (SEC(2010)1547, 14 Dec. 2010, n. 12), in the consultations on the planned proposal, 'most stakeholders' preferred to address the issue of patent litigation by creating a new international court. The Commission therefore left the issue out of the 2010 proposal, but stated that it would 're-consider its approach towards patent litigation under the Brussels Regulation, if the ongoing efforts to create a unified patent litigation system were not to lead to the warranted result.'

¹⁰³ Art. 29(2) of the proposal. The time limit would not apply in 'exceptional circumstances', which are not further defined. Presumably if the time limit is infringed, the court second seised would then be free to determine its jurisdiction, but this is not expressly stated. *See also* the proposed amendment to the current Art. 25 (Art. 27 of the proposal).

¹⁰⁴ *See* Arts. 2(a), 2(b), 31 and 35 of the proposal, as well as recital 22 in its preamble. On the relevance of this issue to intellectual property litigation, *see* the Hess report (*supra* n. 100), section 3.6 of the report on application of the rules (*idem*) and section 6 of the Green Paper (*supra* n. 102).

¹⁰⁵ *OJ* [2009] L147/5 (text of Convention); *OJ* [2009] L 147/1 (decision on conclusion); *OJ* [2009] C 319/1 (explanatory memorandum). The Convention would have to be revised to take account of any amendments to Reg. 44/2001 that might be agreed (*see* Art. 76 of the Convention).

Brussels Regulation.¹⁰⁶ Exercising that competence, the EU (without the participation of its member states) has concluded the Lugano Convention, a treaty on the extension of the jurisdiction rules to Denmark and the Hague Convention on maintenance obligations,¹⁰⁷ and also signed the Hague Convention on choice-of-court agreements.¹⁰⁸ In several cases, the EU has concluded or signed treaties alongside its member states because the agreements contained rules on civil jurisdiction alongside other substantive rules;¹⁰⁹ the EU has also authorized its member states to sign and/or ratify such agreements where it was too late for the EU itself for the EU to become a party to them.¹¹⁰ The EU has also become a member (alongside its member states) of the Hague Conference.¹¹¹ While there is EU legislation delegating its exclusive external power in this area to EU Member states under certain conditions,¹¹² this legislation does not extend to the subject-matter of the Brussels Regulation.¹¹³ Nor does that Regulation itself provide for authority for member states to sign new treaties within its scope.¹¹⁴

The EU's exclusive external competence over civil jurisdiction and recognition of judgments has been described at some length because it is a central issue as

¹⁰⁶ *Opinion 1/03* [2006] ECR I-1145, concerning the Lugano Convention. See generally Art. 3(2) TFEU.

¹⁰⁷ *Supra* n. 92 and 105, and press release of the JHA Council, 9-10 June 2011. As regards conflicts of law, the EU has also concluded (without its member states) the Protocol to the Hague Convention on maintenance (*OJ* [2009] L 331/17).

¹⁰⁸ *OJ* [2009] L 133/1.

¹⁰⁹ These treaties are the Unidroit Convention on international interests in mobile equipment and its Protocol relating to aircraft equipment (*OJ* [2009] L 121/3) and a further Protocol to this Convention, concerning matters specific to railway rolling stock (*OJ* [2009] L 331/1). The Commission has also proposed that the EU sign or conclude two other treaties in its own name: the Council of Europe Convention on contact concerning children (COM(2002)520, 2 Oct. 2002) and the Protocol to the Athens Convention 1974 on carriage of passengers and luggage by sea (COM(2010)686, 30 Nov. 2010). The Council has agreed to conclude the latter Convention (Council Doc. 8663/11, 3 May 2011).

¹¹⁰ The decisions in question concern: the Convention on civil liability for bunker oil pollution damage (Bunkers Convention: *OJ* [2002] L 256/7); the Convention on liability for damage caused by carrying hazardous and noxious substances by sea (HNS Convention: *OJ* [2002] L 337/55); the Hague Convention on parental responsibility, etc for children (*OJ* [2003] L 48/1 and *OJ* [2008] L 151/36); a Protocol to the Paris Convention on liability in case of nuclear accident (*OJ* [2003] L338/30, *OJ* [2004] L 97/53 and *OJ* [2007] L 294/23); and a 2003 Protocol to a Convention on a fund for oil pollution damage (*OJ* [2004] L 78/22).

¹¹¹ *OJ* [2006] L 297.

¹¹² See Art. 2(1) TFEU.

¹¹³ Regs. 662/2009 and 664/2009 (*OJ* [2009] L 200/25 and 46).

¹¹⁴ Compare Art. 57 of the Brussels Convention to Art. 71 of Reg. 44/2001; this point is confirmed by the Court of Justice judgment of 4 May 2010 in Case C-533/08 *TNT Express* (not yet reported), para. 38. Art. 71 of the Reg. would not be amended by the 2010 proposal (see Art. 84 of the proposal).

regards member states' competence to ratify the planned EPLA.¹¹⁵ However, it should be noted that other EU civil law measures are also potentially relevant to patent litigation, for instance the rules on gathering evidence¹¹⁶ and the rules on conflict of law as regards contractual and non-contractual liability.¹¹⁷

The proposed litigation agreement

In *Opinion 1/09*, the Court of Justice was asked to rule on the compatibility with EU law of the treaty creating a Unified Patent Litigation System (or European and Community Patents Court: hereinafter the 'draft patent court agreement').¹¹⁸ The draft patent court agreement would have created a new court, comprised of regional first instance chambers and an appeal court, with exclusive jurisdiction over key aspects of litigation over EU patents and European patents. The first instance chambers would have been able to send questions for a preliminary ruling on EU law issues to the Court of Justice, while the appeal court would have been obliged to send such questions. The agreement would have been signed by the EU, its member states and any third states which are party to the EPC; it would have come into force once all EU member states had ratified it.¹¹⁹

After holding that the request for an opinion was admissible,¹²⁰ the Court then stated that the draft agreement did not conflict with Article 262 TFEU, since the possibility of granting jurisdiction to the EU courts over patent disputes as set out in that Article is not exclusive. Also, the draft agreement did not conflict with Article 344 TFEU, which gives the Court of Justice exclusive jurisdiction over disputes between member states as regards EU law, since the draft agreement did

¹¹⁵ See further the 'Proposed Litigation Agreement' section, *infra*.

¹¹⁶ See Case C-175/06 *Tedesco* [2007] ECR I-7929; compare to Case C-104/03 *St. Paul Dairy Industries* [2005] ECR I-3481.

¹¹⁷ On this point, see Jaeger *supra* n. 32, at p. 69-70.

¹¹⁸ For the draft text which the Court was asked to rule on, see Council Doc. 7928/09, 23 March 2009. The case was decided by the full Court due to its 'exceptional importance': see Art. 16 of the Statute of the Court. The Court's Advocates-General delivered a collective opinion (see Art. 108(2) of the Court's rules of procedure, *OJ* [2010] C 177), which the Court did not officially make available, but which is available on the Internet: for an English translation, see: <http://patlit.googlegroups.com/web/OPINION+1_09+%288744551_1%29.pdf?gda=1LDg7loAAACy9MXLZz5_dq_pHkqb9eDLFLBp18A5SQXsp7zj_52uSpOiC-9uqzTj6ZH5oGwvMb9X2vp7SNMPVMz0RYozFlkafNW6b9oKlqj5KMTfqXDfP3t1oNBp6n3SjsA61lodbQ>. The Advocates General also concluded that the draft Patent Court Agreement was incompatible with EU law, but for quite different reasons than the Court.

¹¹⁹ Arts. 58b and 59 of the agreement (*ibid.*). Note, however, that the 2009 Council conclusions on the EU patent (*supra* n. 47) stated that only the EU, its member states and parties to the European Free Trade Area (namely, Norway, Iceland, Liechtenstein and Switzerland) could sign the treaty at the outset.

