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National, European and
Community Patent Protection:
Time for Reconsideration

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Abstract

The completion of a Community system of unitary intellectual property protection has come to a halt when the Commission's proposal for a Community Patent Regulation was shelved by the Council on political grounds in late 2004. By contrast, under the auspices of the European Patent Organization a draft European Patent Litigation Agreement has been set up with a view to have it adopted by those Contracting States of the European Patent Convention (EPC), which would volunteer for it. Given that conceptually both the Community patent project and the European Patent Convention date back to the mid of the last century, and that due to economic and technological change there is a good case to be made for a broad reform effort, it is proposed to benefit from the present crisis of unification of patent law by undertaking a review of the entire system with a view to establish a fundamentally modernized system of protection. This should include the recognition of the role national patents have to play in an integrated system of patent protection in Europe.

Keywords

Differentiated integration, economic law, RTD policy, language policy, international agreements, judicial review, Single Market

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National, European and Community Patent Protection: Time for Reconsideration

Hanns Ullrich*

I. Introduction

At the time of writing this paper the European Commission has just closed the first phase of new a consultation process on patent protection in Europe. Following a questionnaire action a public hearing has been held in Brussels on the 12th of July.¹ The Commission now hopes to be able to present its own conclusions and the steps to be taken by the end of the year.² This will be about a decade after the publication of “Promoting innovation through patents”: Green Paper on the Community patent and the patent system in Europe”,³ by which the Commission signalled to resurrect the project of a Community Patent which Member States had not managed to set up for over 30 years. In all the years since 1997, much has been done, but nothing achieved. We are in the second half-time of the Lisbon Programme⁴ aimed at making Europe the most

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1 See Commission, Questionnaire “On the patent system in Europe” of 9 January 2006; *Commission, Future Patent Policy in Europe: Public Hearing 12 July 2006 – Preliminary findings: issues for debate* (summarizing the written submissions); *id.*, Report on the Hearing; Mc Crevy (Commissioner), Closing remarks at public hearing on future patent policy (speech/06/453 of 12/07/2006), all available at the Commission’s homepage, DG Internal Market/Industrial Property/Patents/Community Patent.

2 Mc Crevy, *supra* n. 1; *id.* Future action in the field of patents, Commission statement before the European Parliament, Plenary Session Straburg, 28 September 2006 (Speech/06/546, available at European Commission, Press releases)

3 COM (97) 314 final

4 Lisbon European Council, 23 and 24 March 2000, Presidency Conclusions, sub 13 “ensure that a Community patent is available by the end of 2001, including the utility model, so that Community-wide patent protection in the Union is as simple and inexpensive to obtain and as comprehensive in its scope as the protection granted by key competitors” (!!), text available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/eu/ec/00100-r1.enO.htm; *Commission, Staff Working Document of 5 October 2005, SEC (2005) 1215, Annex to the Communication from the Commission “Implementing the Community Lisbon Programme: A policy framework to strengthen EU manufacturing – Towards a more integrated approach for industrial policy* (COM (2005) 474 final) mirrors all the disenchantment of the Commission since the failure of its proposal for a Directive on the protection of computer-implemented inventions (see *infra* n. 25).

dynamic innovation place in the world with a correspondingly up-graded system of technology protection, but we still face the 1997-situation: there is no Community Patent in sight, which would

- provide for a modern form of protection,
- be adapted to the needs of a knowledge-based economy,
- be equally accessible for all,
- be of unitary character,
- and work evenly throughout the Internal Market.

Instead, we live with 25 national patent systems of different reliability. As before, we additionally trust in the efficiency of the European Patent Organization. But the EPO, however successful, basically provides only for a cost-saving mechanism, namely the centralisation of the grant of a bundle of national patents, and we share it with many neighbour states outside the Community. In fact, it seems that the Community patent has much more of a past than of a future – almost half a century of fruitless efforts, but little prospect of ever being put into operation – whilst the further development of the European Patent Organisation remains a controversial option. Industry would like to see it used at a maximum, but many governments appear willing to “dismantle the European Patent Office” by asking for a share of its business.⁵ In addition, the Community has blocked the EPLA project as an unwelcome rival of its own proposal of a Community Patent Court, and it is reconsidering its position in this regard only now.

Institutionally speaking, the system of patent protection in Europe thus finds itself in an impasse, as it did so many times in the past. There are basically two ways out of it.

One is that which the Commission apparently wants to go. It is willing to re-launch the Community patent project, but only once the moment is more favourable. In the meantime, the Commission will ponder the many suggestions made to it during the consultation. Whether and to what extent it will modify its original proposal remains unclear. At any rate, no fundamental changes are to be expected, since its concern essentially is with so-called “political” questions concerning the language regime and the costs of patent protection in the Community. Additionally, it may be that the concept of a Community Patent Court will be revised; most likely it will be complemented by a mediation system.⁶ As an immediate approach, the Commission seems to be willing to place more reliance on the European patent, possibly even on the idea of a European Patent Litigation Agreement. How such an approach will work out without the Community joining the European Patent Convention, and how it will join the EPC – as apparently the Commission is willing to propose – without a Community patent, is not yet clear. In short, the Commission, nolens volens, seems to be inclined to follow a political path of muddling through, relying, as regards substance, on what from the many suggestions made by interested circles it thinks it can successfully carry through the legislative process.⁷

⁵ See *infra* sub 2 b)

⁶ See Mc Creevy, (*loc. cit.* *supra* n. 1) reacting positively to requests for mediation made during consultation.

⁷ Most likely, the purpose of the consultation process was to seek support, and to find out where and for what it is strongest, so as to impress the Council. In that sense, the consultation with its large number of reactions was a success for the Commission.

An alternative way out might be to use the present crisis as an opportunity to fundamentally reassess the project of a Community patent with a view to propose a fully modernized system of patent protection in the Community. Such an approach would be based on the assumption that the repeated failures of the project of a Community patent are due not only to “political” obstacles, which undeniably have been and are important. Rather, the “political questions” have become excessively weighty, if not a pretext due to the combination of two effects. First, there is the capture of the patent system by vested interests of various kinds – big industry, some industry branches in particular, the patent bar both before the offices and the courts, some public interest groups. Second, there is the increasing mismatch between, on the one hand, the patent system as it exists in Member States since almost half a century, and as it has been uncritically carried over into the Community patent proposal, and, on the other, the changes of both the innovation process, which it is supposed to serve, and the industrial structure, within which it must operate.

The first observation is obvious enough; sufficient evidence can be found throughout the history of the Community patent project.⁸ Its analysis is a matter of political sciences, since it largely concerns the way modern, and in particular the Community’s legislative process works. The second observation will need to be substantiated when examining the proposed system of protection and its alternatives. There is, however, enough evidence on the need to re-examine the question whether the patent system adequately meets its public policy purpose, such as the fact that the patent system works differently in different industry branches, that the expansion of patent protection tends to be counterproductive in some fields of innovation, that cooperative innovation puts specific strain on the operation of the patent system in general, and on its territorial limitation in particular, that socio-economic factors and ethical as well as environmental considerations increasingly concern the design of the system itself rather than only the regulatory framework, within which it operates, etc.⁹ The point to make here is that such an examination and reassessment would, first, readjust the order of private and public interests in the patent system, and , thus, might help to overcome the present legislative deadlock. Second, that by proposing an entirely modernized system of patent protection, it would help to better meet the objectives of the “Lisbon Programme”. Third, if based on a “vue d’ensemble” of the Community patent and the existing national systems of patent protection, including the nationally administered systems, a fundamentally revised overall approach might more actively contribute to the process of integration – possibly even by a differentiation of the system – than would a reanimation of the Community patent as it was proposed, and its reactive imitation by Member States in the form of soft harmonization, as has been the case in the past.¹⁰ It may be remembered, that both the successful creation of a Community mark , and later on, a Community design, has been based on prior harmonization of national laws, the objective being always not only a reduction of trade distortions

⁸ Well known illustrations are the patent agents insistence on privileged translation authority and Member States’ bazaar attitude as regards distribution of fee income, see Krieger, Brouer, Schennen, Die dritte Luxemburger Konferenz über das Gemeinschaftspatent vom 11. bis 15. Dezember 1989, GRUR Int 1990, 173, 177 et seq.

⁹ See also infra sub III 2

¹⁰ See infra n. 14

between Member States, but also and most importantly, a broad modernization of the systems of trade mark and of design protection respectively.¹¹

The following is not intended to outline the reasons for and the features of such an integrated Community system of patent protection. Rather, it is limited to serve as a first introduction into the problem area with a view to open the discussion. Even as such, it represents no more than a first approach, which in no way exhausts the topics that might need to be dealt with. Although the stories of the Community patent and of the European patent are well-known, they are summarized here again by way of introduction into the background of the problem, and because many of the arguments and counter-arguments, of the proposals and of the refusals of solutions for the Community patent, which have been made at various points in time, keep reappearing in the consultation process.

¹¹ In trade mark law harmonization related to the concept of what signs qualify for protection, to the recognition of service marks, to the notion of confusing similarity, i.e. the very definition of the scope of protection, to the transformation of the mere right to affix a trademark on a product into a full exclusivity of use, but also to the limitations, such as the requirement of use. As regards design law, an entirely revised rationale for protection had to be developed, which would overcome fundamentally diverging national principles of protection. See for the history of these more innovative approaches to establishing Community intellectual property titles against the backdrop of national laws which were modernized by way of harmonization *Ullrich*, *Die gemeinschaftliche Gestaltung des Wettbewerbsrechts und des Rechts des geistigen Eigentums*, in *Müller-Graff* (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 2nd ed. Baden-Baden 1999,403,435 et seq.; *id.*, *Die gemeinschaftsrechtliche Entwicklung des Rechts des geistigen Eigentums*, in *Behrens* (ed.), *Stand und Perspektiven des Schutzes geistigen Eigentums in Europa*, Baden-Baden 2004,9,44 et seq..

II. The development of the system of patent protection in the Community

1. The Community patent: lost in enlargement

a) The Convention approach by Member States

(i) In the Community's Official Journal of January 26, 1976 – so about a generation ago – the Council published the “Convention for the European patent for the common market (Community Patent Convention)” of December 15, 1975. It thus backed a project which, upon the Commission's invitation, Member States had begun with as early as 1959.¹² This “Luxemburg Convention” (CPC) was to be the Community counterpart to the “Munich Convention” on the Grant of European Patents of 1973. Limited to the Member States of the Community – nine at the time – the CPC provided for the post-grant rules of a Community patent. The principles were clear and straightforward: The Community patent was to be granted by the European Patent Organization, whose office would set-up “special departments common to the contracting states” for the administration of the Community patent and for its revocation.¹³ The Community patent was to have a unitary character, giving it equal effect throughout the Common Market, and excluding any grant, transfer, revocation, lapse or invalidation for less than the entire Common Market.¹⁴ According to Art. 3, designation of one Member State of the Community in the European patent application necessarily meant designation of the entire Community. The substantive rules covered much, but not all the terms of patent protection, as remedies had been left to national law. Conversely, matters contained in the Convention, such as the definition of the exclusivity and of the exceptions therefrom (Art. 29 et seq.), subsequently were adopted by national law, in part by way of soft harmonization,¹⁵ in part due to pressures from Community law. Politically more delicate issues, such as prior user rights and compulsory licences, were dealt with in a rather Community-unfriendly way, and with a promise of later harmonization that was never held.¹⁶

However, the Convention did not fail on these grounds. Rather, its non-ratification was due, among other things, to the combined effects of inherent weaknesses of the

¹² See Haertel, *Münchener Gemeinschaftskommentar* (Beier, Haertel, Schrickler, eds.), *Europäisches Patentübereinkommen*, 1. Lfg. Munich 1984, at p. 21 et seq., 25 et seq. (Geschichtliche Entwicklung, no. 36 et seq.); Beier, *ibid.*, 22. Lfg. 1998, p. 90 et seq. (Einführung 3. Teil, no. 10 et seq.)

¹³ Art. 4, 7 et seq. CPC 1975

¹⁴ Art. 2 para. 2 CPC 1975

¹⁵ See as to the influence of the EPC Haertel, *Harmonization of national patent law by European patent law*, 14 IIC 719 (1983); the influence of the CPC is less well documented, but see Benyamini, *Patent Infringement in the European Community*, Weinheim 1993, 57 et seq.; the requirement of domestic manufacturing and the rules on exhaustion have been indirectly harmonized by Community law, see Ullrich in Immenga, Mestmäcker (eds.), *Recht der Wettbewerbsbeschränkungen*, 4th ed. (= EG-Wettbewerbsrecht, 2nd ed.), Munich 2006, *Immaterialgüterrecht Teil A*, at no. 33 et seq., 74 et seq.

¹⁶ See Art. 38 (territorially limited prior user rights), Art. 46 (territorially limited compulsory licenses), Annex I containing resolutions on prior user rights and on compulsory licenses respectively; see also *infra* n. 44

Convention and of the second enlargement of the Community: New Members did not want to swallow the pill, unless old Members had swallowed it first, and all hesitated on some pretext or another. The reality was that Member States were unhappy with some of the arrangements (the share on fee income), industry as a potential client missed a litigation system, and both were – for opposite reasons – dissatisfied with the language regime.¹⁷

(ii) On the penultimate day of the year 1989, the Council published in the Community's Official Journal the "Agreement on the Community Patent" of December 15, 1989,¹⁸ so exactly 14 years after the 1975 Convention. The Agreement was the result of protracted negotiations over the revision and completion of the 1975 Convention.¹⁹ The revision of the 1975 Convention, which is incorporated into the Agreement as an annex, essentially concerns the language issue and the optionality of the Community patent. The language issue is solved by Art. 29, 30 to the effect that, instead of only the claims, now the claims and the full text of the application (the specification) have to be translated in all the languages of the Contracting States – by then 12 (= 10 languages). And instead of the principle of 1975 (Art. 3 CPC), whereby the designation of an EU-Member State on an EPO patent application necessarily was deemed to be one for the entire Community – Art. 86 limited the principle only by a relatively narrow transitional rule –, a new set of rules of default and transition (Art. 33 para. 5, 6; Art. 81) practically resulted in a principle of optionality between a Community patent and a European patent, i.e. a bundle really of national patents.

The revised 1975-Convention then was completed by a Protocol on Litigation.²⁰ It provided for a complicated combination of selected national courts, designated as Community patent courts, with a Common Appeal Court, which has to share its jurisdiction with national courts of appeal, designated as Community patent courts of second instance, the former being called upon to deal with matters of genuine Community patent law, the latter with the issues of general (national) law. That division of labour was due to both the absence of rules on remedies in the system of Community patent protection, and the diversity of national law in this respect. This diversity was also the reason why the more ambitious project of establishing a truly central Community Patent Appeals Court (COPAC) had been abandoned earlier. At the time, harmonisation of remedies was not as serious a concern as it is nowadays according to the Community's directive on remedies for the infringement of intellectual property.²¹ The result was the bifurcated litigation system, which as well was considered to be practically unmanageable. So the 1989 Agreement of the Community patent was bound to the fate of its predecessor, and the more so as the language regime again did not satisfy the future client of Community Patent, which after all is industry. All in all, the

¹⁷ See Krieger, Das Luxemburger Übereinkommen über das Gemeinschaftspatent – Herausforderung und Verpflichtung, GRUR Int 1987, 729, 730 et seq.