¹²⁰ Paras. 46-57, *Opinion 1/09*.

not concern such disputes. The Court then restricted its review to the questions relating to jurisdiction over EU patents, as distinct from European patents.¹²¹

As to the substance of the issue, the Court started out by reiterating that EU law was a 'new legal order', and stated that 'the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States.'¹²² On the other hand, the proposed patent court was 'outside the institutional and judicial framework of the European Union', was 'not part of the judicial system provided for in' the Treaties, and was 'an organisation with a distinct legal personality under international law.'¹²³

The prior case-law of the Court of Justice had admitted that the EU could participate in agreements which created international courts, or conferred new jurisdiction upon or affected the powers of the Court of Justice provided that the 'essential character' of its powers and functions were preserved.¹²⁴ However, the Court distinguished these cases, on the grounds that the judicial systems in question mainly concerned disputes about the interpretation or application of the agreements concerned, and did not affect the powers of the national courts of EU member states as regards the interpretation and application of EU law, or the power or obligation of the national courts to send questions to the Court of Justice. But the planned patent court would have extensive jurisdiction to interpret and apply EU patent legislation, as well as EU rules on free movement and competition, other EU rules on intellectual property and EU human rights rules. Member states could not divest their national courts of that jurisdiction and give it to an international court.¹²⁵

While the planned patent court would have the power to refer questions on EU law to the Court of Justice,¹²⁶ this was distinct from the creation of an international court by member states *alone*, since the latter type of court was part of the 'judicial system of the European Union', and 'its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European

¹²¹ Para. 59, *Opinion 1/09*.

¹²² Paras. 65 and 66, *Opinion 1/09*.

¹²³ Para. 71, *Opinion 1/09*.

¹²⁴ Paras. 74-76, *Opinion 1/09*. It should be noted that the Court of Justice was then (in effect) lobbying for the planned treaty on the EU's accession to the European Convention of Human Rights (ECHR) to contain additional jurisdiction for the Court: see the joint statement of the Presidents of the Court of Justice and the European Court of Human Rights of 17 Jan. 2011, online at: <www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011_Communication_CEDHCJUE_EN.pdf>. See also Art. 3(6) of the provisionally agreed text of the agreement on accession, doc. CDDH-UE (2011) 16, online at: <www.coe.int/t/dghl/standardset ting/hrpolicy/CDDH-UE/CDDH-UE_documents/CDDH-UE_2011_16prov_en.pdf>.

¹²⁵ Paras. 77-80, *Opinion 1/09*.

¹²⁶ Art. 48 of the draft agreement (*supra* n. 118): the appeal court would have been obliged to send such questions.

Union.¹²⁷ On that point, the power and obligation to refer questions to the Court of Justice could not be transferred from national courts to an international court in which third states were involved, because the Court of Justice would lose its power to control judicial error by national courts through means of damages liability for member states, or by means of the Commission bringing an infringement action against the member state in question.¹²⁸

The broader impact of this judgment is to enhance further the importance of national courts and the system of references for a preliminary ruling within the EU legal order, in particular in the context of ensuring that there are no errors by national courts.¹²⁹ Those national courts cannot be deprived of that jurisdiction, even if the preliminary rulings system is replicated in a treaty creating an international court in place of national courts. On the other hand, the creation of common courts by Member states alone is acceptable. Presumably any breaches of EU law by such common courts would still be subject to the control mechanisms of EU law, with the *caveat* that the liability for breach of EU law would be shared in some way among the member states which created the common court.¹³⁰

Is the Court's analysis convincing? The question would obviously arise how to allocate the financial responsibility which the Court refers to, and how exactly in practice an individual litigant can sue multiple member states following an alleged breach of EU law by a common international court. Also, the Court of Justice did not consider the possibility of finding member states collectively *severally* liable (i.e., as distinct from third states) for any breaches of EU law by the proposed patent court.¹³¹ The process of establishing and enforcing such distinct liability surely could not be much more complex than the process of establishing and enforcing liability for breach of EU law by a court common only to member states.

While the Court's judgment is therefore, with great respect, unconvincing, the focus of this paper is on its practical implications – in conjunction with the decision authorizing enhanced co-operation as regards the EU patent, to which we now turn.

¹²⁷ Para. 82, referring to *Dior supra* n. 84, in which the Court of Justice accepted a reference from the Benelux Court.

¹²⁸ Paras. 83-88 of *Opinion 1/09*, referring (*inter alia*) to Case C-224/01 *Köbler* [2003] ECR I-10239 and Case C-129/00 *Commission v. Italy* [2003] ECR I-14637. On the combination of the two forms of control, see Case C-379/10 *Commission v. Italy*, pending.

¹²⁹ As noted by T. De La Mare and C. Donnelly, in 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis', in P. Craig and G. De Burca, *The Evolution of EU Law*, 2nd edn. (OUP 2011) p. 363 at 391, 'the greatest factor in the [Court's] close supervision seems to be a fear of error on the part of national courts.'

¹³⁰ See also Art. 260 TFEU.

¹³¹ After all, since third States are not bound by EU law in the first place, they should not be held liable for any acts which result in breaching it.

AUTHORIZING ENHANCED CO-OPERATION

The EU has long had specific rules on enhanced co-operation as regards, for instance economic and monetary union and Justice and Home Affairs (JHA) law. However, the Treaty of Amsterdam introduced general rules regarding the possible authorization of enhanced co-operation in any areas of EU policy-making;¹³² these rules were then amended by the Treaty of Nice,¹³³ and then again by the Treaty of Lisbon.¹³⁴

The basic rules regarding enhanced co-operation, as amended by the Treaty of Lisbon, provide that enhanced co-operation must concern the EU's non-exclusive competences, must be open to non-participating member states at any time,¹³⁵ and must 'aim to further the objectives of the Union, protect its interests and reinforce its integration process.'¹³⁶ Enhanced co-operation can only be authorized as a 'last resort' by the Council, 'when it has established that the objectives of such co-operation cannot be attained within a reasonable period by the Union as a whole'; at least nine member states must participate in it.¹³⁷ Member states which join the Union subsequently are not obliged to participate in enhanced co-operation measures which have already been adopted.¹³⁸

Substantively, enhanced co-operation 'shall comply with the Treaties and Union law', 'shall not undermine the internal market or economic, social and territorial cohesion', 'shall not constitute a barrier to or discrimination in trade between Member States' and shall not 'distort competition between' member states.¹³⁹ Enhanced co-operation must 'respect the competences, rights and obligations of

¹³² On this initial version of the rules, see, for instance: F. Tuyschaever, *Differentiation in European Union Law* (Hart 1999); A. Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond* (Palgrave 2002); and S. Weatherill, "If I'd Wanted You to Understand I Would Have Explained it Better": What is the Purpose of the Provisions on Closer Cooperation Introduced by the Treaty of Amsterdam?', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Hart 1999), p. 21.

¹³³ On this version of the rules, see: J. Shaw, 'Enhancing Cooperation After Nice: Will the Treaty Do the Trick?', in M. Andenas and J. Usher (eds.), *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform* (Hart 2003), p. 207; Stubbs (ibid.); and J. De Areilza, 'The Reform of Enhanced Cooperation Rules: Towards Less Flexibility?', in B. de Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) p. 27.

¹³⁴ On the latest version of the rules, see: M. Dougan, 'The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and their Constitutional Implications', in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press 2009) p. 157 and F. Amtenbrink and D. Kochenov, 'Towards a More Flexible Approach to Enhanced Cooperation', in *idem*, p. 181.

¹³⁵ See further Arts. 328 and 331 TFEU.

¹³⁶ Art. 20(1) TEU.

¹³⁷ Art. 20(2) TEU.

¹³⁸ Art. 20(4) TEU.

¹³⁹ Art. 326 TFEU.

those Member States which do not participate in it' but these non-participating member states 'shall not impede its implementation by the participating Member States.'¹⁴⁰ Procedurally, authorization of enhanced co-operation requires a request from a group of member states, a proposal from the Commission and a qualified majority in favour among *all* member states in the Council, following the consent of the EP.¹⁴¹

Following authorization of enhanced co-operation, only the participating member states can vote on the substantive measures concerned,¹⁴² and the voting rules are the same (adjusted for non-participating member states) as they would be if all Member states were participating.¹⁴³ As regards the patent proposals, this means that all participating member states will vote on the translation proposal (with consultation of the EP), while the ordinary legislative procedure (including QMV) will apply to the main patent proposal. Intriguingly, the Commission and Council declared at the time of adoption of the authorization decision that participating member states would be free to back out of participation in enhanced co-operation as long as no measure implementing it had been taken.¹⁴⁴ This assertion is legally doubtful, in the absence of any provision to this effect in the Treaty rules on enhanced co-operation, but the issue will only be relevant if a member state purports to back out in practice.

Moreover, it is open to the participating member states in the Council to decide, acting unanimously, to shift a special legislative procedure to an ordinary legislative procedure, or to abolish unanimity and replace it with qualified majority voting.¹⁴⁵ It is presumed that the conditions governing the authorization of enhanced co-operation are exhaustive, in light *inter alia* of the intention of the drafters of the Treaty of Nice to make enhanced co-operation easier to authorize.¹⁴⁶

As noted already, this is the second time that the Council has authorized enhanced co-operation; the first occasion (the 'Rome III' Regulation, on conflict of divorce law), was not legally challenged, and there are good grounds to conclude that it was legally valid.¹⁴⁷ But in light of the pending legal challenges to the authorization of enhanced co-operation as regards the EU patent, it is obviously necessary to consider whether this authorization is also valid.

¹⁴⁰ Art. 327 TFEU.

¹⁴¹ Art. 329(1) TFEU. Art. 329(2) TFEU sets out different rules as regards foreign policy.

¹⁴² Art. 20(3) TEU. All members of the European Parliament can vote.

¹⁴³ Art. 330 TFEU. The Council voting weights are recalculated in accordance with Art. 238(3) TFEU.

¹⁴⁴ Council doc. 6524/11, 2 March 2011, point 15.

¹⁴⁵ Art. 333 TFEU. The EP urged use of this provision as regards both Rome III and the EU patent, but the Council has not taken up these suggestions.

¹⁴⁶ See Peers *supra* n. 2, p. 348 at n. 61 of the article.

¹⁴⁷ See generally *ibid.*

First of all, the procedural requirements were undoubtedly fulfilled, as regards a request from a group of member states, a proposal from the Commission, consent of the EP and a qualified majority vote in favour in the Council. Also, there were indisputably nine Member states willing to participate in the proposal.

As for the 'last resort' requirement, although the proposal relating to patent translation was tabled only a few months before the authorization of 'enhanced co-operation', provisions concerning translation had been included in the text of the Regulation proposed in 2000, and the translation issue had been extensively debated in that context, to say nothing of the prior discussions on this issue as regards the Community's patent Conventions. So the EU had certainly been discussing this issue for long enough to satisfy the 'last resort' condition. Next, although Spain and Italy were willing to sign up to the proposed legislation in principle, the other Member states could not find common ground with them. But in the absence of wording to the contrary, the 'last resort' condition is not satisfied only where member states disagree with the very idea of proposed legislation; it should also be considered satisfied whenever agreement among all member states (or, where relevant, a qualified majority of them) seems impossible to reach in the foreseeable future, regardless of the reasons why.¹⁴⁸

It might also be argued that the 'last resort' condition was not met in this case because one of the proposals involved (the general EU patent proposal) was subject to QMV, not unanimity, and was moreover agreed by all member states previously. On the first point, the enhanced co-operation rules do not require that the measures concerned be subject to unanimous voting, and indeed the possibility that QMV might be used to adopt measures implementing enhanced co-operation is referred to expressly.¹⁴⁹ On the second point, while it would obviously normally not be possible to use the enhanced co-operation procedure where member states had reached agreement on a proposal, this is a special case because Article 118 TFEU explicitly links the translation issue with the legislation creating EU intellectual property rights, and because the translation issue is equally linked to those substantive rights by the EPC.

It cannot be argued that the 'last resort' criterion requires the EP to have given its view on the proposed measure concerned beforehand, since even if the EP had already given its (non-binding) opinion on the patent translation proposal, this would not have altered the conclusion that agreement among all member states was not feasible.

¹⁴⁸ See by analogy the Court of Justice's ruling that a non-participant in the Schengen *acquis* cannot demand that the other member states amend draft legislation building on that *acquis*, so that it can participate: Case C-482/08 *UK v. Council*, judgment of 26 Oct. 2010, not yet reported.

¹⁴⁹ Art. 330 TFEU, third para.

Could it be argued that the issues concerned by the authorization fall within the scope of the EU's exclusive competence? First of all, the creation of an EU intellectual property right is an internal market matter,¹⁵⁰ and the internal market is a shared competence.¹⁵¹ This issue cannot be regarded as falling within the scope of the CCP either,¹⁵² given the specific legal base for the creation of EU intellectual property rights inserted into the TFEU by the Treaty of Lisbon, and because the authorization for enhanced co-operation does not concern trade-related issues as such, even though there is a link between these issues and the creation of an EU patent.¹⁵³

Secondly, as regards civil jurisdiction, which falls within the scope of the EU's exclusive external competence following the adoption of internal legislation,¹⁵⁴ the issue does not (yet) arise because the authorization of enhanced co-operation does not (yet) concern the issue of patent litigation,¹⁵⁵ even though that issue is obviously linked to the EU patent.¹⁵⁶

While it is conceivable that the proposals on the substance of the EU patent, and on patent translation issues, when (and if) they are adopted, will touch on issues of EU exclusive competence, or violate other substantive conditions for enhanced co-operation, the member states which object to enhanced co-operation will be able to challenge those measures separately if need be,¹⁵⁷ for it must follow that both the decision authorizing enhanced co-operation and any decision implementing it must comply with those substantive conditions. While it would be preferable for the measures implementing enhanced co-operation to be tabled and agreed in principle at the time the enhanced co-operation is authorized,¹⁵⁸ this is

¹⁵⁰ See the opening words of Art. 118 TFEU: '[i]n the context of the establishment and functioning of the internal market...'

¹⁵¹ Art. 4(2)(a) TFEU.

¹⁵² The point is important because the CCP is an exclusive EU competence: see Art. 3(1)(e) TFEU.

¹⁵³ See the discussion in the proposal to authorize enhanced cooperation (*supra* n. 49) about the link between the EU patent and EU legislation on enforcement of intellectual property rights at the external borders, which falls within the scope of the CCP (see *Opinion 1/94*, *supra* n. 25). The opinion in Case C-13/07 (*supra* n. 75) also confirms that Art. 118 is the correct legal base for legislation on an EU patent (at n. 94 of the opinion).

¹⁵⁴ See the 'EU Civil Law section' *supra*.

¹⁵⁵ The Commission proposal to authorize enhanced cooperation (*supra* n. 51) was silent on the litigation issue, but the distinction between the two issues is confirmed by Council Doc. 6524/11, as noted above (*supra* n. 57).

¹⁵⁶ In any event, as discussed in the section on the 'Future of the EU Patent', *infra*, the EU's exclusive competence following the adoption of internal legislation pursuant to Art. 3(2) TFEU only concerns treaties with third countries, not internal legislation.