¹⁸ OJEC 1989 L 401, 1

¹⁹ See Haertel, Die Luxemburger Konferenz über das Gemeinschaftspatent 1985, GRUR Int 1986, 293, 295 et seq.; Krieger, loc. cit. GRUR Int 1987 at p. 731

²⁰ For details see Stauder, Die Vereinbarung über Gemeinschaftspatente, das Streitregelungsprotokoll und das Änderungsprotokoll, GRUR Int 1986, 302; Foglia, Procedural Aspects of Litigation Relating to Community Patents, 22 IIC 970 (1991).

²¹ Directive 2004/48/EC of the European Parliament and the Council on the enforcement of intellectual property rights, OJEC 2004 L 195, 16.

1985/89 Community Patent simply was too costly and too complex. It was officially buried in 1992 at a conference in Lisbon, which was aimed at setting the Community Patent into force among less than all EU Member States. The reason to consider a unitary patent for a Community à géométrie variable was that, on special grounds of domestic law, Ireland and Denmark were unable to ratify the Agreement/Convention. However, several Member States steadfastly dismissed such an approach on the ground that a Community patent, which does not cover the entire Community, is unacceptable as a matter of principle. The argument needs to be remembered when assessing where the Community stands in 2006, and so needs the system of designated national Community patent courts.²²

b) The Community law approach by the Commission and the Council

Five years after the Lisbon collapse of the Convention approach to setting-up a Community patent the European Commission decided to take over the project of a Community patent. In the Green Paper on “Promoting innovation through patents” mentioned earlier,²³ it pleaded for a Community patent regulation instead of an extra-Community convention, stressed the need for Community-wide unitary protection, and broadly discussed a variety of options for the solution of the language and the litigation issues. The ensuing consultation of interested circles resulted in a paper on Follow-on measures in 1999, which presented both a short-term and a long-term harmonisation programme and the confirmation of the Community Patent project.²⁴ Little of this has materialized into positive law.²⁵ The failure of the proposed directive on the harmonisation of the law of patents for computer-implemented inventions²⁶ is well-

²² As to the concept of a „géométrie variable” underlying the EPLA, see *infra* sub 2 a (ii); as to the resurrection of the idea of designated national Community patent courts, see Commission, Report of the Hearing, Debate No. 4: Jurisdiction, in fine. The underlying idea of local accessibility of courts is a major argument against a Community Patent Court, see *infra* sub (iii)

²³ *supra* n. 3

²⁴ Commission, Promoting innovation through patents – The follow-up to the Green Paper on the Community Patent and the Patent System in Europe COM (1999) 42 final (of 5 February 1999); in addition to “Urgent actions at Community level” (Community patent, harmonisation directive on patentability of computer programs, Communication on free movement, qualification and role of patent agents, backing efforts of national patent offices to promote innovation, preparation of accession to the EPO) the paper listed “Medium-term actions at Community level (study on standard clauses and arbitration procedures regarding employees’ inventions (in fact a fig leaf for non-harmonisation of the law), harmonisation of the scope of exceptions of patent protection in sectors where product release is subject to prior authorization (see now: Art. 10 par. 6 Directive 2001/83/EC as amended by Art. 1 No. 8 Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 on the Community code relating to medicinal products for human use, OJEU 2004 L 136, 34), and “Recommendations” to be addressed to the EPO (reduction of fees, lowering of translation costs (the EPO did take these measures by itself, see *infra* sub 2 a) (i)), and to Member States (encourage modernization of EPC etc.).

²⁵ The only “achievement” is the harmonisation of the exception to patent protection for the purpose of seeking authorisation for product release in the pharmaceutical sector, see *supra* n. 23.

²⁶ See Commission, Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions, COM (2002) 92 final, OJEC 2002 C 151, 129; as to the controversies surrounding the proposal, its hesitant support in modified form by the Council, and its rejection by Parliament on 6 July 2005 see Hilty, Geiger, Patenting Software? A Judicial and Socio-Economic Analysis, 36 IIC 615, 619 et seq. (2005).

known. Although there is a link between this failure, patent law harmonization in general and the role a Community patent has to play, the fate of the Community Patent project of the Commission may be considered first.

The Commission was, indeed, quick to submit to the Council – it is only the Council who has to decide under Art 308 of the Treaty, so again Member State governments, European Parliament being only heard – a Proposal for a “Regulation on the Community patent”.²⁷ This original Proposal of August 2000 essentially is composed of two sets of rules of different nature: One set is for immediate application upon enactment of the regulation, namely the rules of substantive law. Another set of rules needs fundamental implementation. These are the rules on institutional matters, namely those on the establishment of a specialized judicial system that is to handle Community patent litigation, and those relating to the link to the granting procedure, which will be entrusted to the European Patent Organization, and therefore, presupposes – according to the controversial option proposed by the Commission²⁸ – accession of the Community to the European Patent Organization. So from the beginning the Proposal was asymmetric as regards its potential for full realization, and more a sort of a promise than a project ready for realization. Arguably, this weakened its chances for success from the beginning. Except for a vague description of a “Community Intellectual Property Court” in the Explanatory Memorandum,²⁹ there was no concrete concept, let alone a draft of the rules and statute of such a Court. Therefore, the Proposal was vulnerable by rival projects. In fact, though hailed by parts of industry, the proposal immediately came under attack, with much of its thrust precisely on the concept of a central Community Patent Court.³⁰

This open-endedness was not simply a tactical mistake,³¹ but evidence of a lack of understanding of the strategic dimension of the project and of an over-estimation of the position of the Community vis-à-vis the patent community, notably the European Patent Organization. In fact, as a matter of legislative patent policy of the Community, the Proposal, instead of following a broad and daring overall strategy, was poorly conceived ad hoc and remained politically hesitant. Therefore, it collapsed again at the same obstacles at which the convention approach broke down. It simply offered nothing better.

²⁷ COM (2000) 412 final (of 1 August 2000), OJEC 2000 C 337, 278

²⁸ The alternative, as originally favoured by Germany, would be a delegation of power as a matter of “contracting out” the granting procedure, see Ullrich, Patent Protection in Europe: Integrating Europe into the Community or the Community into Europe? 8 Eur L.J. 433, 459 (2002); Hucko, Der Verordnungsvorschlag der EU-Kommission zum Gemeinschaftspatent – aus der Sicht der BMJ, VPP-Rundbrief 2000, 105.

²⁹ COM (2000) 412 final, supra n. 26, sub 2.4.5 (the Explanatory Memorandum is not reprinted in the O.J.E.C.)

³⁰ See Hucko, loc. cit. VPP-Rundbrief 2000, at p. 106; Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, Fachausschuß für Patent- und Gebrauchsmusterrecht, Beschluß of 27 September 2000, GRUR 2001, 491; contra: UNICE, Statement of 18 August 2000 on the Proposal for a Regulation Creating a Community Patent; note that at the time there was not even enough authority in the Treaty to establish such a court, that authority was yet to be created by the Treaty of Nice.

³¹ Part of the tactical aspects was pressure of time, since the EU wished to have a decision on the principles of its accession to the EPO before the latter was enlarged by another 8 States from Central and Eastern Europe in 2002, which then would have a saying on the matter (many of them being also EU accession States), see Wiesner, Neues vom EU-Wirtschaftsrecht, VPP-Rundbrief 2001, 23.

(i) Thus, as regards substantive law, the Proposal is no more than a slightly revised re-edition of the Luxemburg Community Patent Conventions. It naturally adopts their rules regarding the unitary and autonomous character of the Community patent (Art. 2 para. 1 and 2). However, the adhesion to the principle of a unitary Community patent is considerably weakened by the acceptance of mere optionality of the Community patent by reference to the European patent,³² which allows to cover only some selected Member States. Thus, without any reservations,³³ market unity is made a matter of choice of the applicant, not a public policy desideratum. This move of deference toward formerly expressed wishes of industry as well turned out to be a strategic mistake, because it asked for the question, what, in addition to the European patent as combined with national post-grant law, a Community Patent has to offer. Since the plus-value is only costs and a court, it became critically important that the Community patent would really be able to “deliver” on these two points.

In Art 4 et seq., the proposal deals with entitlement to protection, escaping by a conflict-of-laws rule the thorny question of employee inventions, which the original Green Paper had been bold enough to at least address.³⁴ The Proposal, therefore, adds only little to the Luxemburg Conventions, which were altogether silent on the matter. As regards the “Effects of the Community Patent”, meaning the definition of the patentee’s exclusive right, the Proposal closely follows the Luxemburg Conventions. Thus, the prohibited acts of direct (Art. 7) and indirect (Art. 8) infringement as well as the distribution of the burden of proof regarding the infringement of process patents (Art. 13) are cast in terms identical to that of the 1989 Convention (Art. 25, 26, 35) and the 1975 Convention respectively (Art. 29, 30, 75).³⁵ The same holds true for the classical exceptions, such as private non-commercial use or experimental use, except that the list of Art. 9 has been complemented during the legislative procedure by the exceptions provided for in the Directives on the legal protection of biotechnological inventions³⁶ and the Directive on legal protection of computer programs by copyright³⁷ (Art. 9 lit g-j).³⁸ The exhaustion rule (Art. 10) again has been taken from the

³² This optionality results from that there is no counterpart to Art. 3 CPC in the Proposal, and from the Memorandum, loc. cit. sub 2.1 in fine;

³³ Note, that even Art. 81 CPC 1989 was a transitional rule formally maintaining the claim to mandatory maintenance of market unity by a unitary exclusivity.

³⁴ See Green Paper, loc. cit. sub 4.3 raising still too timidly the right question, whether the divergences of national laws on employee inventions hinder innovation and free movement, and whether, by distorting competition, affect the well-functioning of the patent system and, as a result, the Community’s international competitiveness.

The Memorandum explains its option for a mere choice-of-law rule by a necessary parallelism with Art. 60 par. 1 EPC. But that means that the issue is seen and solved only for the granting procedure although the Community patent precisely concerns the post-grant period of protection, where decisions have to be taken on the maintenance and the exploitation of the patent that affect the employee-inventor’s interests.

³⁵ During the legislative process the burden-of-proof rule of Art. 13 has been extended to cover cases where there is a strong likelihood that a product has been obtained by the protected process.

³⁶ Of 6 July 1998, OJEC 1998 L 213, 13, Art. 10, 11

³⁷ Of 14 May 1991, OJEC 1991 L 122, 42, Art. 5, 6

³⁸ Surprisingly enough, as regards the “biotechnological exceptions” in Art. 11 lit g, h, j, no provision on the scope of protection (Art. 8, 9 Biotech Directive) has been inserted first. Also, the systematization

Luxemburg Conventions without change in substance, in particular including a sub-exception for non-exhaustion whose meaning under Community law remains as obscure as ever.³⁹ In fact, the entire matter is largely pre-empted by the free-trade principles of EU-law. A welcome improvement, albeit one that again follows from general Community law anyway,⁴⁰ is that the Proposal brings prior user rights in conformity with Internal Market requirements by extending them to the entire Community territory (Art. 12).

Under the heading of “The Community patent as an object of property”, the Proposal, like its convention predecessors, establishes, first, the principle of application of national law (Art. 14), and then sets forth provisions on transfer of the patent (Art. 15),⁴¹ its status as a security, as an object of execution, and in insolvency proceedings (Art. 16-18) as well as on contractual licensing (Art. 19).⁴² Only the latter provision departs from its counterpart in the Convention by elevating any breach of a restriction of the license to a patent infringement.⁴³ More welcome is the Proposal’s implementation of a system of compulsory licenses in cases of non-use or of dependency of patents. It is in accordance with the former Conventions’ principles as derived from generally accepted laws of Member States, but transposes them on the level of the entire Community territory (Art. 21, 22).⁴⁴ In addition, these rules have

of these exceptions is poor, and the scope of Art. 11 lit I (computer programs) unclear as long as the patentability of software inventions (in contrast to computer-implemented inventions?) has not been settled.

³⁹ Art. 10 of the Proposal only incompletely adapts Art. 28 CPC 1989 (Art. 32 CPC 1975 respectively) from the convention to the regulation approach (why the reference to “acts ... carried out within the territories of the Member States” rather than “the Community” or deleting it altogether? See Art. 13 Community Trademark Regulation). It also needs clarification as to substance, since exhaustion does not necessarily extend to all acts of post-sale use of the invention (the repair-reassembly-manufacturing issue). The sub-exception only refers to further “commercialisation”, but it is difficult to see what in patent law might be a counterpart to Art. 13 par. 2 Community Trade Mark Regulation, see for details on the Community’s exhaustion rule as derived from Art. 28 et seq. of the Treaty Ullrich in Immenga, Mestmäcker (eds.), loc. cit., Immaterialgüterrecht, Teil A, No. 74 et seq.

⁴⁰ See Ullrich in Immenga, Mestmäcker (eds.), loc. cit., Immaterialgüterrecht, Teil A, sub no. 101.

⁴¹ Originally, Art. 15 par. 1 and 2 had been copied upon Art. 17 par. 1 and 2 of the Community Trade Mark Regulation (assignment independently from the business), an aberration which has been corrected during the legislative procedure by simple deletion.

⁴² Comp. Art. 40, 41 CPC 1989

⁴³ In contrast to the careful, trademark-specific wording of Art. 22 para. 2 Community Trade Mark Regulation, Art. 19 para. 2 of the Proposal entirely abandons the well-established distinction between restrictions that operate only inter partes, and restrictions in rem, thus transforming any breach of the license, including customer restrictions, product specifications – whether patent-related or not – single source limitations or tying clauses, into an infringement. As a result, all the products manufactured or marketed in excess of the restriction are infringing goods that may be seized where ever they may be found. The framers of Art. 42 par. 2 CPC 1989 (or of Art. 43 par. 2 CPC 1975) knew very well why they limited in rem effects to the restrictions mentioned in par. 1 of the Article. There may be reasons to go beyond that, but there is no basis for going as far astray as Art. 19 par. 2, and the less so as the potential for conflict with the principle of exhaustion is obvious enough.

⁴⁴ Comp. Art. 45, 47 CPC 1989 defining the conditions and limits of compulsory licenses by reference to national law and territory (with the exception of Art. 46 regarding domestic manufacturing requirements, which are inconsistent with Art. 28, 30 EC Treaty anyway, ECJ of 18 February 1992, case C-30/90, Commission/United Kingdom, Rep. 1992 I 829 and companion cases). See also Art. 83 CPC 1989 and Annex I, Resolution on a joint regulation on the grant of compulsory licenses for Community Patents.

been amended with good reason by the Council,⁴⁵ but also complemented by a controversial rule allowing Member States to apply their national laws on Government use to Community patents (Art. 9a).⁴⁶

The Proposal then contains a chapter on renewal, lapse, limitation and invalidation of the Community patent, which corresponds, as it must, to the terms established by the European Patent Convention. Finally, to the difference of the Luxemburg Conventions, the Proposal, in its Chapter on jurisdiction and procedure, rounds up substantive Community patent law by an almost complete system of remedies regarding post-application and post-grant patent infringement respectively (Art. 33 et seq., in particular Art. 42 et seq.).⁴⁷ These rules have undergone some change in the legislative process, but still need to be brought fully in accordance with the more elaborate terms of the Remedies Directive.⁴⁸ Even then, the Community patent will be only on a par with national law.⁴⁹ In sum, therefore, the Proposal breaks hardly any new ground, and offers little, if anything that would make it attractive. Therefore, its treatment of the language issue became all the more important.