¹⁵⁷ However, if the decision authorizing enhanced cooperation is invalid, then it must follow that the measures implementing enhanced cooperation are invalid as well.

¹⁵⁸ This was the case as regards the Rome III measures. See the discussion in Peers (*supra* n. 2).

not a legal requirement set out in the Treaty,¹⁵⁹ and so the authorization of enhanced co-operation is not invalid on that ground alone. It is even conceivable that the measures authorizing and/or implementing enhanced co-operation might infringe the substantive conditions governing enhanced co-operation only some time after they are adopted, because of their interaction with EU legislation or international treaties which are subsequently adopted, or subsequent case-law of the Court of Justice, but in that case the member states affected by this can bring annulment actions against the subsequent measures or complaints against the other member states which apply them,¹⁶⁰ arguing for instance that there is a breach of the Treaty rules on the internal market or non-discrimination on grounds of nationality. Therefore the decision authorizing enhanced co-operation is not invalid merely because of the hypothetical possibility that the subsequent measures implementing enhanced co-operation might violate the conditions for authorizing it.

In the particular case of the EU patent, the argument might be made that it is possible to review the decision to authorize enhanced co-operation in light of the planned patent litigation system (including the incompatibility with EU law of the plan previously under discussion) as well as the intention for the EU to conclude the EPC, given that such developments were essential elements of the 2009 agreement.¹⁶¹ Furthermore, the patent litigation will likely be linked to the legislation implementing enhanced co-operation.¹⁶² In any case, the issues arising from the links between EU patent legislation, the EPC and a patent litigation treaty are bound to arise when measures implementing enhanced co-operation are examined, and so they are considered further here.

Essentially, the links between these three issues were political choices made in the 2009 conclusions that could be reversed when the EU adopts measures implementing enhanced co-operation, as there is no underlying legal requirement that a patent litigation treaty be agreed or that the EU conclude the EPC (and/or that the EPC be amended) in order for EU patent legislation to be adopted.

¹⁵⁹ As discussed *supra*, the 'last resort' requirement can be met as regards a previous proposal on the same subject-matter.

¹⁶⁰ See Art. 259 TFEU.

¹⁶¹ See Art. 63(2) of the 2009 agreement on the patents regulation (*supra* n. 46), which would have made the application in practice of that legislation dependent upon the EU's membership of the EPC and the entry into force of the patent litigation treaty. See also the 2009 conclusions (*supra* n. 47).

¹⁶² There is no such link in the proposal for the Regs. implementing enhanced cooperation (*supra* n. 53), but Art. 22(2) of the agreed text (*supra* n. 54) makes such a link. On the other hand, the proposal to authorize enhanced cooperation and the decision to authorize it make no reference to this issue (*supra* n. 1 and 51). None of these measures makes any reference to the EU's conclusion of the EPC, and recitals 6, 14, 15 and 15a in the preamble and Arts. 1, 12 and 13 of the agreed Reg. implementing enhanced cooperation implicitly assume that the EU will not conclude the Convention.

On the first point (patent litigation), it would certainly be unwise for the EU patent to be launched without addressing patent litigation issues in parallel, because in that case, the current complications arising from patent litigation would be increased in magnitude,¹⁶³ since the EU patent would be valid in many more member states than the European patent usually is. It is likely that in this scenario, there would be little interest in applying for EU patents. However, there is no legal requirement that EU legislation has to be a good idea.¹⁶⁴ More precisely, while the 2009 agreement gave power to the planned patent court to decide on the compulsory licensing of EU patents,¹⁶⁵ this was a political choice too, given that the original proposal would have conferred such power on the Commission.¹⁶⁶ In any event, the issue of compulsory licensing is outside the scope of the agreed EU patent legislation.¹⁶⁷

On the second point (EPC amendment), while the Commission and Council certainly asserted in the 2009 conclusions that it was necessary for the EU to conclude the EPC and amend that Convention, and the Commission even drew up a 'wish-list' of proposed amendments,¹⁶⁸ the EPC already provides for the possibility of creating a 'unitary' patent, and also provides for a non-exhaustive list of possibilities for 'special arrangements' between a limited number of parties.¹⁶⁹

If the EU did still wish to conclude and/or amend the EPC, it should be recalled that it is possible to amend the EPC by a three-quarters majority, forcing those states in the minority to ratify the amendments or leave the organization.¹⁷⁰ However, the EU member states participating in the EU patent fall short of a three-quarters majority, and so would the full complement of EU member states.¹⁷¹

¹⁶³ See the 'EU Civil Law' section *supra*.

¹⁶⁴ Readers may wish to speculate how many EU measures would be invalid if such a legal rule existed.

¹⁶⁵ Arts. 21 and 22 of the 2009 agreement (*supra* n. 46).

¹⁶⁶ Arts. 21 and 22 of the 2000 proposal (*supra* n. 30). It has been argued that it would be unwise to give this power to the Commission (Jaeger, *supra* n. 32, at p. 71 at n. 51 of that article), but not that it would be *illegal* to do so.

¹⁶⁷ See recital 9a in the preamble to the agreed text (*supra* n. 54). The proposal for the Reg. (*supra* n. 53) made no mention of this issue.

¹⁶⁸ SEC(2001)744, 7 May 2001. The Commission suggested six changes, relating to translation, fees, the role of national offices, substantive EU patent law, judicial control (as regards observance of EU law) and EU conclusion of the EPC as such. On the EU/EPO relationship, see H. Ullrich, 'Patent Protection in Europe: Integrating Europe into the Community or the Community into Europe?', 8 *European Law Journal* (2002) p. 431-491, at p. 462-467.

¹⁶⁹ Part IX of the EPC; see the 'Background' section *supra*. As noted above (*supra* n. 162), the agreed text of the Reg. implicitly assumes that the participating member states will apply these provisions of the EPC, in place of the EU concluding the EPC and arranging for amendments to the EPC.

¹⁷⁰ Art. 172 EPC.

¹⁷¹ A three-quarters majority is 29 of the 38 EPC members.

It might anyway be questionable whether it would be legal for the EU and the member states participating in the EU patent to call into question the EPC membership of Spain and Italy. Equally it is hard to argue that Spain and Italy could be compelled to support such changes.¹⁷²

If the EU did conclude the EPC, that agreement would become an integral part of EU law, with the Court of Justice competent to give rulings on the interpretation and legal effect of that Convention.¹⁷³ On the other hand, as long as the EU does not conclude the EPC, the Court of Justice will not in principle have the competence to interpret that Convention, as long as the EU has not completely replaced the member states' role in that organization in practice.¹⁷⁴ However, it will still be possible to argue that an EU act is invalid in light of the EPC if that act requires the member states to breach their EPC obligations, while claiming not to.¹⁷⁵

A specific issue arises, however, as regards judicial review of EPO decisions, where it is arguable that as far as the EU patent is concerned, it is necessary to ensure judicial review of decisions, instead of administrative appeals to the EPO's Board of Appeal.¹⁷⁶ It is arguable, however, that the rights of those opposing the grant of a patent are protected by the possibility of bringing an action for revocation or resisting an infringement action by claiming the invalidity of the patent.¹⁷⁷ For a disappointed applicant, the position is different, but it remains to be seen whether the Court of Justice will tolerate any possibility of the automatic application within the EU legal order of the decisions of bodies established by international treaties which are not subject to effective judicial review.¹⁷⁸

¹⁷² Since the EPC would remain a 'mixed agreement' (with both the EU and its member states as parties) as long as it is possible to apply for a European patent designating some member states only, the member states would retain an individual voting right as regards EPC amendments. Any amendments to the EPC regarding translation would anyway require a unanimous vote of the EU member states participating in the relevant decision: see Art. 218(8) TFEU. Also, as regards enhanced cooperation, while Spain and Italy cannot 'impede its implementation', the participating member states must 'respect the competences' and 'obligations' of non-participants.

¹⁷³ See by analogy the case-law relating to the TRIPs (*supra* n. 84-87).

¹⁷⁴ See, for instance, Case C-301/08 *Bogiatzi* [2009] ECR I-10185 and Case C-308/06 *Inter-tanko* [2008] ECR I-4057.

¹⁷⁵ Case C-377/98 (*supra* n. 87). It should not matter whether that act applied to all member states, or just to those participating in enhanced cooperation. It could also be argued that the Reg. establishing the EU patent should be interpreted in light of the EPC, given the links between the two measures: see by analogy the opinion of 29 June 2010 in Case C-162/10 *Phonographic Performance (Ireland)*, pending.

¹⁷⁶ See the opinion of the Advocates General in *Opinion 1/09* (*supra* n. 118) and Jaeger *supra* n. 32, at p. 109-111.

¹⁷⁷ See by analogy Case C-50/00 *UPA* [2002] ECR I-6677.

¹⁷⁸ See by analogy Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351 and subsequently the judgment

While the Commission originally believed that a judicial review of EPC decisions was not necessary,¹⁷⁹ its 2011 proposal to implement enhanced co-operation instead required a guarantee of such review, and the Council's agreed text also incorporates such a requirement.¹⁸⁰ There is no indication of which court will exercise this review. Also, it is not clear whether it is necessary to amend the EPC to this end.¹⁸¹

As for the requirement that enhanced co-operation protect the EU's interests, further its objectives and reinforce its integration process, it is true that enhanced co-operation can only accomplish these goal among *some* member states, but then it must follow that 'half a loaf is better than none', i.e., it is better to accomplish these goals as among some member states than among none of them, or to attempt to accomplish them outside the EU legal order instead (which can hardly be said to further the EU's integration process).¹⁸² If this basic principle is not accepted, then it is hard to imagine how *any* authorization of enhanced co-operation could be valid. It can hardly have been the intention of the Treaty drafters that it would be legally impossible to justify the launch of enhanced co-operation, particularly in light of the intention of the drafters of the Treaty of Nice to make it easier to trigger that process.¹⁸³

The more difficult issues relate to the concerns of the non-participants. First of all, the requirement that enhanced co-operation must respect their rights, obligations and competences is satisfied as long as those states are not forced to leave or amend the EPC, as discussed above. Secondly, as regards the internal market, trade barriers or discrimination and distortion of competition, the Court of Justice has already ruled that distinctions in the language regime relating to the European patent do not as such distort trade.¹⁸⁴

As for the argument that the enhanced co-operation discriminates on grounds of language (and therefore nationality) against Italian and Spanish, this point could equally be made as regards the *other* EU languages which are not subject to trans-

of the EU's General Court of 30 Sept. 2010 in Case T-85/09 *Kadi II* (not yet reported), which is on appeal to the Court of Justice (Joined Cases C-583/10 P, C-594/10 P and C-595/10 P, *Commission, Council and UK v. Kadi*, pending).

¹⁷⁹ See *supra* n. 168. It should be noted that national courts have consistently rejected arguments raised for judicial review of EPO decisions on patents (or other EPO decisions), and the European Commission of Human Rights has backed them. For details, see A. Reinisch, 'Decisions of the European Patent Organisation Before the National Courts', in A. Reinisch, (ed.), *Challenging Acts of International Organizations Before National Courts* (OUP 2010) p. 137-156.

¹⁸⁰ See Art. 12(3) of the proposal and agreed text (*supra* n. 53 and 54). The Council changed the proposed reference to a 'national' court to a reference to a 'competent' court.

¹⁸¹ This would not necessarily, as such, entail EU conclusion of the EPC.

¹⁸² See Peers *supra* n. 2, at p. 349-350.

¹⁸³ See, by analogy, *supra* n. 146.

¹⁸⁴ *BASF* (*supra* n. 8).

lation obligations. The Court of Justice has already rejected a similar argument as regards the language regime governing the EU trademark (where only German, English, French, Italian and Spanish are used),¹⁸⁵ and these arguments are relevant by analogy to the EU patent. The distinction between the languages used for the EU trademark and for the EU patent can be explained by an objective distinction – the official languages of the EPO, which will be granting the EU patent. EU citizens' right to write to any EU body or agency in any EU language applies only to certain bodies,¹⁸⁶ and in any event the EPO is not an EU body at all. Finally, while the EU Charter of Rights requires the EU to respect cultural and linguistic diversity,¹⁸⁷ the Charter also provides for limitations on rights if they are proportionate and meet 'objectives of general interest recognized by the Union.'¹⁸⁸ The Union's objectives include 'promot[ing] scientific and technological advance',¹⁸⁹ and as for proportionality, it can hardly be claimed that the richness of the languages of Cervantes and Dante is dependent upon their use in patent claims.

THE FUTURE OF THE EU PATENT

Given that simplifying the issue of patent litigation will be important as regards EU patents, and is already an issue as regards European patents,¹⁹⁰ it is necessary to examine the options, in light of *Opinion 1/09*, for establishing a patent litigation system which is not only legally sound from the perspective of EU law, but also both workable in practice from the point of view of users of the patent system,¹⁹¹ and realistic in light of the political constraints on possible developments.

First of all, it would be possible to amend the EU Treaties to permit EU accession to the draft patent court agreement which the Court of Justice rejected in *Opinion 1/09*,¹⁹² but this is highly unlikely due to a general resistance among

¹⁸⁵ Case C-361/01 P *Kik* [2003] ECR I-8283, upholding the Court of First Instance judgment in Case T-120/99 *Kik* [2001] ECR II-2235.

¹⁸⁶ Art. 24 TFEU, fourth para.

¹⁸⁷ Art. 22 of the Charter (*OJ* [2007] C 303).

¹⁸⁸ Art. 52(1) of the Charter (*ibid.*).

¹⁸⁹ Art. 3(3) TEU, first sub-para.

¹⁹⁰ See the 'Patent Litigation' section *supra*.

¹⁹¹ If these users do not think the judicial system for the EU patent is workable, they will not apply for EU patents (given that they will still have an option to apply for national patents or European patents which do not take the form of the EU patent), and the whole exercise will have been in vain.

¹⁹² According to Art. 218(11) TFEU, a Court ruling that a draft treaty is incompatible with the Treaties means that the treaty concerned cannot enter into force unless it is amended or the 'Treaties are revised.' There is precedent for the latter approach: the current Art. 6(2) TEU, permitting (in fact requiring) the EU to accede to the ECHR, effectively overruled the judgment in *Opinion 2/94* [1996] ECR I-1759.

member states to Treaty amendment, the difficulty of obtaining approval for such an amendment if there were referenda in the UK and Ireland, and in particular the probability that Spain and Italy would be unwilling to approve any measure which facilitates the development of the EU patent, due to their objection to the authorization of enhanced co-operation.

This leaves two categories of options within the current legal framework: those involving the participation of non-EU states, and those concerning (at least some) EU member states only. The first category can be sub-divided into three possible sub-options: a treaty between (some or all) member states and third states relating to litigation concerning both EU patents and European patents; a treaty between (some or all) member states and third states relating to litigation concerning European patents only (i.e., the EPLA); or a treaty between (some or all) member states and third states relating to litigation concerning *EU* patents only.

As regards any of these options, it would not be possible for the EU to participate, since its participation in a treaty with third states creating a common court in place of Member states' courts is incompatible with the EU legal order. *Opinion 1/09* ruled this out explicitly as regards the first sub-option,¹⁹³ but the ruling also logically rules out the EU's participation in *any* treaty with third states which creates a common court in place of Member states' courts.