(ii) This language regime has been modified during the legislative process. The original Proposal wanted to follow the EPO's 3- language approach, i.e. translation only of the claims in the two official languages which were not the procedural language (Art. 14 EPC). To this effect the Proposal simply abstains from implementing Art. 65 EPL. However, it mitigated this regime by subjecting negligence-depending claims for compensation or damages to proof of knowledge of the patent, which it presumed not to

⁴⁵ See Art. 21 in Council Consolidated/annotated text of the Proposal for a Council Regulation on the Community patent of 4 September 2003 (Inter-institutional File 2000/0177, Doc. 12219/03) shifting the authority to grant compulsory licenses from the Commission to the Community Patent Court (with an exception in par. 3a as regards compulsory licensing in times of crisis). The Council did not do away with Art. 21 par. 3, which relates to the grant of compulsory licenses as a remedy to anti-competitive practices: It is misplaced in Art. 21, and should be regulated, if at all necessary, by the regulations implementing the enforcement of Art. 81, 82 EC-Treaty. Note also that Art. 22, which transforms Art. 31 TRIPs Agreement into Community law, needs to be revised in view of the Doha "waiver agreement" and its implementation by the Community.

⁴⁶ Art. 9a of the Proposal is conceived as an exception to protection. But it really concerns a public interest limitation of the exclusivity, possibly operating also in favour of government contractors, and it hides a considerable problem of harmonization (what is Government use ?).

⁴⁷ There are, however, no rules specifying the general pre-conditions for the award of remedies, such as on negligence and good or bad faith or on calculation of damages, nor are there rules on unjust enrichment or on abusive/careless threats of action for infringement (even though such causes are listed or have been listed in Art. 30 par. 1).

⁴⁸ Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights (OJEU 2004 L 195, 16), in particular Art. 9, 10 et seq.

⁴⁹ Note that Art. 2 para. 1 of the Remedies Directive expressly allows "more favourable" modes of enforcement and forms of remedies, that Art. 3 establishes a framework which in view of its contradictory criteria, will hardly be implemented uniformly (see e.g. as regards the tension between dissuasion and equity when it comes to fix rules on damages and other sanctions Dreier, *Ausgleich, Abschreckung und andere Rechtsfolgen von Urheberrechtsverletzungen*, GRUR Int 2004, 706), or that Art. 1 para. 1 lit a) seems to fit infringement of copyright or trademarks better than infringement of patents (no moral prejudice, since patent protection is not based on concepts of authorship or reputation). It would also be necessary to adapt remedies better to the function patents actually fulfil, so that broad remedies are avoided that would reinforce tactical uses of patents.

exist where the patent had not been translated before in to the language of the country of the infringer (Art. 11, 44). It was up to the patentee to prevent such an “excuse” by providing early translations at his own expense (Art. 58). This reduced the “official” costs on their face, but was not fair to anyone. Governments could hardly be presumed to accept it, since their uniform practice under Art. 65 EPC was to require full translation. The outcome of a revision of their Art.65-practice by a special agreement (the London Protocol) was uncertain enough. The equities were not set correctly either, since the patentee’s enforcement costs increased with the dissemination of the invention through the Common Market, and the infringer was exposed to the harshest of all sanctions, the injunction, on the basis of foreign language patents.

Later modifications made things worse in that they went almost half the way to an Art. 65 EPC-regime: Mandatory translation of the claims (rather than the entire specification) into all the official languages, unless a Member State dispense the applicants from this obligation.⁵⁰ But neither this modification nor the rules that have to go with it – effects of erroneous, too broad or too narrow translations, delay within which to submit the translation (3, 6, 9, 12 months, 2 years) – met with unanimity. After a series of unaccepted compromise formulas the Council put the project on the shelf in March 2004.⁵¹ Later efforts of reanimation failed immediately.

(iii) As a result of the stalemate on the language issue, deliberations on the design of a Community Patent Court, which the Commission hoped would make the Community patent attractive, have been suspended as well.⁵² In fact, the structure of the Community Patent judiciary, as it has developed from the Commission’s original concept,⁵³ has always been controversial both in its principle and in details.⁵⁴ The principle follows from the structure of the Community’s judicial system in general, which does not allow for the establishment of courts outside the organisation of the Court of Justice. Therefore, instead of a separate Community Intellectual Property Court encompassing both a first instance and an appeals court, as originally envisaged,⁵⁵ the Community Patent Court will be a specialized panel as provided for by Art. 229a, 225a, which the

⁵⁰ Art. 24a et seq. Council, Consolidated text of 4 September 2003

⁵¹ See Communiqué de Presse, Memo/03/242 of 26 November 2003 – Preparation of the Competitiveness Council of Ministers; Council of Competitiveness, 2570th Council meeting, 11 March 2004; Press Release, Memo/04/58 of 12 March 2004, Results of the Competitiveness Council of Ministers, Brussels 11th March 2004 Internal Market, Enterprise and Consumer Protection issues – Community Patent (with statement Commissioner Bolkestein); Vieregge, Wiesner, Neues vom EU-Wirtschaftsrecht, VPP-Rundbrief 2004 (2) 74; Geiger, Grußwort VPP-Jubiläum 50 Jahre VPP, VPP-Rundbrief 2005 (1) 46, 47; see also Art. 70 par. 3 EPC, and for a discussion of the “compromise” Tilman, Community Patent and European Patent Litigation, (2005) EIPR 65.

⁵² Reported by Vieregge, Wiesner, Neues vom EU-Wirtschaftsrecht, VPP-Rundbrief 2004 (4) 129/130

⁵³ See supra n. 28; it should be remembered that at the time the Commission submitted its Proposal, the process leading to the Treaty of Nice was still going on, see the Memorandum, loc. cit. at 2.4.5.3

⁵⁴ See as regards Germany: Beschlüsse der Herbstkonferenz der Justizministerinnen und -minister 2000, NJW 2000 (51) XIV; Schade, Das Streitregelungssystem zum Gemeinschaftspatent nach dem Verordnungs-Vorschlag der Kommission, GRUR 2000, 827 (dealing also with the relationship to judicial control of the granting and revocation procedure); for the development Tilman, Gemeinschaftspatent mit einem zentralen Gericht, GRUR Int 2003, 381, 382 et seq.; Lavranos, The new specialised courts within the European judicial system, 30 E.L. Rev. 261, 265 et seq. (2005).

⁵⁵ Commission, Proposal (Memorandum), loc. cit. sub 2.4.5.1

Treaty of Nice introduced in the EC Treaty.⁵⁶ Appeals will go to a new chamber of the Court of First Instance, with no further appeal to the Court of Justice being available. According to the Commission's Proposals the Court would have exclusive jurisdiction in all validity and infringement matters including claims for damages or compensation, but not in matters of contractual or compulsory licences.⁵⁷ Basically, therefore, it represents a centralised jurisdiction for post-grant patent litigation, with the seat of the Court in Luxemburg (albeit with the right to hold session elsewhere). The problems, which such a centralisation of jurisdiction on the entry level raises in a Community with 25 Member States are obvious enough. Equally obvious is the remaining split of jurisdiction, since all litigation concerning the grant, the limitation, and the revocation of the Community patent remain within the European Patent Organisation.⁵⁸

These problems are compounded by matters of detail:⁵⁹ Technical expertise will be available only through assistant rapporteurs, who take part in the hearing and the deliberation, but will not have a right to vote. The expected workload may be more than the panel (composed of two chambers) may be able to handle. The language issue reappears in the form of the defendant's right to use its country's official language (an irresistible approach, but it is in conflict with all efforts to reduce the number of languages of patent claims). Patent attorneys may assist lawyers before the Court, but have no right to independently represent clients etc.

⁵⁶ Art. 229a, as introduced into the EC Treaty by the Treaty of Nice (OJEC 2001 C 80, 1, in force since 1 February 2003) allows and requires to confer jurisdiction in matters of industrial property on the Court of Justice; Art. 225a then provides for the procedure and the power to create "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas". The Commission, therefore, has submitted both a "Proposal for a decision of the Council to confer jurisdiction in Community Patent matters on the Court of Justice (COM (2003) 827 final) and a "Proposal for a decision of the Council on the establishment of the Community Patent Court and concerning the appeal before the Court of First Instance, (COM (2003) 828 final), both of 23 December 2003. The Court of Justice has given its opinion on the latter proposal, see Vieregge, Wiesner, loc. cit. VPP-Rundbrief 2004 (4) 129 et seq.

⁵⁷ See Art. 1 Commission Proposal 827, Art. 1 Commission Proposal 828; non-extension of jurisdiction to compulsory licenses comes as a surprise, given that the Council had already modified Art. 21 of the Commission's Proposal for a Community Patent in September 2003, see Council, Consolidated text, loc. cit.; the exclusion of litigation arising from contractual licensing is justified by the fact that such litigation mostly relates to matters of general contract law. Patent law issues may be brought to the Court (in the future the CFI) via requests for preliminary rulings in accordance with Art. 234 EC-Treaty.

⁵⁸ This, of course, is also true as regards the European grant of national patents. For efforts of the EPO to institutionally separate these Boards of Appeals from the European Patent Office, see EPO, Draft basic proposal for a revision of the EPC implementing the organisational autonomy of the Boards of Appeal of the European Patent Office within the European Patent Organisation, CA/46/04 of 28 May 2004 (available at http://patlaw-reform.european-patent-office.org/boards-appeal/draft_pdf)

⁵⁹ For an overall appraisal and a critique of details see Sydow, Die Ausdifferenzierung des Gerichtssystems der EU, GRUR 2001, 689; Jacob, Creating the Community patent and its court, in Vaver, Bently (eds.), Intellectual Property in the New Millennium (Essays in Honour of William R. Cornish), Cambridge 2004, 79, 86 et seq.; Tilman, Die Zukunft der Patentstreitregelung in Europa, GRUR 2001, 1079; id., loc. cit. GRUR Int 2003, at 384 et seq.; the importance of technical expertise in and before the court is underlined by many, and not only by interested authors, see only Bayer, Litigators at Community Patent Proceedings – Whose Representation is it? 34 IIC 361 (2003); Sedemund-Treiber, Braucht ein europäisches Patentgericht den technischen Richter? GRUR 2001, 1004. The question whether a specialized and centralized court best serves the public interest or only the interested circles has not visibly surfaced in the debate.

c) Why the deadlock?

Clearly, the issues of costs and of a common court for a Community patent are serious enough. With 25 Member States a multi-lingual language regime becomes almost untreatable in terms of both costs and efficient operation of the system.⁶⁰ Likewise, in such an enlarged – and possibly further enlarging – Union a litigation system following classic principles of attribution of jurisdiction to the courts of the defendant's country is as problematic as is a fully centralized jurisdiction. And yet one wonders why these problems cannot be overcome. The Community patent seems to become the less acceptable the more it is needed. Indeed, it would well become the Union precisely because of its enlargement, namely as a factor of integration in that it provides the same incentive and protection for innovation throughout the Internal Market.

Apparently, however, the need for a Community patent, or more precisely, the need for the kind of Community patent the Commission proposes, does not produce enough pressure or creativity for the legislator and the various interested circles to enable them to find a way out of the self-created crisis. There may be many reasons to this failure, some of them may even have to be sought in the patent system itself.⁶¹ Certainly however, the case for a Community patent was weakened – and thus pretexts for blocking an undesired version of it strengthened – by the concomitant reform movement in the European patent system. With the reduction of the costs of the European patent – actual or promised – and its completion by a litigation system it became ever more and the Community Patent ever less attractive.

2. The European Patent: An ever larger system of protection

a) From a centralized patent grant to centralized patent litigation

Already in 1985, when reporting on the failure of the second Luxemburg Conference on the revised Convention for the Community Patent, Kurt Haertel, one of the founding fathers of the European Patent Organisation, noted a disappointing change of political climate in favour of reliance on the European patent system alone as a form of protection that is Community-wide available.⁶² He attributed this change to the success of the European patent granting procedure, and success it had indeed.

⁶⁰ The Commission estimated in 2003 that translation costs for the claims of a Community Patent in 19 languages will amount to 4845,- €, and the overall costs of a Community Patent over its life time 23145,- €, as compared to 28500,- € for a European Patent covering 8 EPC-States, (statement available at http://europa.int/comm/internal_market/en/indprop/patent/docs/2003-63patent-costs_eu.pdf). Whether such figures are correct has always been a matter of controversy, but that controversy may too easily detract from the problem that costs, and even indirect costs, are only one aspect of the language issue, the other being the effect on the operation, the acceptance, and the achievement of the patent system's broader objectives, see *infra* III.2.c)

⁶¹ In its present form the patent system might not meet the legitimate needs of (all or some) industry, or the purposes for which it is actually used can sufficiently be satisfied by the existing system, see *infra* III. 2.

⁶² Haertel, *loc. cit.* GRUR Int 1986, at p. 300

(i) The success was, first, one of the number of patent applications filed with the EPO. It was overwhelming in the beginning, and it increased ever since, with few slowdowns in between.⁶³ The success was, second, one of the number of countries joining the European Patent Organisation.⁶⁴ It was, of course, always larger than that of the European Union, since it was the very purpose of the EPO to be open to all States of Europe, in particular those outside the Community. But also potential or actual Community candidates joined the EPO long before they became Members of the Union, and many of them did so independently from that EPO-membership was made a condition of admission to the Community. It was made a condition of adherence because, first, the European patent offered protection for the full range of inventions, in particular for pharmaceutical products,⁶⁵ and, second, because, from the very beginning, the European and the Community patent had been conceived as twins, the former providing for a centralized Europe-wide grant, the latter for unitary Community-wide protection.⁶⁶ If subsequently they have become rivals, then it is not so much because the Community patent got stuck in the intra-Community quarrels described above – the issues of language and of cost is also a problem of the EPO⁶⁷ –, but because it has more advantages to offer than only the centralisation of a granting procedure based on full prior examination of the patentability of the invention for which patent protection is requested.

Indeed, as prominent and economically important the centralisation of the patent grant for so many States may be, there is another major advantage of the European patent which is the degree of uniformity of patent protection that it has actually achieved. Not only are the conditions for the grant of patents uniform throughout Europe, and not only does the EPC, due to its status as autonomous law, provide for quite some uniformity beyond the grant: interpretation of claims, protection of products resulting from a patented process, term of protection, grounds for revocation/invalidation of the patent

⁶³ See for the long-term trend OECD, *Compendium of Patent Statistics 2005*, Paris 2005, p. 10 et seq.; in 2005 the EPO received 193623 patent applications, of which 132861 were Euro-direct and Euro-PCT-regional phase applications and 60762 European applications, see EPO, *Annual Report 2005*, Munich 2006, at p.17. Whilst all other application numbers (including Euro-PCT applications) have increased considerably since 2000 and before, the number of (“purely”) European applications has grown only slowly, see EPO, *ibid.* cover page inside. Notwithstanding the overall increase of patent applications during the last decade, which mirrors a global trend, the EPO had developed its own, specific dynamism from the beginning, see Braendli, *The Dynamism of the European Patent System*, 22 IIC 177 (1991): Within 10 years the applications rose from 11457 to 57765, with, at the time, European applications amounting to 49280 (Euro-PCT: 8465).