What if the member states (or some of them) acted *without* the participation of the EU in concluding such a treaty with third states? Although the Court of Justice did not rule expressly in *Opinion 1/09* on whether member states could enter into such treaties without the EU's participation, this can be explained by the procedural framework of that case: Article 218(11) TFEU only concerns 'agreement(s) envisaged' in which the *EU* will be a party.¹⁹⁴ But the objections of the Court of Justice to the draft patent court agreement did not hinge on the EU's competence or any specific rule relating to the EU as distinct from its member states. Indeed, the Court of Justice ruled that:

... the *Member States* cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement

¹⁹³ See the section on the 'Proposed Litigation Agreement', *supra*.

¹⁹⁴ The 'agreement(s) envisaged' in Art. 218(11) must logically be the agreements 'between the *Union* and third countries or international organisations' (emphasis added) referred to in Art. 218(1) TFEU. This is confirmed by comparison with the Treaty establishing the European Atomic Energy Community (*OJ* [2010] C 84), which provides for jurisdiction for the Court of Justice to rule on agreements envisaged between *member states* and third States (Arts. 103-105 of that Treaty: see *Ruling 1/78* [1978] *ECR* 2151). Member states' participation in a treaty incompatible with EU law could be challenged by means of EU infringement actions (see, by analogy, *Case C-467/98 Commission v. Denmark* [2002] *ECR* I-9519), and conceivably also by means of a reference for a preliminary ruling from a national court to the Court of Justice.

European Union law and, thereby, of the power...or...the obligation, to refer questions for a preliminary ruling in the field concerned.¹⁹⁵

It must follow that, at least as regards EU patents, member states cannot enter into a treaty which divests their national courts of all jurisdiction concerning EU legislation and hands that jurisdiction instead to a court created by an international treaty between member states and third states. There is no provision of the Treaties which gives the EU the authority to confer such power upon member states.¹⁹⁶

Could it be argued, however, that member states could nevertheless enter into a treaty which divests their national courts of jurisdiction as regards European patents only, i.e., the second option (the EPLA)? As noted already, the Court's ruling in *Opinion 1/09* confined itself to the question of compatibility of rules divesting national courts of jurisdiction as regards EU patents.¹⁹⁷ However, it must follow by analogy from *Opinion 1/09* that although it might be acceptable to divest national courts of jurisdiction as regards an issue which was not linked to EU law, this is not permissible as regards issues with links to EU law. But as explained above,¹⁹⁸ there are links between European patents and EU law as regards civil jurisdiction, substantive EU patent law, EU legislation on enforcement of intellectual property rights, free movement of goods, competition law and the common commercial policy (as regards the TRIPs and arguably also 'TRIPs-plus' agreements).

It might be argued that the Court of Justice's objections could be overcome if (as regards any of the three sub-options) there were some form of route from a court created by an international agreement back into a national court system, at least where issues of EU law were concerned.¹⁹⁹ This might also permit the EU to become a party to the treaty in question. But given the central importance for the Court of Justice of national judicial control, this alternative approach could only be legally viable if any case raising EU law issues were automatically transferred to or reviewed by a national court, at least as regards the EU law issues.²⁰⁰ The mere possibility of a special appeal to the national courts as regards the EU law issues would not offer a sufficient guarantee of national courts' involvement, since

¹⁹⁵ Para. 80 of *Opinion 1/09* (emphasis added).

¹⁹⁶ Compare with Art. 2(1) TFEU, which permits the EU to delegate its exclusive competence to member states.

¹⁹⁷ *Supra* n. 121.

¹⁹⁸ See the sections on 'Other EU rules on patents' and 'EU civil law' *supra*.

¹⁹⁹ It would not be necessary for the non-EU States participating in the treaty concerned to provide for such a mechanism.

²⁰⁰ A mandatory requirement for a preliminary ruling from the international court to a national court as regards the EU law issues would also arguably be satisfactory.

there is always the possibility that the parties might not introduce such an appeal. However, while such an alternative approach is probably legally viable, it is not practically viable, since users of the patent system have a strong aversion to such an extensive involvement of national courts on patents issues.²⁰¹

Even if the obstacles relating to the role of national courts could be overcome, there is a further obstacle: the external competence of the European Union, which would require either the participation of the EU in such a treaty alongside its member states, or EU authorization for member states to sign up to the treaty concerned. Such external competence obviously exists as regards the first and third sub-options, since they concern litigation on the EU patent,²⁰² but it also exists as regards the second sub-option, i.e., litigation on European patents only (i.e., the EPLA). This is because as noted above, there are links between European patents and EU law as regards in particular) civil jurisdiction and EU legislation on enforcement of intellectual property rights. It has rightly been argued by the Commission and the EP's legal service that the EPLA cannot be signed by the member states without EU participation or authorization,²⁰³ because the EU's external competence as regards civil jurisdiction is exclusive and the EU also has external competence as regards the enforcement of intellectual property rights because of its own legislation on this issue.²⁰⁴ This is so even though the civil jurisdiction issues in question only form part of the agreement concerned,²⁰⁵ and even though the draft EPLA purports to ensure the priority of EU law.²⁰⁶ It should

²⁰¹ See Jaeger (*supra* n. 32). However, it should be noted that national courts have extensive powers as regards other EU intellectual property rights: see the judgment of 12 April 2011 in Case C-235/09 *DHL Express*, not yet reported.

²⁰² Arguably the mere *authorization* of enhanced cooperation as regards the EU patent has already created external competence for the EU as regards that issue. Such competence would indisputably exist once the measures *implementing* enhanced cooperation are adopted.

²⁰³ For the reasons which follow, the contrary arguments in the literature must be rejected. For those arguments, see J. Willems, 'Awaiting the Community Patent – A Suggestion for an Interim Solution', 33 *International Review of Intellectual Property and Competition Law* (2002) p. 561 and A. Oser, 'The European Patent Litigation Agreement – Admissibility and Future of a Dispute Resolution for Europe', 37 *International Review of Intellectual Property and Competition Law* (2006) p. 520. On the other hand, see the arguments in favour of exclusive competence in A. Arnulf and R. Jacob, 'European Patent Litigation: Out of the Impasse', 29 *European Intellectual Property Review* (2007) p. 209, and Jaeger *supra* n. 32, at p. 103-105.

²⁰⁴ See SEC(2009)330, 20 March 2009, and the EP legal service opinion, online at: <www.ipeg.com/_UPLOAD%20BLOG/Interim%20Legal%20Opinions%20Legal%20Service%20EP%20Feb%201%202007.pdf>. However, it is not correct to argue that the EPLA falls entirely within the EU's exclusive competence, as the EP legal service opinion argues, because (for instance) the EU is not exclusively competent as regards the creation of a common court.

²⁰⁵ See, by analogy, the treaties referred to *supra* n. 109 and 110.

²⁰⁶ Arts. 39(2) and 38(3) of the EPLA (*supra* n. 15). According to the Court of Justice, such 'disconnection' clauses do not take the treaty concerned outside the scope of the EU's external

be noted that the EPLA contains an express requirement to designate the planned international court as a national court for the purposes of the Brussels Regulation, which undoubtedly 'may affect common rules or alter their scope' within the meaning of the *ERTA* judgment and Article 3(2) TFEU.²⁰⁷ This is true *a fortiori* since the Regulation makes express reference to jurisdiction regarding European patents.²⁰⁸ Furthermore, the EU's exclusive external competence is not simply an expression of the primacy of EU law, for it exists *regardless of whether there is a conflict* between the treaty in question and internal EU legislation.²⁰⁹

It would be possible for the competence issues to be resolved if the EU participated in or authorized its Member states to conclude the treaty concerned.²¹⁰ However, there was insufficient support from the Council for the EU to participate in the EPLA, or presumably to authorize member states to do so.²¹¹

In conclusion, the option of a treaty between the member states and third states (with or without the EU's participation) concerning patent litigation (regardless of its application to EU patents, European patents or both) is probably not feasible because a) such a treaty would in part fall within the scope of the EU's exclusive external competences, so the member states could not sign it without the EU's participation or authorization, and there is probably not enough support for either; and b) even if there were enough support for this, in light of *Opinion 1/09* neither the EU nor its member states can participate in a treaty with third states which divests EU member states' national courts of any jurisdiction as regards issues within the scope of EU law, unless the involvement of those national courts was in some way guaranteed as regards EU law matters. But the involvement of na-

competences, but rather *reinforce* the conclusion that the treaty concerned affects those competences: see *Opinion 1/03* and *Commission v. Denmark* (*supra* ns. 106 and 194).

²⁰⁷ Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263. It is assumed that Art. 3(2) TFEU simply restates the *ERTA* principles (see by analogy the opinion in Case C-13/07, *supra* n. 75, as regards Art. 2 TFEU). Alternatively, even if Art. 3(2) TFEU has a different meaning than the *ERTA* principles, it must at least extend exclusive competence where a treaty, like the EPLA, expressly requires Member states to implement EU legislation a certain way.

²⁰⁸ Art. 22(4) of Reg. 44/2001 (*supra* n. 92). See also the *TNT Express* case (*supra* n. 114). While Art. 71 of the Reg. protects pre-existing member state treaties, this presumably only applies to those in force at the time when the Reg. was adopted: see by analogy *Commission v. Denmark* (*supra* n. 194), paras. 33-42.

²⁰⁹ See, for instance, *Commission v. Denmark* (*ibid.*).

²¹⁰ On the latter point, see Art. 2(1) TFEU.

²¹¹ SEC(2009)330, 20 March 2009. For a critical view of the Commission's failure to propose EU authorization for member states to sign the EPLA, see J. Papenburg, 'Another Year of Debates on Patent Jurisdiction in Europe, and No End in Sight?', 38 *International Review of Intellectual Property and Competition Law* (2007) p. 805. It should be noted that to the extent that EU competence regarding the EPLA relates to civil jurisdiction and enforcement of intellectual property rights, only QMV would be necessary to authorize member states to participate.

tional courts is rejected by users of the patent system. In short, the few options which are legally feasible are probably not also politically or practically feasible.

It would also be legally possible to leave jurisdiction regarding EU patents with the national courts, addressing the problems with patent litigation by means of more far-reaching amendments to the EU's civil jurisdiction rules, in order to centralize jurisdiction as regards European patents and future EU patents, and also bring together validity and infringement actions.²¹² However, users of the patent system doubt the viability of giving jurisdiction to national courts at all to give centralized judgments on the validity of patents, even in the context of the 1989 version of the Community patent convention which created a common appellate patent court.²¹³

This leaves us with the second category of options: those which concern the creation of a common court between EU member states only. This could most obviously take the form of conferring jurisdiction on the existing EU courts (or a new judicial panel) as provided for expressly in Article 262 TFEU, and as proposed by the Commission in 2003.²¹⁴ Such an approach has the drawback that it cannot apply to European patents, since Article 262 only applies to 'disputes relating to the application of acts adopted on the basis of the Treaties.' The obscure prospect of adopting a 'special agreement' conferring jurisdiction on the Court pursuant to Article 273 TFEU is not relevant, since it only applies to 'dispute[s] between Member States.' However, member states have in the past been willing to sign international treaties between member states only which confer new jurisdiction on the Court of Justice (for instance, the earlier Community patent Conventions), so presumably they could do so as regards the European patent, in parallel to a measure conferring jurisdiction pursuant to Article 262 TFEU as regards the EU patent.

The central problem with conferring patent jurisdiction upon an EU court is not legal, but practical: users of the patent system doubt the viability of the idea due to the delays in the EU court system and the lack of specialization in patent issues.²¹⁵

However, as noted above,²¹⁶ the Court of Justice confirmed in *Opinion 1/09* that 'the procedure described in' Article 262 TFEU 'is not the only conceivable way of creating a unified patent court', and in particular that Article 262 'does not establish a monopoly for the Court in the field concerned and does not predetermine the choice of judicial structure which may be established for disputes between individuals relating to intellectual property rights.'²¹⁷

²¹² See the 'EU Civil Law' section, *supra*.

²¹³ See *supra* n. 33.

²¹⁴ *Supra* n. 31 and 32.

²¹⁵ *Supra* n. 33.

²¹⁶ See the 'EU Civil Law' section, *supra*.

²¹⁷ Paras. 61 and 62 of the judgment (*supra* n. 4).

So this brings us to the final remaining sub-option: the creation of a common court system separate from the EU court system, except that, in accordance with *Opinion 1/09*, it must be possible to refer questions regarding EU law issues from that court to the Court of Justice. Subject to that proviso, a common court established by Member states only is not fundamentally incompatible with EU law, as the Court of Justice expressly confirmed in *Opinion 1/09*.²¹⁸

It is probably not possible to create such a common court by means of EU legislation, given that Article 118 TFEU confers competence on the EU as regards the ‘creation’ of intellectual property rights and ‘the setting up of centralised Union-wide authorisation, co-ordination and supervision arrangements’ concerning those rights, but makes no reference to the creation of a common court system. In any event, Article 118 does not apply to European patents, but only to those created by EU legislation, so could not be used to create a court with jurisdiction over European patents. It might conceivably be argued that the EU’s internal market powers or its residual legal powers to act where the Treaties have not conferred the necessary powers would confer power to create such a court (with jurisdiction over European patents as well),²¹⁹ but this suggestion would likely be contested by some Member states’ governments, as well as national parliaments or courts.

If the EU did have competence to create such a court, the adoption of an EU measure to this end could presumably only apply, as far as EU patents are concerned, to the member states participating in the EU patent legislation, and so enhanced co-operation would again have to be authorized in this regard, since the current authorization for enhanced co-operation does not extend to the creation of a common court.²²⁰ It might be argued that authorization of enhanced co-operation would be illegal in this case because the measure concerned would fall within the scope of the EU’s exclusive competence (as regards civil jurisdiction), and enhanced co-operation cannot be authorized in such cases. However, this argument should be rejected because the definition of exclusive EU competences in Article 3 TFEU distinguishes between competences which are exclusive by nature,²²¹ and those which are exclusive by exercise – and in the latter case, the EU only has exclusive competence ‘for the conclusion of an *international agreement*’.²²² An internal legal act of the EU is clearly not an ‘international agreement’.

²¹⁸ Para. 82 of the judgment, *ibid*.

²¹⁹ Arts. 114 and 352 TFEU.

²²⁰ See the ‘Authorizing Enhanced Cooperation’ section, *supra*.

²²¹ Art. 3(1) TFEU. Civil jurisdiction is not listed here.

²²² Art. 3(2) TFEU (emphasis added).

On the other hand, the authorization of enhanced co-operation as regards such a court could be problematic to the extent that such a court also has jurisdiction over European patents because it could be argued that this would create discrimination, et al against European patents which were also granted in respect of Italy and Spain. It might be possible to address this by adopting two separate instruments, one giving the court concerned jurisdiction over European patents as regards all member states, the other giving that court jurisdiction over EU patents as regards those member states participating in the EU patent only.