⁶⁴ The EPO entered into force with 7 Member States (Belgium, France, Germany, Luxemburg, the Netherlands, Switzerland, the United Kingdom; Italy followed in 1978, Austria in 1979; other EU-Member States only after their entry in the Union); in 2005 there are 31 Member States (plus 5 “extension” states).

⁶⁵ The importance of this pre-condition to accession to the Union is best illustrated by ECJ of 5 December 1996, cases C-267/95 and C-268/95, *Merck/Primecrown*, Rep. 1996 I 6285, and by the specific transitional rules on parallel imports, see Ullrich in Immenga, *Mestmäcker, Recht der Wettbewerbsbeschränkungen*, 4th ed. (= *EG-Wettbewerbsrecht*, 2nd ed.), Munich 2006, *Immaterialgüterrecht*, Teil A, no. 76 with references.

⁶⁶ See Braendli, *loc. cit.* 22 IIC at p. 190 et seq. (1991)

⁶⁷ See *infra* sub c)

granted.⁶⁸ Rather, that autonomy, which imposes a duty of internationally harmonious interpretation and application on national courts,⁶⁹ has become a practical reality due to a long standing form of communicative networking between national supreme court judges.⁷⁰ In addition, due to anticipatory soft harmonization along the lines of both the European Patent Convention and the Luxemburg Community Patent Conventions, most national patent laws seem to have become quite similar as regards both the conditions for the grant of national patents and the terms of the exclusivity and of its exceptions.⁷¹ Therefore much of the substantive law applicable to European patents is already uniform. This means that, contrary to what was expected in the beginning, the bundle of national rights an applicant obtains from the EPO is quite homogeneous.

In addition the most conspicuous drawback of the European patent system, the limitation of the grant of protection to the territories of the Contracting States the applicant designates and pays for (in addition to the application, search, examination and granting fees, Art. 79), has been turned by applicants if not into an advantage, so at least into a manageable policy of protection. For one thing, as in general international patenting practice, parties limit the countries of designation to those in which they are really interested.⁷² For another, due to its success, the EPO has not only considerably reduced its general fees,⁷³ but it also has adopted a rule whereby payment of seven times the regular one-country designation fee is deemed to be payment for all Contracting States.⁷⁴ Whilst this underlines a claim of the EPO-patent to serve also as a Community-wide patent, it does not quite hold this promise. The obligation to pay as many national maintenance fees as there are territories to be covered makes for that the choice of countries, and therefore the territorial coverage, remains highly selective and concentrated on a few major countries.⁷⁵ But apparently, this largely satisfies the needs of patent-minded industry.

⁶⁸ See Art. 63 et seq., Art. 138 EPC; see also Art. 62 (designation of inventor), 71 et seq. (status of patent application as property).

⁶⁹ See Art. 2 EPC, and Beier/ Ohly in Münchener Gemeinschaftskommentar, loc. cit., 22nd supp. 1998, Art. 1, no. 1 et seq., 8 et seq.; Jestaedt in Benkard (ed.), EPÜ - Europäisches Patentübereinkommen, Munich 2002, Art.1 no. 2 et seq., 5; Stauder in Singer, Stauder (eds.), The European Patent Convention, 3rd ed. Cologne 2003, Art. 1, no. 2, Art. 2, no. 8 et seq.; Ullrich, loc. cit. 8 Eur. L. J. at p. 436 et seq., notes 122, 179 (2002), all with references.

⁷⁰ Evidenced by regular “Europäische Patentrichter”-Symposia, some of which have been published, see for an overview Stauder, Die Symposia europäischer Patentrichter, Festschrift Rogge, GRUR 2001, 955; bibl. references for the reports on the symposia by Stauder et al., in Festschrift Kolle, Stauder, Cologne 2005, 573 et seq.

⁷¹ For a summary survey of national post-grant patent law see Schade, Patenttabelle, 8th ed. Cologne 2001; Benyamini, loc. cit. is broadly comparative, but not up-to-date; the basic legal instruments are listed in EPO, National Law relating to the EPC, Munich 2003.

⁷² As to the designation rates of Contracting States see EPO, Annual Report 2005, loc. cit. at p. 82 et seq.; only France (93, 38%), Germany (98, 27%) and the UK (92, 96%) have designation rates above 90%: with the exception of Italy (76, 31%), Spain (61, 65%) and the Netherlands (59, 85%) all Contracting States have designation rates around or below 50%. On average 15 States are designated, see EPO, Annual Report 2004, Munich 2005, p. 18.

⁷³ See Ullrich, loc. cit. 8 Eur. L. J. at p. 443 et seq. with references

⁷⁴ Art. 2 Nr. 3 EPO – Fee Regulation

⁷⁵ See supra n. 72

(ii) Whilst for decades the European Patent Organization's rivalry with a Community patent was neither clearly expressed nor recognizable – the EPO always cooperated with the Community and supported the idea of a Community patent, which, after all, it would grant and administer – it became more or less foreseeable when in 1999 – so at a time when the Commission had already decided to make a proposal of its own for a Community patent – a Ministerial Conference of EPO-Contracting States gave a mandate, first, to the EPO to revise its operations and costs, and, second, to a Working Group of Member States to develop projects for the harmonization of the settlement of litigation on European patents.⁷⁶ Three options were envisaged: international arbitration on both infringement and invalidity; establishment of a joint advisory expert body from which national courts may request non-binding opinions regarding validity or infringement, and a facultative protocol on European patent litigation instituting an integrated judicial system with uniform rules of procedure and a common Court of Appeals. Making a political move of its own, the Working Group essentially concentrated its efforts on the latter option, and, within 4 years of intense work accompanied by a broad public, basically constructive discussion⁷⁷ elaborated a draft “European Patent Litigation Agreement” as a document to be submitted to a diplomatic conference.⁷⁸

⁷⁶ Governmental Conference of the Contracting States of the European Patent Organisation on the Reform of the European Patent System held at Paris on June 24 and 25, 1999, Mandate, reprinted in GRUR Int 1999, 722; as to the other parts of the Mandate (better access to the European patent - costs and length of the granting procedure – modernization of the institutional decision-making process, period of grace, preparation of a conference for the revision of the EPC – this would regard software patenting, accession of the EU to the EPO –), see Ullrich, loc. cit. 8 Eur. L. J. at 440 et seq., 449 et seq. (2002) with references.

⁷⁷ See Schade, Gerichtliche Regelung der Patentstreitsachen in Europa, GRUR 2000, 201 et seq.; id., loc. cit. GRUR 2000, 827 et seq.; Cole, Centralised Litigation for European Patents: New Proposals for Inclusion in the EPC Revision Package, (2001) E.I.P.R. 219; Brinkhof, Die Schlichtung von Patentstreitigkeiten in Europa, GRUR 2001, 600; Luginbuehl, A Stone's Throw Away from a European Patent Court: The European Patent Litigation Agreement, (2003) E.I.P.R. 256; Dreiss, Streitreglungsprotokoll EPLA – Vision oder Utopie? GRUR Int 2004, 712; it is noteworthy that the Draft EPLA has been set up by a Working Party closely listening to the “patent community”, and seeking advice from “inside” experts (see Pagenberg, The Patent Litigation Protocol and the Community Patent – Conference of the Sub-Group of the Working Party on Litigation in Munich on May 19 and 20, 2003, 34 IIC 535 (2003)), that quite naturally its work and the public debate took place against the backdrop of the Commission's concepts of a Community Patent Court (and the discussions accompanying it, see supra n. 53, 58), and that expert advisors of the Working Party also participated actively in the public debate, see Pagenberg, The First Instance European Patent Court: A Tribunal Without Judges and Attorneys? 31 IIC 481 (2000); id., Industry, Legal Profession and Patent Judges Press for Adoption of the European Patent Litigation Agreement, 37 IIC 46 (2006); Willems, The European Patent Court of First Instance, Mitt. Pat. Anw. 2000, 394; id., The EPLA - Trojan Horse or Gift of the Gods?, Festschrift Kollé, Stauder, loc. cit. at p. 325 et seq.

⁷⁸ European Patent Organisation, Working Party “Litigation”, Draft “European Patent Litigation Agreement” of April 20, 2004 (available at www.european-patent-office.org/epo/epla/pdf/agreement_draft.pdf); the Working Party also presented with the same date a “Draft Statute of the European Patent Court; in February 2006 the European Patent Office, acting in its capacity as “Secretariat of the Working Party” Litigation” has submitted at Statement “Beurteilung der Auswirkungen des Europäischen Übereinkommens über Patentstreitigkeiten (EPLA) auf das bestehende System zur gerichtlichen Durchsetzung und Übermittlung (Vermittlung?) von europäischen Patenten” (Assessment of the impact of the European Patent Litigation Agreement (EPLA) on the existing system of judicial enforcement and mediation of European patents) underlining the advantages and cost savings the adoption of the EPLA would bring about. It may be

The salient features of this project are (as compared to the Community Patent Court):

- The establishment of a joint European patent judiciary on a facultative basis. This means, on the one hand, that not all the Contracting States need to participate so that centralisation of patent litigation remains territorially selective, but, on the other, that it extends beyond the boundaries of the European Union. Clearly, however, once a State has joined the European Patent Litigation Agreement, its rules will mandatorily apply to all patent litigation arising within that State's jurisdiction. Parties will have no choice, except in the beginning the patentee. He may opt for either a European or a nationally granted patent.
- The European Patent Judiciary is composed of an "Administrative Committee" and of the European Patent Court, which is subdivided in a Court of 1st Instance and a Court of Appeal (Art. 3). The Court of 1st Instance is composed of a Central Division and Regional Divisions either for a group of countries or within larger countries (up to 3 according to Art. 19, 20 of the Statute). It sits in panels of at least 3 members, one of whom must be technically qualified (Art. 26 of the Statute). Representation before the court is mandatory and reserved to registered "European Patent Litigation Counsels", who may be assisted by European Patent Attorneys (with a right to present arguments, Art. 34, 35 of the Statute). Clearly in all these respects the EPLA departs from the Community Patent Court system.
- Whether it will also depart from the Community Patent Court in that it is assumed that it will be financially self-sufficient, seems to be unclear to its framers, since a financial support by Contracting States is explicitly envisaged.⁷⁹
- The Court of Appeals has no regional divisions, but is central. It hears appeals on matters of law and fact, but new facts or evidence are admitted only exceptionally (Art. 79, 80).
- According to Art. 32 of the Statute, the language regime is that of the EPC working languages: English, French and German, in a slightly adapted form, namely:
 - before the Central Division, the language of the proceedings before the EPO
 - before a Regional Division located in a State having an EPO official language as official language, that official language
 - before a Regional Division located in a State having either more than one or no official language which is one of the official EPO languages, any official EPO-language which that State designates.
 - before the Court of Appeals the language is always that of the first-instance proceedings.

noted that in Art. 4, 83 et seq. the Draft EPLA also provides for the alternative of a "Facultative Advisory Council", but does so rather summarily and surprisingly by entrusting the Court with this alternative function. Presumably, this is not what the Governments had in mind when agreeing on the Paris Mandate.

⁷⁹ Art. 19 Draft EPLA, see also the Assessment Statement by the EPO, supra n. 77, and its comparative estimates of the costs of (3) national infringement procedures v. the costs of litigation before the European Patent Court.

Whilst this seems to be an elegant language regime, it is not without problems. Not only may the language regime for Regional Divisions nullify part of the benefits of regionalisation (and favour European Patent Attorneys who are used to the system), and disadvantage non patent-experienced small infringers. Rather it will work properly only where the patent, as infringed in a given country – after all it is a national patent – is in one of the 3 official EPC-languages. That, however, is not necessarily the case, not even under the proposed London Protocole regarding the use of Art. 65 EPC (which still provides for the right to have the patent translated into national language).⁸⁰

- A feature of systematic, practical and political importance is the introduction of a set of rules of autonomous “Substantive Patent Law” (Art. 32-37) “for the purpose of litigation under this Agreement” (Art. 32). These rules are composed of first the provisions of the EPC as they apply to any European Patent, namely those on patentability (Art. 52-57 EPC), those on the scope of protection (Art. 63, 64 para. 2, 69 EPC⁸¹), and those on the grounds of invalidity (Art. 138, referring, inter alia, to Art. 83 EPC). Second, the Draft EPLA introduces provisions of its own regarding the definition of direct (Art. 33) and indirect (Art. 34) infringement, the exceptions to protection, correctly called “limitations to the effects of the European patent” (Art. 35, in particular regarding private, non-commercial use and experimental use), the reversal of the burden of proof regarding the infringement of patented processes (Art. 36) and the right of prior users (Art. 37). Such indirect “harmonization” of national patent law by the creation of autonomous rules (not only for litigation purposes, of course) may not have been within the Paris Mandate, but it is a matter of necessity for a central court to be able to work efficiently.⁸² The terms of all these provisions generally correspond to those, which the Luxemburg Convention of 1989 and the Commission’s Proposal for a Regulation had foreseen for the Community patent. Thus, they do not break new ground either by reference to generally accepted concepts or by reference to the Community’s ideas for unitary patent law. And yet they raise a basic problem which results from that the European patent precisely is not unitary, but national, and from that it may cover other States than the Member States of the Union. Thus, the “limitations” of Art. 35 do not encompass those which the Council, in view of the Community’s Directive on the legal protection of computer programs and in view of the Directive on the protection of biotechnological inventions, introduced in its 2003-version of the Community Patent Regulation.⁸³ This difference is not due to inadvertence or a lack of synchronisation of the EPLA-drafting process with that of the Community patent, but almost

⁸⁰ See as to this London Protocol *infra* sub b); note also that Art. 32 lit c) carries over into the EPLA the – divergent – national laws implementing the EPO-language regime regarding the letters patent, the application and its provisional sanctions, and the authenticity of the language of the patent, Art. 65, Art. 67 para. 2, 3 and Art. 70 para. 3, 4 EPC.

⁸¹ See *supra* text at n. 68

⁸² Remember that the concept of a Community Patent Appeals Court was ill-fated precisely because no court can handle the divergent laws of a larger number of states (see Stauder, *loc. cit.* GRUR Int 1986, 302), and that the Common Appeals Court of 1989 was equally ill-fated because of the split of jurisdiction in accordance with whether Community law or national law was at stake.

⁸³ See *supra* text at n. 36 et seq.; this abstention is not without problems, because the EPO has adopted the Community’s law on the patentability of biotechnological inventions by Rule 23 b et seq. of its Implementing Rules; see also *infra* n. 122.

unavoidable, unless the non-EU States of the EPC simply accept via the EPLA some rules of Community origin for EPO-granted patents even though they may not wish and need not to adopt them for patents granted nationally. It thus becomes obvious that a particular link needs to be established between the Community and the EPLA or else there will either be an effect of frustration of the Community's developments of patent policy and law by harmonization or of the centralisation effect of the EPLA. The European Patent Court will have no authority to apply Community law.⁸⁴ It thus will always be unable to give a uniform judgement on the European patent in respect of all the territories it may cover.