The stronger legal argument is that a common court could be created by means of a treaty between member states. It might be objected at the outset that while treaties between member states are perfectly legal (as a matter of EU law) as long as they concern competence which the EU *shares* with its member states (provided that they do not conflict with EU law, in order to take account of the primacy of EU law),²²³ their validity might be questioned where those treaties concern an exclusive competence of the European Union, i.e., treaties concerning civil jurisdiction. The answer to this argument is that the Union's exclusive competence in this regard (i.e., where its competence is exclusive by exercise) applies only to international agreements *with third states* (for example, the planned EPLA), not between member states only. This is not expressly stated in Article 3(2) TFEU, but is undeniably clear from the judgment of the Court from which Article 3(2) is derived.²²⁴

So member states are not prevented from entering into treaties between each other, even in areas where EU competence is exclusive by exercise, unless they infringe the principle of primacy of EU law (by contradicting their EU obligations) or the principle of loyal co-operation (now set out in Article 4(3) TEU).²²⁵ But far from violating the latter principle, the participation of member states in a treaty creating a common court for patent litigation will *facilitate* the application of the legislation establishing the EU patent, and might even be necessary for that legislation to apply in practice. So it might even be argued that the principle of loyal co-operation *requires* the member states participating in the EU patent to

²²³ See B. De Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union', in G. de Burca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart 2000) p. 31.

²²⁴ *ERTA* (*supra* n. 207): the Court refers to 'third States', 'third countries' or 'external relations' as regards the EEC's competence in paras. 12, 14, 17-19 and 26-29 of that judgment. It is also arguable that the prohibition on authorizing enhanced cooperation in areas of exclusive competence could be circumvented if the EU delegates its powers to member states pursuant to Art. 2(1) TFEU.

²²⁵ See further B. De Witte, 'Chameleonic Member States? Differentiation by Means of Partial and Parallel International Agreements', in B. De Witte, F. Hanf and E. Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) p. 231.

negotiate and ratify a treaty conferring jurisdiction on a common court as regards that patent.

As regards the former point (the primacy of EU law), the EU's civil jurisdiction legislation would have to be amended in order to take account of the creation of a common court for patents, given that the legislation currently refers to the jurisdiction of national courts as regards EU and European patents.²²⁶ The legislation could be amended on this specific point quickly, if necessary separately from the broader amendments to that legislation proposed in 2010,²²⁷ which might take longer to discuss. While it might be argued that creating separate regimes as regards patent litigation in the EU's civil jurisdiction would be discriminatory, there is a precedent for comparable distinctions.²²⁸ More broadly, it could be argued that measures of this type are necessary, because Article 334 TFEU expressly requires the EU to ensure consistency between measures adopted within the framework of enhanced co-operation and other EU policies. Similarly, amendments could be made if necessary to the EU's legislation on enforcement of intellectual property rights to ensure consistency with the EU patent measures,²²⁹ and to the Lugano Convention for consistency with amendments to the Brussels Regulation.²³⁰

Moving on to the content of the patent litigation treaty, it would be easy to adapt the text of the EPLA (as adapted already to extend its jurisdiction to EU patents) for this purpose. The treaty would, of course, have to be amended so that only EU member states are signatories. It would be possible (and arguably legally necessary, to avoid distorting trade flows within the EU) to invite Spain and Italy to participate in the treaty, as regards litigation on European patents.²³¹ There would be no legal requirement to delay the entry into force of this treaty until a certain number (or all) member states had ratified,²³² although complications as regards patent litigation would persist to some degree as long as not all member

²²⁶ Art. 22(4) of Reg. 44/2001 (*supra* n. 92). See also Art. 14 of the 2009 agreement (*supra* n. 46), and Art. 10 of the proposed and agreed implementing Reg (*supra* n. 53 and 54).

²²⁷ *Supra* n. 101.

²²⁸ See the different treatment of the UK as compared to the other member states as regards conflict of law regarding maintenance in Reg. 4/2009 (*OJ* [2009] L 7/1). Art. 71 of the Brussels Reg. (*supra* n. 92) also entrenches similar distinctions, as do Regs. 662/2009 and 664/2009 (*supra* n. 113).

²²⁹ Dir. 2004/48 (*supra* n. 67). On the link between this Directive and the civil jurisdiction legislation, see the opinion of 5 April 2011 in Case C-406/09, *Realchemie Nederland*, pending.

²³⁰ This would also address the need for consistency if the EU patent legislation is extended to the non-EU members of the European Economic Area (Norway, Iceland and Liechtenstein).

²³¹ Similarly, the creation of a court for EU patents only (but not European patents) might arguably be discriminatory against Italy and Spain, since it would create an incentive to apply for EU patents only (and not European patents) in future as the only route to reduce litigation costs.

²³² As noted in the section on 'Authorizing Enhanced Cooperation', *supra*, the provisions to this effect in the EU patent legislation agreed in 2009 are not legally necessary.

states had done so. It would be necessary to provide expressly that the common court could (at first instance) and must (on appeal) refer questions for a preliminary ruling on EU law issues to the Court of Justice, since in the absence of such a provision that rule would not apply, since the common court would not have any links with national courts.²³³

The solution suggested above has also been recommended, following the same reasoning, in a non-paper from the Commission, which appears to have been endorsed broadly by the Council.²³⁴ On that basis, the draft patent litigation treaty is being revised.²³⁵ The revised draft treaty on a 'Unified Patent Court' retains the provisions on requesting preliminary rulings from the Court of Justice, and adds express provisions on the primacy of EU law, the damages liability of member states as regards the patent court and collective liability pursuant to Articles 258-260 TFEU.²³⁶ This draft also provides for the treaty to enter into force early as regards those member states which ratify it first.²³⁷ This flexibility is highly welcome, given that the EU patent legislation cannot apply until the litigation treaty enters into force,²³⁸ and that the ratification of the litigation treaty might run into political and constitutional difficulties in some member states (just as the prior EU patent conventions did).²³⁹ In the event that the treaty is agreed and ratified, it can be expected that the Unified Patent Court will, over time, play a significant role in the development of patent law in practice.²⁴⁰

²³³ See the judgment of 14 June 2011 in Case C-196/09 *Miles*, not yet reported, distinguishing the judgment in *Dior* (*supra* n. 127).

²³⁴ Council Doc. 10630/11, 26 May 2011; see also the recording of the public debate of the Competitiveness Council, 30 May 2011.

²³⁵ Council Doc. 11533/11, 14 June 2011.

²³⁶ Arts. 14a-14d of the draft treaty (*ibid.*). There is also a new clause on languages in proceedings (Art. 31(3)), which perhaps addresses some concerns in the Advocates-Generals' opinion on this point (*supra* n. 118).

²³⁷ Art. 59 of the draft treaty (*ibid.*), which provides for entry into force once the treaty is ratified by an unspecified number of member states, including the three member states with the biggest number of European patents (this would likely be the UK, France and Germany). This is apparently based on the London Agreement (*supra* n. 12), which entered into force after ratification by eight countries, including the three States with the biggest number of European patents (Art. 6(1) of that agreement).

²³⁸ See *supra* n. 162.

²³⁹ At the very least, such early application of the treaty should be allowed as regards European patents, since the application of the treaty to such patents does not impact upon the EU patent and is therefore essentially a matter for member states – as long as the EU civil jurisdiction legislation is amended to permit this, as the 'non-paper' (*supra* n. 234) suggests,

²⁴⁰ See the analysis of C.S. Petersen and J. Schovsbo, 'On Law and Policy in a European and European Union Patent Court (EEUPC) – What Will It Do to Patent Law and What Will Patent Law Do to It?', in H. Koch, et al. (eds.), *Europe: The New Legal Realism – Essays in Honour of Hjalte Rasmussen* (Djof 2010) p. 609-638.

CONCLUSION

In this area, it is clearly not easy to satisfy simultaneously users of the patent system, who are reticent of granting jurisdiction over the EU patent to national courts, and the Court of Justice, which is equally reticent to see any jurisdiction taken away from those courts. But the solution suggested above, and which is now under consideration by member states, would address both the practical concerns of the former and the legal objections of the latter. It is now almost possible to imagine that despite innumerable constitutional complications, the EU patent will become a reality in the foreseeable future.