Even if a link between Community law and EPLA-law can be established that bridges the differing dynamism of patent policy and law between the EU and the EPO/EPLA,⁸⁵ a structural problem will remain, which results from the non-unitary character of the European patent, in fact from its nation-state rather than common Market foundations. The rules on prior-user rights are an obvious illustration: Pursuant to Art. 12 Community Patent Regulation as proposed, the prior-user right is acquired and valid with respect to the entire Internal Market whereas according to Art. 37 Draft EPLA it is the territory of the Contracting State which, in both respects, is relevant. The Community may, in fact it must avoid this result,⁸⁶ but can do so only by obliging all its Member States to join the EPLA. The EPLA would then be no longer facultative, except for non-EU States, and the Community would de facto, if not de iure, have renounced on a patent court of its own. Besides, the centralisation effect of the EPLA will remain imperfect in relation to non-EU States, a matter which, apparently, these States are willing to accept anyway by agreeing to Art. 37 EPLA.

This structural problem is, indeed, inherent in the European patent system, this being a system of organisational centralisation of the grant of and the litigation on patents, which creates autonomous law only to the extent necessary for the well-functioning

⁸⁴ Formally speaking, rules of Community origin will be transformed into EPLA-law just as harmonization rules of EU-directives are transformed into national law. But the transformed rules need to be construed in the light of Community law and so as to meet its "effect utile"; this is a duty of EU-Member States based upon Art. 10 para. 2 of the Treaty to which the European Patent Court is not subject, since it is not part of the Community's institutional and legal order. If it nevertheless does so unilaterally, it arrogates itself Community authority. Conversely, the Court of Justice has no power to control the EPC's jurisprudence as a matter of Community authority, and it cannot and will not act as an EPLA-court either. Art. 40 Draft EPLA does not change this state of the law, since it is a rule of international, not of Community law; see as to possible conflicts ECJ, opinion 1/91 of 14 December 1991, Rep.1991 I 6079, 6104 et seq.; opinion 1/92 of 10 April 1992, Rep. 1992 I 2821,2841 et seq. .

⁸⁵ Note that this synchronisation problem exists generally with respect to an EPO-granted Community patent, e.g. as regards the definition of the criteria of patentability or other EPC-determined terms of protection, and it becomes particularly acute if the EU becomes a member of the EPO, as it is foreseen, rather than entering into a principle/agent relationship, see Ullrich, loc. cit. 8 Eur. L. J. at p. 462 et seq. (2002). However, under the EPLA approach the synchronisation problem is generalized and affects almost all elements of the patent system.

⁸⁶ See supra n. 40 and accompanying text. It is difficult to imagine that the Community legislator, when reforming patent protection in the interest of enhanced integration and competitiveness may fall back on such territorial limitations.

of a centralized administration or judiciary.⁸⁷ Thus, the EPLA does not touch on national rules regarding patents as property, such as the rules on assignment or on contractual licensing, even though they may be relevant for litigation, e.g. as regards standing, and even though assignments or contractual licenses may be the sources of litigation and judicial conflict.⁸⁸ The EPLA does not rule on compulsory licenses either. Except for compulsory licenses in the general interest, such as for defence or emergency purposes, this is not compellingly explained by the interventionist character of such licenses, albeit this may be consideration. Rather, under the EPC/EPLA-system of European patents, which are bundles of national patents, the explanation is that the grounds for granting a compulsory license in the public interest – general or specific, such as in cases of non-use or of dependency – are national⁸⁹ and that, as a consequence, the scope of the compulsory license will be naturally limited to the national territory.

It may be, that these territorial features of the EPLA contribute to industry preferring it over the Community patent. Prior user rights remain limited, compulsory licenses remain void of interest.⁹⁰ For the Community, however, they must be a matter of real concern. They mean, indeed, that it either has to accept the continued risks of territorially split markets, the effects of which it cannot satisfactorily prevent or remedy by harmonization,⁹¹ or, as just mentioned, it has to make accession to the EPLA mandatory for all its Member States, and hope to impose its own patent policy on EPO/EPLA. Whether this is legally feasible or not,⁹² politically it should be unacceptable. First, why would Member States accept or be subject to mandatory accession to the EPLA, if they cannot agree on a Community patent? The “political” questions remain the same, and the legal questions are solved less satisfactorily. Second, how can the Community transfer patent litigation on a non-Community court, when the litigated patents and, therefore, markets, essentially are the markets

⁸⁷ The national, territory-based bundle-of-independent-patents concept is particularly conspicuous in Art. 42, 43 in that they aim at invalidating all the patents in the bundle by one stroke, but need to do so with respect to the specific States covered.

⁸⁸ Note that the law would be similar under the Community patent system, given that the Community Patent Court will not have jurisdiction over contract matters, see *supra* n. 57.

⁸⁹ This is so because non-use or insufficient use (supply) is determined by reference to the domestic, national market; likewise, the grant of compulsory licenses in favour of dependent or improvement patents is aimed at enhancing innovation on domestic markets or at least to strengthen the position of the domestic owner of the improvement patent.

⁹⁰ This is so because most national markets, taken alone, are too small to be rewarding, in particular in view of the risk of competition by the patentee, and because requests for compulsory licenses in several states are too costly, take too much time, and offer too little prospect of being uniformly successful. See also *infra* sub III 1 b (ii).

⁹¹ The Community may, of course, prescribe that prior user rights or the use requirement for patents be defined by reference to the entire Internal Market, but this it can do only with respect to national patents – either EPO-granted or nationally granted –, not with respect to EPO/EPLA-patents. As regards prior-user rights, Community-wide effect will then depend upon whether the European Patent Court and national patent courts in non-EPLA countries render harmonious decisions; as regards compulsory licenses, harmony must be brought about by 25 national judiciaries, the Court of Justice of the Community having only limited control in this respect: Art. 234 EC-Treaty being limited to abstract questions of law, and unlikely to be activated frequently in this particular area of the law.

⁹² See *supra* n. 84; note also the difficulty of foreign competences in non-trade areas, and the Berne Convention – incident (see *infra* n.128).

within the Community, indeed the Internal Market. Third, why should the Community wish to solve its present problems of setting up a Community patent in exchange of the future problems of patent policy making with even more States, and States which are not bound by a Community interest and discipline?⁹³

- Finally, Art. 62 et seq. of the Draft EPLA set forth the remedies the European Patent Court may pronounce in cases of patent infringement, in particular the grant of injunctions and the award of damages, but also forfeiture of infringing goods and recovery of enforcement costs. Although these remedies, just as those of the EU-Remedies Directive⁹⁴ and of the Community patent proposal, are only intended to implement Art. 44 et seq. TRIPs-Agreement, they differ considerably in practically important details.⁹⁵ Whilst this may be a matter of negotiation, and whilst differences of the law possibly occurring between EU/EPLA and EU/non-EPLA States will be contained by the TRIPs-standards, the problem remains that the EU, if it tolerates or even accepts the EPLA, will lose control over its enforcement policy. This concerns less the introduction of criminal sanctions on a broad scale,⁹⁶ since these may be pronounced in addition to and independently of civil enforcement under the EPLA. But it may become relevant to the extent the EU wishes to develop its arsenal or the deterrent effects of the private law remedies. If the theories of prevention underlying such an approach are correct,⁹⁷ then the distortion of competition resulting from that such remedies are available under national law, but not under EPLA-law may not be altogether negligible.

b) Centrifugal forces

In the European patent system the language issue represents a neuralgic spot as well. The above mentioned protocol, which was agreed upon at a Ministerial Conference in London in 2000,⁹⁸ would limit the requirement of translation into national languages, which all contracting States have introduced on the basis of Art. 65 EPC.⁹⁹ However, the reduction of translations has been agreed upon only by and for countries using one of the three EPC languages and countries willing to designate one of these languages (presumably English) as sufficient and binding.¹⁰⁰ Besides, Art. 2 of the “London

⁹³ See as to the changed strategic interests of the European Patent Organisation (international orientation due to PCT-business; dependency on non-EU applicants for 50% of its workload) *infra* text at n.107

⁹⁴ *Supra* n. 48

⁹⁵ See only the rules on limitation in Art. 45 Community Patent Proposal (5 years upon acquisition of knowledge, absolutely 10 years, or no absolute limitation at all?) and Art. 67 (5 years upon acquisition of knowledge or 5 years following termination of procedure without result).

⁹⁶ See COM (2005) 276 final, reported in GRUR Int 2005, 758

⁹⁷ See Dreier, *loc. cit.*, GRUR Int 2004, 706 with references.

⁹⁸ Agreement on the application of Article 65 of the Convention for the grant of European Patents, OJEPO 2001, 549; the Agreement needs to be ratified by 8 EPO-Contracting States including France, Germany and the UK. All but France have done so, see Vieregge, Wiesner, Neues vom EU-Wirtschaftsrecht, VPP-Rundbrief 2005 (2) 77; EPO, Annual Report 2005, *loc. cit.* at p. 94.

⁹⁹ These translations are part of a “validation” procedure, which imposes formalities and a fee, see Singer, Stauder, *loc. cit.* Art. 65 no. 3 et seq.; EPO, National Law relating to the EPC, *loc. cit.* sub IV showing the various national requirements and procedures.

¹⁰⁰ It is estimated, that translation costs will be reduced by half, if the Art. 65-Agreement enters into force for 12 EPC-States, see Kober, *die Rolle des Europäischen Patentamts im Spannungsfeld*

Protocol” still allows all Contracting states to require translations of the full specification in cases of litigation, and it is unlikely to be ratified unless the language issue of the Community patent is solved or the Community patent abandoned definitely.¹⁰¹ Even if put into force, the Art. 65-Agreement will do little to cure the defects of the European patent system. These are of various kinds, and only in part related to the costs of a European patent.¹⁰² This does not mean that costs do not matter. European patents are expensive, possibly too expensive as a matter of an evenly working innovation policy.¹⁰³ The reasons for the high costs are multiple. The processing costs of the EPO are considerable in themselves, due to some degree to the Office’s mode of operation and staffing, but also due to its understanding as a central office serving several States rather than one European market. It has been criticized on both accounts,¹⁰⁴ and the Paris Ministerial Conference gave a mandate to look into the level of fees as well,¹⁰⁵ but did not ask to also look into its reasons. After all, the EPO and its Contracting States have a common interest in fee income,¹⁰⁶ and the European Patent Office is a central granting authority for national patents of a large number of States, not all of whom belong to the European Union. Designation fees and validation procedures only mirror in terms of costs the legal structure of the European Patent System.

globaler Wirtschaftsentwiclungen, GRUR Int 2001, 493, 495; that estimate, if realistic, needs to be put in relation to the overall costs of a European patent over its life time, rather than only in relation to fees accruing till the grant of the patent, as is usually done. It will then appear that the Art. 65-Agreement will do little in terms of enlarging the geographical scope of a European patent beyond the territories of a small number of core States, mainly those which support the Art. 65 Agreement.

¹⁰¹ This is so because France, a necessary ratification state (see supra n. 97), has no interest to jeopardize its position on the language issue of the Community Patent by ratifying the London Protocol.

¹⁰² A major deficit of the operation of the EPO is the slow-granting procedure. The EPO is proud to have the average time for granting a patent reduced from 46,2 months to 45,3 months, so by less than a month for a duration of close to four years; to remedy the situation, search reports, which in 50% of all cases are delivered within a little more than half a year, are now accompanied by a preliminary assessment of patentability of the invention for which protection is sought (see EPO, Annual Report 2005, loc. cit. at p. 18, 22). The lengthy procedure is not only a problem for the applicant and for third parties facing a risk of future infringement and compensation payments (Art. 67 EPC). First, it poses a problem the public. Whilst the invention has to be disclosed within 18 months in the EPO procedural language (Art. 93 EPC), translations will be available only 3 months after the grant of the patent, so 4 years after the application. Second, it threatens the well-functioning of the patent system as such in that it allows patent applicants to adopt a strategy of deterrence, which frustrates competing innovation, and in that it tends to transform the granting procedure from an examination system into one of registration and self-evaluation of the validity of the title to protection.

¹⁰³ Meaning: affordability for all segments of industry and all types of qualifying inventions; by contrast, international comparisons, such as made by the Commission, Proposal for a Community Patent, loc. cit., Memorandum sub 2.4.3.2 are of little interest. High European fees have not deterred US-applicants from seeking protection (see infra n.108), and lower fees in the US or in Japan have not made European firms to apply for more patents in the USA or in Japan; patent protection is sought after internationally, and so firms must calculate in overall budgets. The idea of a comparative disadvantage is ill-conceived and based on concepts of protected home markets, which do not correspond to economic reality.

¹⁰⁴ See as early as 1990 Armitage, Updating the European Patent Convention, 22 IIC 1 (1991, first published in GRUR Int 1990, 662); see also Ullrich, loc. cit. 8 Eur. L. J. at p. 443 et seq. (2002).

¹⁰⁵ See supra n. 75

¹⁰⁶ For details see Ullrich, 8 Eur. L. J. at p. 442 (2002)

Of course, politically speaking, the European Patent Organisation has a hybrid nature, because, as mentioned, it was always intended to serve as the Patent Office of the European Economic Community. But its legal structure, which may be a necessity if the EPO is to serve also the neighbouring States non-Members of the EU, makes it vulnerable to centrifugal forces. These centrifugal forces, represented by the national patent offices of a large number of Contracting States, take their energy from many sources. Most of them are known, only some are openly discussed. Among the former is that the EPO is increasingly transmuting from a European into an international patent office seeking to establish itself as the leading PCT-office both in terms of quantity of its intake and quality of its output.¹⁰⁷ Another cause for centrifugal forces to gain momentum is that both application rates from and designation rates for Contracting States are grossly asymmetric,¹⁰⁸ a fact which is not due, but possibly aggravated by that the major part of EPO-business is of non-European origin.¹⁰⁹ Whether or not these developments have produced some non-avowed sense of envy and of being neglected by national patent administrations, is a matter which need not be discussed here. But they do give increased legitimacy to centrifugal national forces which take their energy not from their own merits, but from those of the European Patent Organisation, namely from its success as a central granting authority for a bundle of national patents. From the beginning, indeed, the EPO, by its examination procedure for multi-territorial patents, has not only relegated patent offices running a registration system into purely domestic-market offices,¹¹⁰ but it has taken business away from those national offices which operate examination systems.¹¹¹ This meant, of course, a loss in income from fees, but, more importantly, it meant, at least for smaller countries, a reduction of workload to sub-critical levels.¹¹² The remedy to prevent an ensuing loss of national or regional expertise in patent-related information handling originally was sought in workload-sharing agreements of a few national patent offices with the EPO regarding novelty searches. But now a strategic debate has been triggered within the European Patent Organisation with many Contracting States asking for a much broader approach, namely a division of labour, in part in guise of PCT-activities, whereby national offices would do both the search and a first assessment of its results in form of a written

¹⁰⁷ See the statistics *supra* n. 63; the mission statement and the quality management as described in EPO, Annual Report 2005, loc. cit. p. 2, 24 et seq.; Kober, Die Rolle des Europäischen Patentamts im Spannungsfeld globaler Wirtschaftsentwicklungen, GRUR Int 2001, 493, 496 et seq.

¹⁰⁸ See *supra* n. 72 and *infra* n. 109

¹⁰⁹ Applications from within Europe regularly are slightly below 50%, with German-origin applications leading by far (around or slightly less than 20%; France has only around 6%, the U.K. even less); applications from the USA vary between 25% and 30% (with decreasing tendency), those from Japan permanently turn around 17%, the remainder being spread over many countries, see EPO, Annual Report 1995, Munich 1996, 38; Annual Report 2000, Munich 2001, 21; Annual Report 2005, loc. cit. at p. 19.

¹¹⁰ See e.g. as regards France OECD, Compendium of Patent Statistics 2005, 37 as compared to the UK Patent Office (*ibid.* p. 38), which, in addition, benefits from a language advantage.

¹¹¹ See Phillips, Time to Close the Patent Office Doors? (1990) 5 E.I.P.R. 151, and the references *supra* n. 109 for the U.K.; the German Patent and Trademark Office essentially lives on the strength of German applications, which is unmatched in Europe, see GPTO, Annual Report 2005, 9 and *supra* n. 109.

¹¹² See as regards the Netherlands switching from an examination to a registration system Kraßer, Münchener Kommentar (Beier, Haertel, Schrickler, eds.), 22nd supp. 1998, Einführung 4. Teil, p. 148 (no. 140); see also as regards Switzerland, *ibid.* at p. 159 (no. 209).

statement, so in the case of Euro-PCT applications as part of the EPC-granting process itself.¹¹³ The objective of this move is as to enable national offices to properly advise local applicants both as regards the further processing of the application and as regards its viability as an innovation project.

This move away from a few specific work sharing agreements to a general system of “outsourcing” search and evaluation activities to national offices even outside formal PCT-affiliation is justified by its proponents, almost half of the Contracting States, by the need to adequately serve the interests of local or regional industry. The link to the language issue, but also to modern innovation policy with its emphasis on regional differentiation and clustering¹¹⁴ is fairly obvious. However, giving priority to local customer preferences and needs, assuming, as one must, they are real (rather than a pretext for bureaucratic survival interests) collides with the European Patent Office’s claims, first, to efficiency by centralization, and, second, to quality leadership by combining search and examination (BEST) as well as by professional qualification (including acculturation of an international staff). In addition, it may pose a problem for its apparently highly developed and complex quality management system.¹¹⁵

The conflict divides the European Patent Organization, and it is politically important enough to be echoed by the press.¹¹⁶ The arguments forwarded by both sides are plausible, but for the outsider difficult to assess. The political implications of this new decentralization debate, however, might be far reaching. Whilst the need for Europe-wide patent protection is not put into question, to the contrary, the differentiation of the subject-matter of protection seems to reach a degree that defies uniform treatment. It is, indeed, only on this ground that Contracting States can make a plausible claim for participation in the granting process by “outsourcing” and “networking”, because they cannot pretend to maintain full capacity in all fields. The argument is thus one for specialisation, and, as such, it presents a challenge not only to the abstract design and operation of the patent system,¹¹⁷ so its a-political nature, but to the concept of a centrally-guided Europe-wide uniform patent policy. Thus, to switch back again to the Community level, the Community patent may and should be unitary, but its grant would be decentralised, at least in part, and “special” in the sense of subject-matter specific. To some degree such subject-matter specificity is inherent in the differences of patentable subject-matter. The novelty, however, is the claim of an added value that

¹¹³ This Strategy Debate is only briefly mentioned in EPO, Annual Report 2005, loc. cit. at p. 27, 91, but is accessible via the homepage of the EPO, http://ac.european-patent-office.org/pct_consultation-process/received_contributions; and http://ac.european-patent-office.org/strategy_debate/documentation/index.de.php. The issue is not a fresh one (see van Benthem, *The European Patent System and European Integration*, 24 IIC 435, 443 et seq. (1993)); the EPO aims at settling the current controversy by the creation of a “European Patent Network”, which, however, does not include cooperation in examination.

¹¹⁴ See the contribution to “Regionalization of Innovation Policy”, Special Issue, 34 Res. Pol’y 1123 (2005), in particular Feldman, Martin, *Constructing jurisdictional advantage*, 34 Res. Pol’y 1235 (2005), and note that the issue is region-specific patent claiming for global patent protection.

¹¹⁵ See EPO, Annual Report 2005, loc. cit. at p. 24 et seq.

¹¹⁶ *Süddeutsche Zeitung* of 22/23 April 2006, p. 23: Streit um Europäisches Patentamt

¹¹⁷ See Ullrich, *Standards of Patentability for European Inventions*, Weinheim 1977, 105 et seq.; id., *Wissenschaftlich-technische Kreativität zwischen privatem Eigentum, freien Wettbewerb und staatlicher Steuerung*, in Harabi (ed.), *Kreativität – Wirtschaft - Recht*, Zürich 1996, 203, 218 et seq., all with references.

specialisation would bring about in comparison to centralisation. How big is the step to take from here to doubting the wisdom of centralised patent policy or at least to doubt its practical effect, the implementation being anyway in the hands of specialists, who would more or less strictly cooperate within a network?¹¹⁸

¹¹⁸ The issue of region-specific patent administration services in part converges, in part collides with the issue of industry-specific patent protection, see *infra* n.145

III. Reinventing patent protection for market integration

1. The logic of the European patent

a) An international system of property protection

The new decentralisation movement thus raises the question whether it substantially weakens the European patent system as an alternative to a Community patent or as a default position should the Community patent really fail. The proponents would, of course, rather argue that by strengthening the local hold of the patent system they also contribute to the solidness and the efficiency of patent protection, whether European or Community-based. The question, however, is whether to this effect they should insist on participating in the granting procedure¹¹⁹ or whether they should rather concentrate on a different, complementary role, possibly in combination with a revision of national systems of protection, a role which, indeed, they envisage as well, namely a broader invention and innovation advisory function.¹²⁰ At present, at least politically speaking, they represent a threat to the European Patent Office's ambition to be or to become the leading, standard-setting international search and examination office in the globalized patent world of the PCT-system (and beyond).¹²¹ Again, such a role would do no harm to the Community patent, if it were to come, in particular not if quality standards mean rigour in applying strict substantive standards.

However, the international rank of the European Patent Organization is not only a matter of its search and examination activities. Even, and in particular, in case the Community patent definitely fails, the European Patent Organization will gain importance on the international level. It is the only authority to grant Community-wide available patent protection. Such protection will be uniform not only as regards granting and invalidation criteria, but also as regards major, albeit not all features of substantive law. The enforcement of this European bundle of national patents will be entrusted to a companion institution, the European Patent Court as established by the European Patent Litigation Agreement. In fact, the attractiveness of the European patent as a sort of Community patent by default rests on both its international, rather than Community character, and on its customer-oriented functionality. The international character is not only a matter of the reach of the European patent beyond EU Member States, but of the concomitant independence of protection from Community policy and interests. This

¹¹⁹ The structures and the functions of national patent offices differ considerably; some have a long tradition as examining offices, others have been set up as examining offices only relatively recently (Spain), some have been transformed from examination into mere registration offices (see supra n. 112), and some have a tradition as "qualified" registration offices in that they provide some service in addition to registration (INPI, France). It is, therefore, beyond the scope of this paper to examine their present role and future functions.

¹²⁰ See IBM, Role of national patent offices, the European Patent Office, as well as the Japanese and US patent offices in promoting the patent system, Report to the European Commission, Almere, 14.02.2003 (available at the Commission's homepage, Internal Market/Industrial Property/Patents), and see infra sub 2.c),3.

¹²¹ See supra n. 113 and accompanying text

independence will remain largely intact even if the Community as such were to become a member of the EPO without having a patent system of its own, i.e. in the absence of a Community patent. The reason is that the European patent, in its EPC- and EPLA-form, is and has to remain uniform in all EU and non-EU Contracting States. Whatever wishes the Community might have, as long as it does not have the Community patent, it must compromise with all other Contracting States.

In that regard, the Community, as all Contracting States, will have to abide to the customer-oriented logic of the European patent system. As a matter of conception, the European Patent Organization is a granting office only; the future European Patent Judiciary will be an enforcement judiciary only. Both must respect the rules of the Convention and of the Agreement respectively, and they must remain totally neutral as regards the patent policy of Member States. This is not to imply that the Office as a granting authority or the European Judiciary as a court system might have a pro-patent bias. It simply means that they must be policy-neutral, as, in fact, the EPO seeks to be,¹²² whatever criticism one might wish to express as regards its interpretation and application of the rules of the Convention.¹²³ The full meaning of this neutrality is, indeed, not so much a result of the Office's – or in the future of the Judiciary's – attitude and practice, but of that the contracting States, by agreeing on uniformity of the law across a very large number of economically quite diverse countries, consciously have foregone almost all (country-specific) political orientation of patent protection. Also they have not agreed upon any political umbrella organization that could formulate a common public patent policy. The European patent organization and the future European Patent Judiciary are apolitical, technocratic institutions by design. The up-shot of all of this is, that if there is a policy rationale underlying both international organisations, than it is that of the establishment of a system of protection which, in the interest of patent-dependent industry and the economy at large, follows as much as possible a pure property logic.¹²⁴

b) A territorially separable uniformity

As such, the European patent system represents quite an international achievement. Its international and neutral character as well as its property logic make it attractive for industry quite independently from the saving of transaction costs resulting from the centralisation of the granting procedure and of enforcement. There is, however, a price

¹²² A borderline case is the adoption by anticipation of the Community's rules on biotechnological inventions by insertion into the EPO-Implementing Rules (Rule 23b et seq.), and the more so as this was done prior to the transformation of the Community's Directive 98/44 on the legal protection of biotechnological inventions (OJEC 1998 L 213, 13) into national law by all Member States, so prior to the availability of the exceptions from protection or of compulsory licenses (Art. 10 et seq., 12 of the Directive), see OJEPO 1999, 437.

¹²³ E.g. the controversies on the EPO-practice of granting protection for software-related inventions, which are bound to resurrect after the failure of the Commission's proposal of a Directive on the legal protection of computer-implemented inventions, see only Hilty, Geiger, loc. cit. 36 IIC 615 (2005).

¹²⁴ For a fundamental critique see Godt, Eigentum an Information – Patentschutz und die allgemeine Eigentumstheorie am Beispiel genetischer Information, Tübingen 2006 (forthcoming); for a more technology –specific reconsideration see Vaver, Basheer, Popping Patented Pills: Europe and a Decade's Dose of TRIPS, (2006)E.I.P.R. 282, sub 5.

to be paid for these advantages by the EU if it wishes to rely on the European patent system only.

(i) The international character of the European Patent Convention excludes an extension of EU-harmonization to all Contracting States, unless these consent with respect to their territories. Thus, the European Patent Litigation Agreement does not adopt the rules of the Community Directive on the protection of biotechnological inventions regarding the scope of protection and of its limitation.¹²⁵ It does not provide for a rule on the exhaustion of the patent exclusivity either, since this principle, however fundamental, has different meaning as between Member States of the EU and between these and non-EU Contracting States.¹²⁶ Also, as already mentioned, it defines, in accordance with the nature of the European patent as a bundle of national rights, prior user rights in terms of national territories, which, as regards EU-Contracting States, is at least a doubtful approach. And at any rate, as between non EU-Contracting States, the uniform definition of the prior user right limits the uniformity nation-wise.

(ii) The political neutrality of the European patent system excludes rules on the grant of compulsory licenses in the public interest. There is no joint public interest of all Contracting States. It would seem to exclude compulsory licenses in case of non-use or of patent dependency; at least the European Patent Court is not entrusted with their grant. The matter is, therefore, left to Member States. Given the national character of the European patent – it more correctly should be called an EPO-granted patent –, this abstention is understandable. It most likely means that such licenses will be even less practically available than they are already now. For one thing, national authorities or courts will be reluctant to thus interfere with the patent exclusivity when other countries' authorities or courts are not likely to do so as well. For another, a nationally limited compulsory license unlocking a situation of patent dependency has little economic value unless the same compulsory license is granted elsewhere as well.¹²⁷ Thus, the property logic of the European patent is reinforced as a matter of fact.

The same holds true, albeit to a lesser degree, with respect to the territorial scope of protection in general. Even assuming that all EU-Member States will by themselves or upon obligation – which is doubtful enough¹²⁸ – join the voluntary European Patent Litigation Agreement, European patent protection will always be selective and bundled. Parties remain free as to the countries where they wish to obtain protection and to exploit the invention, a matter which, given that maintenance fees are national, will remain unchanged. In addition, parties may still limit the risks of invalidation of their

¹²⁵ See supra n. 83, 122 and accompanying text

¹²⁶ See for the rules on Community-wide exhaustion by a first legitimate sale of patented products as derived from the public-policy principles of Art. 28, 30 EC-Treaty, their application within the EEA, but not beyond Ullrich in Immenga, Mestmäcker, loc. cit., Immaterialgüterrecht, Teil A, no. 41 et seq., 68 et seq., 74 et seq. with references.

¹²⁷ See also supra n. 89 et seq. and accompanying text

¹²⁸ See for the ill-fated attempt of the Commission to make all EU-members join the Revised Berne Convention, Ullrich, Die gemeinschaftliche Gestaltung des Wettbewerbsrechts und des Rechts des geistigen Eigentums, in Müller-Graff (ed.), Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 1st ed. Baden-Baden 1993, 325 at 366 n. 194 with references.

rights. Indeed, whilst the European Patent Litigation Agreement allows to centralize invalidity attacks, it does so only with respect to those national patents that actually come within its jurisdiction, the latter being determined nationally in accordance with the Conventions on Jurisdiction and Enforcement of judgement and Regulation 44/2001 respectively (Art. 38, 39 EPLA). As a result, there will hardly ever be an identity of the territories of protection of a technology with the markets where it is exploited nor will the non-protected territories necessarily constitute an economically viable residual market for competitors.

2. A Community patent policy

a) Market unity in the interest of integration, innovation and structural cohesion

The non-unitary character of the European patent as a Community patent by default (or, for that matter, as an optional alternative) raises, indeed, more than an issue of artificial market segregation by way of territorially split assignments, abandonment of protection or invalidation, as is suggested and will be prevented by Art. 2 par. 1 proposed Community Patent Regulation. The unitary character of a Community patent is linked, first, to the idea of creating economic market unity through easy and equal access to protection. This means single rather than accumulated designation and maintenance fees, i.e. fees that are calculated in terms of a single market rather than in terms of aggregated national markets.¹²⁹ Fee income, which goes to Member States, and which may be necessary to maintain national patent offices, must be justifiable by value-adding services which the latter render, rather than based on fiscal interests. In fact there are enough services they might offer to their national clientele.¹³⁰

Second, as indicated, it is not enough to say that areas, which are left uncovered by an EPO-granted bundle of national patents, are free for competitors. In economic terms they mostly are not, because they may be too small or too dispersed to be competitively attractive. More important, the argument misses the point which is that such territorial loop holes of protection also present loopholes of actual or potential technology transfer and penetration. The patentee will tend to neglect these areas, and potential licensees have no incentive to ask for such unprotected transfer. This may be all the more economically wasteful as acquisition or non-acquisition of patent protection for certain areas must be decided at the beginning of an innovation cycle, whose potential might develop over a period of almost 20 years.

Third, market unity also requires that the effects of uniform rules of protection or of exceptions therefrom are at least legally the same. Whilst the case-law of the Court of Justice on the free movement of goods and services has developed a unitarily-effective exhaustion doctrine by establishing the principle, that the market of reference for the determination of exhaustion is the Internal Market regardless of divergences of

¹²⁹ See references supra n. 104

¹³⁰ See infra sub 3.

protection,¹³¹ it is not clear, whether the same rule applies as regards prior-user rights,¹³² and it certainly does not apply with respect to compulsory licenses.¹³³

Fourth, beyond the problems of distortion of competition that justify harmonization of the law under Art. 95 of the Treaty, there is the issue – which the Commission rightfully stresses again in the introduction to its consultation questionnaire¹³⁴ – that, being a framework-regulation of the innovation market, patent protection is one of the factors determining innovative competition.¹³⁵ As such, it puts a responsibility on legislation, both on the national and the Community level, to adapt the system of protection to both the needs of the time, the structure of the market they control, and the objectives the Constitution asks them to achieve. This is why, in addition to the competence for an approximation of national laws, the Community has been recognized to be entitled to set up its own system of Community intellectual property.¹³⁶ When submitting its Proposal for a Community patent at the end of the year 2000, the Commission largely failed to meet this (political) responsibility. Instead of submitting a text corresponding to a forward looking patent policy for the 21st century, it proposed a retrospective text of the midst of the last century. Indeed, with the exception of some rules relating to biotechnological inventions, and which the Council had to introduce into subsequent drafts as they were missing in the original proposal,¹³⁷ the Community patent, as submitted, is a replica of the 1985/89 Convention text, which is a replica of the 1975 text, which conceptually dates back to non-official drafts of the early sixties.¹³⁸

b) A modernized Community patent

It is true that some major modernisation issues of patent protection concern the criteria of patentability, and, therefore, the European Patent Convention. Such is the case of the concept of invention regarding computer programs and biotechnological inventions, of the permissiveness of the practice regarding sufficient disclosure of the invention¹³⁹ or

¹³¹ See ECJ of 30 October 1974, case 15/74, *Centrafarm/Sterling Drug*, Rep. 1974, 1147 at no. 13/14; for details Ullrich in Immenga, Mestmäcker, loc. cit. *Immaterialgüterrecht*, Teil A, no. 81.

¹³² The matter is unsettled, see Ullrich, in Immenga, Mestmäcker, loc. cit. *Immaterialgüterrecht*, Teil A, no. 101 with references (the author himself advocates Community-wide effect).

¹³³ See ECJ of 9 July 1985, case 19/84, *Pharmon/Hoechst*, Rep. 1985, 2281; also supra n. 89 and accompanying text

¹³⁴ See supra n. 1

¹³⁵ See Ullrich, Heinemann, in Immenga, Mestmäcker, loc. cit. *Immaterialgüterrecht*, Teil B, no. 21 et seq.; Ullrich, *Intellectual Property, Access to Information, and Antitrust: Harmony, Disharmony, and International Harmonization*, in Dreyfuss, Zimmerman, First, *Expanding the Boundaries of Intellectual Property*, Oxford 2001, 365, 367 et seq.

¹³⁶ See ECJ of 13 July 1995, case C-350/92, *Spain/Council*, Rep. 1995 I 1985; of 9 October 2001, case C-377/98, *Netherlands/Parliament and Council*, Rep. 2001 I 7079; see also Article III-176 Treaty Establishing a Constitution for Europe, and infra sub 3 text at n.171.

¹³⁷ See supra sub III 1 b (i), text accompanying n. 36, and see Art. 9 Commission Proposal for a Community Patent, loc. cit., as compared to Art. 9 lit g, h, j of the Consolidated text of 4 September 2003, loc. cit.

¹³⁸ See references supra n. 12

¹³⁹ See the highly unsatisfactory ruling of BPatG of 8 July 2004, case 17 W (pat) 8/02, CR 2004, 810, which allows patent protection of computer programs without disclosure of the source code, and does

of the specification of the industrial applicability, in fact the “utility” of the invention for which protection is claimed. These issues are well-known and, in part, on the – regrettably only virtual – agenda of another revision conference of the European Patent Organization.¹⁴⁰ But they are by no means the only ones – think of the effects of the discrepancy between the number of patent applications and the number of patents actually granted, or of the time the granting procedure takes¹⁴¹. In addition, there is a number of so to speak follow-on problems, and also of fundamental issues, which concern the Community patent. The reverse engineering issue is of the former type. The European Patent Litigation Agreement ignores it altogether. By contrast, the Council introduced a specific exception later on in the Community patent proposal by an awkward, possibly far reaching referral to the corresponding rules of software-copyright protection (Art. 9 lit i)).¹⁴² A related, but cross-sectoral issue of increasing concern is the proper (re-)definition of the scope of the experimental use exception¹⁴³.

Other problems are of a yet more fundamental nature, and not mentioned in the European Patent Litigation Agreement either. After all, it aims only at providing that minimum of uniform rules that make it work in the average patent infringement case, and it does so on the basis of the above-mentioned pure property logic. But the Community patent must be more ambitious. If deemed to serve and shape an innovative Internal Market, it ought to address the patent law problems of the modern knowledge-based economy. Among the already generally discussed issues are

so in terms which correspond to the definition of know how secrecy of Art. 1 par. 1, Commission Reg. 772/2004 on the application of Art. 81 par. 3 of the Treaty to categories of technology transfer agreements, OJEU 2004 L 123, 11. The problem with a permissive approach to the disclosure requirement is that it creates an imbalance between the patentee’s individual interest in legal protection and the public’s interest in the system’s efficiency as regards follow-on and substitute innovation.

¹⁴⁰ The issue of patent protection for computer programs is included in the Paris Mandate, loc. cit, but has been relegated to a later conference (see Körber, Bericht über die Diplomatische Konferenz zur Revision des Europäischen Patentübereinkommens vom 20. bis 29. November 2000 in München, VPP-Rundbrief 2001 (1) 20); the issue of biotechnological inventions has been provisionally dealt with by Rules 23 b) et seq. EPO-Implementing Regulations (see supra n. 121). Nothing of this, of course, is satisfactory, see Ullrich, loc. cit. 8 Eur. L. J. at p. 449 et seq. (2002).

¹⁴¹ According to European Patent Office, Annual Report 2005, Munich 2006, 17 et seq., there are 128679 European applications, but only 53259 grants per annum; 284000 procedures are pending; the average granting time is 4.5 months, a novelty search is done within 6.4 months. To a large extent, therefore, the EPC system operates like a (qualified) registration system, rather than as an examination system, which it was intended and still is supposed to be. Arguably, such a large number of pending and slowly processed (or not processed at all) applications constitutes a deterrent to innovation by other firms.

¹⁴² Inserting Art. 5 and 6 Directive 91/250 on the legal protection of computer programs by copyright into patent law means introducing a systematically alien ex lege exception for the commercial use of dependent (peripheral) programs. Indeed, since an experimental use of the programme for the purpose of determining its functionality, and thus its interfaces, is allowed anyway according to traditional concepts of patent law, Art. 11 lit i) must be meant to additionally allow the use of the patented programme to the extent that this is necessary to run the peripheral programme.

¹⁴³ See Holzapfel, Die patentrechtliche Zulässigkeit der Benutzung von Forschungswerkzeugen, GRUR 2006, 10; Bor, Exemptions to Patent Infringement Applied to Biotechnological Research Tools, (2006) E.I.P.R. 5; *Danish Board of Technology (Teknologi-Rådet)*, Recommendations for the patent system of the future, Copenhagen 2005, 37 et seq. (see also p. 30 et seq.); more generally *David*, Using IPR to Expand the Research Commons for Science: New Moves in “Legal Jujitsu”, paper presented at the 1st Annual EPIP-Association Conference, Munich 2006 (available at www.epip.dk)

- (i) the claim for equal treatment of all inventions whose effective term of protection may be curtailed by prior product admission procedures;¹⁴⁴
- (ii) the broader claim that a “one-size-fits-all” patent protection does no longer meet neither the innovation reality nor have support in modern industrial economics;¹⁴⁵
- (iii) the high density of patents, in particular interdependent patents (the so-called patent thicket),¹⁴⁶ which is no longer adequately manageable by compulsory licensing rules, so that technology pooling is favoured, but not adequately regulated;¹⁴⁷
- (iv) the related issue of accumulation of merely defensive patents for blocking or portfolio-uses;
- (v) the problem of joint inventorship, which in times of intense and multiple international research and development cooperation is poorly dealt with by national civil law,¹⁴⁸ and
- (vi) the law of employee inventions, which, for the same reason, but also because of the trend to international relocation of RandD – and/or production facilities, corporate reorganisation practices (mergers, acquisitions, outsourcing), and changed patenting strategies, does need reform and European uniformity.¹⁴⁹

Clearly, those issues are all highly complex. But that is a truism. It covers a more fundamental question which is: Should not the present crisis of the Community patent project be used for reconsideration in view of a new beginning? Can we really afford to re-launch on the Community level the introduction of a form of patent protection whose traditional design is in crisis, while other, competing nations are already aware of the

¹⁴⁴ The matter was already on the Commission’s agenda, see Commission, Follow-up on the Green Book on the Community Patent, loc. cit. sub 3.6.; Art. 63 par. 2 EPC is broad enough for a general approach.

¹⁴⁵ See as regards for example software patenting see *Hilty, Geiger*, loc.cit., 36 IIC 642 et seq. (2005); as to the general discussion of the optimal length or breadth of protection see only *Danish Board of Technology*, loc.cit. at p.33 et seq. with references; Merges, Nelson, On the Complex Economics of Patent Scope, 90 Col. L. Rev. 839 (1990); Scotchmer, Innovation and Incentives, Cambridge, Mass. 2005, 97 et seq.; Lévêque, Ménière, The Economics of Patents and Copyright, Paris 2004, 25 et seq., 30 et seq.; Burk, Lemley, Policy Levers in Patent Law, 89 Virg. L. Rev. 1575, 1630 et seq. (2003), pointing also to the obvious problems of insufficient ex ante knowledge to make protection fit technological change (the Hayekian problem of assumed knowledge); problems are compounded by that the industries and the innovation trends, which patent protection is supposed to stimulate, may undergo structural changes over the life time of the relevant patents.

¹⁴⁶ The problem is linked, but not limited to “cumulative” and systems innovation, but also to industrial patenting strategies, see Lévêque, Ménière, loc. cit. at p. 37 et seq.; Burk, Lemley, loc. cit. 89 Virg. L. Rev. 1607 et seq. 1619 et seq. (2003); Bersen, Patent Thickets: Strategic Patenting of Complex Technologies 2003 (available at www.researchoninnovation.org).

¹⁴⁷ See Ullrich, Patent pools: Approaching a Patent Law Problem via Competition Policy, in Ehlermann, Atanasiu (eds.), The Interaction between Competition Law and Intellectual Property Law, Oxford 2006 (forthcoming) with references; more generally on reforming compulsory licensing *Danish Board of Technology*, loc. cit. at p. 35 et seq..

¹⁴⁸ (Default) rules on joint inventorship seem to be inequitable and incomplete in most jurisdictions, for Germany see BGH of 22 March 2005, GRUR 2005,663- Gummi- elastische Masse II; Homma, Der Erwerb des Miterfinderrechts, Baden-Baden 1998; Niedzela-Schmutte, Miterfindungen in Forschungs- und Entwicklungskooperationen, Frankfurt 1998; *Henke*, Die Erfindungsgemeinschaft, Cologne 2005.

¹⁴⁹ The matter was on the Commission’s agenda, but not followed-on, see supra n. 24

problem?¹⁵⁰ A Community patent dealing with all or at least some of the issues mentioned would legitimately develop the pure property-logic of the European patent system into a broader public policy approach, (though still not necessarily a regulatory approach). The underlying rationale could be that patent protection, as any protection of intellectual goods, represents a framework regulation of the market, which also extends to the markets for the embodiments of such goods. As such it must be as modern as is the economy which it is to serve and inform. Of course, this is not the conventional incentive/reward concept, but a variation, if not a reversal of the assumptions underlying the latter: the patent is not the incentive for competition, but the means to realize the incentives set by competition.¹⁵¹ Still, it is an instrumentalist, functional approach with areas of both synergy and friction with the autonomy-focussed property-logic of the EU-patent. It, therefore, raises a number of – old and new – questions that need in-depth legal, economic and socio-political analysis,¹⁵² such as

- whether in a modern research-driven innovation/information economy patent protection really produces – indirect – incentive effects or simply is an ex post facto instrument of defence or even of artificial, inefficient prolongation of the innovation cycle or of the innovation rent produced by “block-busters”,
- whether and how its function varies with technologies, industries, in particular with their systematic nature, their societal relevance, and the structure of the market respectively, so that, in part, liability rules would better serve its purpose than principles of exclusivity, or
- whether it just simply is and ought to remain property as any other, with its utility resulting mainly from its transactional functions (such as within cooperation, mergers, pools). If so, its main particularity would lie in its high degree of divisibility of exploitation, its non-consumption characteristic being compensated by effects of obsolescence.

Likewise, its underlying assumptions, such as the idea that inventive activity rests on the efforts of firms acting individually, or that there is a meaningful quid pro quo between protection and disclosure, may need to be re-examined in times of wide-spread R and D cooperation and interaction between science and industry. This is so because, first, cooperation already allows precisely the internalisation and exploitation of knowledge, which patent are intended to secure, and, second, because in reality the

¹⁵⁰ See the critical assessments of the operation of the US patent system by Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Washington D.C. 2003, Chapters 4, 5 or by National Research Council (Merrill, Levin, Myers, eds.), *A Patent System for the 21st Century*, Washington D.C. 2004

¹⁵¹ See references supra n. 135; for a critique of the incentive theories of patent protection see recently Peritz, *Patents and Competition: Toward a Knowledge Theory of Progress*, Paper submitted at the ATRIP Annual Conference, Parma 2006.

¹⁵² Economic analysis of patent law has become very rich, see references supra n. 145, 146; or the contributions in Granstrand (ed.), *Economics, Law and Intellectual Property*, Den Haag 2004 (with inter alia Granstrand, *Are We on our Way in the New Economy with Optimal Inventive Steps?* *ibid.* at p. 223 et seq., but legal analysis has also become more “political”, see for example Hilty, Geiger, *loc. cit.* 36 IIC 615 (2005); Ghidini, *Arezzo*, *Patent and Copyright Paradigms vis-à-vis Derivative Innovation: The Case of Computer Programs*, 36 IIC 159 (2005); socio-political analysis is less developed, but see Godt, *loc. cit.*, *passim*, and the debates on the ethical dimension of biotechnology patenting or on patents and public health (see Vaver, *loc. cit.* (2006) E.I.P.R. 282).

information secret does not exist vis-à-vis group members anyway, yet it is fully kept vis-à-vis outsiders. Indeed, in almost all practical respects the disclosure requirement of patent law is largely ineffective. Thus, society at large gets its share of the benefits of the patent system not directly, but at best only indirectly in the form of welfare gains hopefully resulting from efficient cooperation.

In sum, basic tenets of traditional patent law doctrine have become highly questionable. A modernized Community patent should take account of the – existing and evolving – insights of theoretical and empirical research. This would not only require a reconsideration of just some of the rules the Community patent proposal contains, but of its entire approach with a view to provide for greater flexibility of the system. Its design in terms of property already tends to delay the effects of any current reform, and it cautions against postponing reforms to later times.¹⁵³ Of course, stability of the system is not a deficit in itself. Reliability of the framework conditions of the market are a pre-condition to long-term investments, such as those in research-based innovation. Fortunately, in the EU, part of the balance between stability and flexibility may be established by a proper determination of the relationship between harmonisation and/or unification of patent protection, i.e. between the community and the national patent systems.¹⁵⁴

A plausible reaction to all these challenges is all the more important as a modernized, enriched Community patent might help to overcome some of its main weaknesses. These are not only the absence of added value by reference to both the European patent and the earlier Luxemburg Convention. Rather it is also the asymmetric operation of the European patent. According to the application statistics and the designation rates, the European patent system seems to benefit the few great technology and innovation-based national economies more than the peripheral and/or the smaller countries.¹⁵⁵ In its present form the Community patent might easily reinforce this asymmetry by covering whatever territorial loop holes may be left under the selective patenting strategies currently practiced under the European patent system without providing for any system-inherent balance.¹⁵⁶ It is, of course, true, that the Community patent system may not be based on or provide for region-specific differentiation of protection. But a modernized Community patent would at least improve the regulatory framework, and thus contribute to some equality of opportunities in competition.

c) The language issue

The most obvious region-specific issue of patent protection in Europe is that of the language. A modernized, comprehensive and balanced Community patent system must take account of all its aspects. Indeed, requirements of translations into national

¹⁵³ This is the result of the constitutional constraints on intervening in property rights, see for the policy implications Ullrich, *Legal Protection of Innovative Technologies: Property or Policy?* in Granstrand (ed.), loc. cit. at p. 439, 466 et seq., 475 et seq.

¹⁵⁴ See Hilty, *Entwicklungsperspektiven des Schutzes Geistigen Eigentums in Europa*, in Behrens (ed.), *Stand und Perspektiven des Schutzes geistigen Eigentums in Europa*, Baden-Baden 2004, 139, 173 et seq.; and see infra sub IV.

¹⁵⁵ See supra n. 72, 109

¹⁵⁶ To the contrary, the uneven distribution of technological and innovative potential would become less transparent.

languages do not simply and only represent a cost burden on the patentee, or a source of business for specialized professionals.¹⁵⁷

First, it is a concern for quite different groups of “stakeholders”: Non-EU-applicants, but also EU-applicants with broad international patenting interests, mostly but certainly not exclusively large corporations, they all seek low transaction costs for global patenting. Local competitors, however, will be faced with foreign language patent claims whose interpretation and scope is, as is well known, difficult enough in any one’s native language.¹⁵⁸ Such a regime raises defendant’s costs whenever the defendant is not itself an experienced international patent player. The problem of cost is aggravated for all by the fact that technologies are protected by packages of patents as well as by patent strategies relying on purely defensive, non-used patents.

Second, there is the public interest in maintaining the patent system’s *quid pro quo*, which is the full disclosure of the patented invention.¹⁵⁹ It is ill served by foreign language patents or by unreliably translated patents. After all, disclosure must be so complete as to enable the man skilled in the art to work the invention (Art. 83 EPC), and also sufficient to practically help avoid infringement. Member States with low domestic patent propensity, which, therefore, essentially are subject to patent “monopolies” originating from outside their territory, quite understandably insist on obtaining at least the full consideration for the grant of the exclusivity, which is early access to the new inventive knowledge.

Third, there is the private and the public interest in the well-functioning of the patent system as a system of property. Its acceptance will not be enhanced nor transactions facilitated, such as the transfer of technology, the sale and acquisition of high tech enterprises, or R and D cooperation, if nobody except some patent experts skilled in a foreign language know what the protected scope of the technology assets really is. The problem, therefore, is not “political”, but fundamental.¹⁶⁰

Clearly, an all language regime will make the Community patent unworkable.¹⁶¹ However, a limited language regime, which reduces the applicant’s transaction costs, will become more easily acceptable if it produces particular benefits, which off-set the costs of increased dysfunctionality of the system as well as the costs it imposes on society at large. Society, indeed, will have to set up and run an educational system providing, in addition to general foreign language skills on all levels, for polyglot technical and legal experts not only in the professions, but in the firms, and it has to create a willingness to accept foreign languages and foreign language technology. Both types of these public costs exist in all countries not generally using a given official

¹⁵⁷ Comp. supra n. 8

¹⁵⁸ Note that the uncertainties regarding the scope of a translated patent will not disappear with a one-language regime, but simply will be passed on to the alleged infringer and to competitors in general.

¹⁵⁹ See as to the importance of the knowledge aspect of the patent grant Peritz, loc.cit, text accompanying n.66, and sect.IV.

¹⁶⁰ See already, and in more detail Ullrich, loc. cit. 8 Eur. L. J. at 469 et seq. (2002)

¹⁶¹ In addition of the additional costs, even if only the claims are translated (see Franzosi, *Save your Translation Expenses*, (1998) E.I.P.R. 36) there is the high likelihood of inaccurate translations (possibly as a result of disinterest in protection in a given country), and there is the problem of increasing costs with every enlargement of the Union.

patent-law language which is not the domestic language, however polyglot such a society may be. They are, therefore, not only a national, but a Community concern.

To the extent that the language issue also concerns the determination and provision of a particular socio-economic and educational infra-structure, its treatment within the nature of the patent system depends on a number of factors, such as,

- first, on how the latter is defined in terms of a balance or trade-off of benefits and drawbacks,
- second, on whether patent protection is as perceived as either an exceptional privilege of exclusivity or as the attribution of general rights of property for regularly accruing forms of incrementally inventive knowledge,
- and third, on how much of any such orientation is made as a matter of regulating private interests or the public interest. In the former case the balance of the burden of costs may be shifted more towards the patentee than in the latter.

Still, as regards the accommodation of private interests, the balance that will be struck on the level of the acquisition of protection, may in part be mitigated on the level of infringement. But this has been done poorly by the Community patent's distinction between injunctive relief and claims for damages. The former is the patentee's sword and the potential infringer's nightmare. Rather, a proper balance might be developed over time by a high flexibilisation of remedies, both injunctive and pecuniary,¹⁶² which, by taking account of all the "language circumstances", might lead to a fixed set of differentiated rules, taking account also of accustomization and educational change.

As regards the satisfaction of the public interest beyond the modernization and enhancement of the Community patent by comparison to its present, old-fashioned design, some of the linguistic frictions may be smoothed by providing national patent offices first, with advanced linguistic skills, and then with both informational and advisory competences in legal, technological and economic matters on all levels of a patent's life cycle, from the choice whether, how and where to patent to exploitation, litigation and invalidation or expiration.¹⁶³

3. The role of national patent systems

The role of national patent offices need not to be a merely auxiliary-one for that matter. For one thing, an extension of their competence from legal patent administration to techno-economic information and consultation services should enhance their position. For another, there should be a role for them to play as central institutions of national

¹⁶² This is not only a matter of determining negligence or willfulness of infringement, but also of deciding on the appropriateness of granting injunctive relief in cases of linguistic ambiguity etc. Note that the language issue will have a bearing on the effectiveness of criminalizing patent infringement.

¹⁶³ The Paris Mandate, loc. cit. should have been taken more seriously in this respect: mediation, for example, is not a matter for courts (which may have to decide the case subsequently), but either for the patent offices or for independent bodies. See also supra n. 120, and Kingston, What Role Now for European National Patent Offices, (2003) E.I.P.R. 289.

patent systems. The paradoxical point, indeed, is that the European patent system as complemented by the European Patent Litigation Agreement leaves little, if any room for national patent systems¹⁶⁴ whereas a Community patent with its proper public policy profile would. The reason is that the European patent simply is a centrally granted national patent, which, as to form and substance is uniform, i.e. a mono-ovular twin of all the other patents in the bundle. This uniformity is indispensable if the European patent is to serve as a Community patent by default. It makes little sense to have national patent offices grant the same patents as well, except for reasons of cost (which are bound to disappear). Nor is it sensible to have within a Contracting State a second set of equally national patents which follow more or less different rules. If these are at all conceivable in such a context, then they really would present some sort of a system of petty patents or of an up-graded form of utility model protection. The proponents of a decentralized European granting procedure¹⁶⁵ are all very aware of this dilemma, and, to overcome it, seek integration into the European patent system. This, however, is a narrow bureaucratic approach, not a political-one seeking to retain or to regain institutional autonomy.

By contrast, a Community patent system with its own, Internal Market-oriented profile, would allow national patent systems to co-exist on the basis of their proper merit and political orientation. This is so because, on the one hand, the decentralisation movement only reaffirms the existence of regional diversity within an enlarged Internal Market, which may as well imply the existence of regionally limited markets, or at least a need of regionally limited protection. The continued use of, for example, the French system of patent acquisition by registration apparently for the French market only reinforces this point.¹⁶⁶ On the other, the profile of the Community patent system will never represent the ultimate configuration of a patent system. Technological change and the insights of economic, sociological and legal patent theory move faster than the Community legislator, let alone the European patent legislature. This lesson is clear enough from the last half century of limited and inefficient patent law reform, part of its explanation being the particular structure of the international legislative process. National legislators, if allowed to do so, may react more promptly, for example as regards adaptation of protection to new subject-matter as produced by technological change, or as regards the definition of new exceptions, the appropriate form and reach of protection¹⁶⁷ or the efficient operation of enforcement.

Clearly, to meet these needs, national patent systems must be comprehensive and self-contained, and, as an alternative to a Community patent, they will need to be assessed and compared at the system level rather than by reference to single criteria of protection. They need not be a weaker form of protection. Stricter standards of patentability combined with rigorous enforcement and narrow limitations on compulsory licenses may make them less easily available, but more attractive even if granted upon a mere

¹⁶⁴ To this effect Laddie, *National I. P. Rights: A Moribund Anachronism in a Federal Europe?* (2001) E.I.P.R. 402, 405 et seq.

¹⁶⁵ See supra n. 113 and accompanying text

¹⁶⁶ For France see references supra n. 110

¹⁶⁷ Meaning the choice between a liability and a property rule, the limitation or not to literal infringement etc., see in general Hilty, *Entwicklungsperspektiven*, in Behrens (ed.), loc. cit., passim

registration procedure.¹⁶⁸ Conversely, easier availability due to lower standards of patentability may be combined with less incisive remedies and broader limitations of the terms of protection.¹⁶⁹ The point is that against the backdrop of a full fledged Community patent system, Member States should enjoy a margin of experimental manoeuvre to cope with local and/or new needs of protection. There is no reason for fears, as it was once expressed when the Community envisaged the introduction of utility model protection throughout the Community, that technology fields may become even more overcrowded than they already are.¹⁷⁰ A differentiation of the terms of protection should be intended to and result in meeting different needs, therefore different types of applicants and industries.¹⁷¹ In addition, the transaction costs of decentralized acquisition of protection, a rule against double protection and, if necessary, some minimum harmonization defining options of protection systems will help to minimize problems.

Indeed, the function of harmonization is to reduce or to minimize distortions of trade resulting from the existence of different national systems of protection, but not to altogether eliminate these systems by undercutting their viability through uniformization among each other and with the Community patent (or the European patent for that matter). Whilst it is true that throughout the Community firms should have access to Community-wide protection on equal terms, it is also true that they should be offered the kind of protection which more specifically meets their needs. There is, of course, a tension between market unity and national diversity of protection. But in a Community, where Member States bear responsibility for the well-functioning of what, after all, are their (albeit common) economies (Art.98 et seq. EC Treaty), patent policy may not be considered to be a matter of the Community alone, neither as a

¹⁶⁸ Protection of biotechnological inventions may serve as an illustration. Under the Directive on the legal protection of biotechnological inventions (supra n.121) some Member States, such as Germany, have opted for a narrow, purpose-bound scope of protection (see § 1a par. 3, 4 PatG) combined with a narrow experimental use-exception (§ 11 lit b PatG), a very hesitant practice of granting territorially limited compulsory licenses, and an efficient and strict enforcement system. Now assume that the Community Patent would afford an absolute scope of protection for biotechnological products combined with a more broadly defined rule on experimental use, a generous practice of Community-wide compulsory licenses, and an efficient, but expensive enforcement system. The assumption is not unrealistic, but it produces a rather unsatisfactory situation for regulatory competition. A reversal of the situation would fit the Community better. Yet the example shows that instead of full synchronisation or parallelism of protection there is room for competitive co-existence of the systems.

¹⁶⁹ This may be done despite Art. 33 TRIPs Agreement e.g. by a modulation of maintenance fees, strict enforcement of use-requirements or the exclusion of the prolongation of the regular term.

¹⁷⁰ Clearly, however, the co-existence of a Community patent and national patents will have an impact on the viability of petty patent or utility model protection, at least in Member States granting patent protection without prior examination. The matter cannot be examined here.

¹⁷¹ This is the experience of countries running two-tier systems of protection, see *Moritz, Christie, Second-Tier Patent Systems: The Australian Experience*, (2006) E.I.P.R. 230, for Germany, German Patent and Trademark Office, Annual Report 2005,8, 51 et seq.; of course, attention must be given to finding an optimal differentiation of the terms of protection, for example by way of including computer programmes (Austria) or excluding chemical compounds (Germany) from second tier protection.

matter of competence nor as a matter of practical necessity.¹⁷² Rather, Community and national protection must be seen as complementary parts of an overall system of protection, where unification and harmonization allow to balance uniformity with specificity and stability with flexibility of protection¹⁷³.

There is only one principle, which has no place in this two tier system of protection, and that is the principle of optionality between the Community patent and the EPO-granted bundle of national patents. It cannot be tolerated that, by opting for a European patent, so for a non-Community alternative, firms may successfully escape the public policy, which the Community defines in its Community patent regulation. Indeed, by its very nature and its current aspirations, the European patent tends to undercut both the definition and unfolding of the Community's unitary patent policy,¹⁷⁴ and the development of specific patent policies by Member States. Its role should remain restricted to what has been intended originally.

¹⁷² See supra n.135; at present, the Community's competence is based on Art. 95 and 308 of the Treaty, but the Community has not an original and exclusive competence, but precisely only one to bring national law in accordance with Community requirements, it is a shared competence which is subject to the substantive requirements of Art.14 and 5 of the Treaty; Art. III-176 of the – ill-born and ill-fated - Treaty Establishing a Constitution for Europe likewise subjects the Community's competence to the needs of the Internal Market as well as to the principle of subsidiarity (Aert.I-11); for a more extensive presentation of the argument see Ullrich, Harmony and unity of European intellectual property protection, in Vaver, Bently (eds.), Intellectual Property in the New Millennium, Cambridge 2004,20,40 et seq.

¹⁷³ It should also be noted that national patent administrations represent not merely self-sufficient bureaucracies, but an enormous stock of valuable human resources and expertise, which is better put to benefit for all than simply to rest, see also supra, text preceding n.163

¹⁷⁴ Thus, there is an obvious temptation for industry to prefer the EPO/EPLA patent over the Community patent in view of the former's decentralized system of compulsory licensing with its built-in inefficiencies (see supra n. 89, 90), and that temptation will be the greater the more "sensitive" the patented technology is in this respect.

V. Conclusion

At present, the prospects for the development of an integrated two level system of patent protection in the Community, which meets the needs of our modern, knowledge based economy with its high degree of industrial, socio-political, and regional diversity, certainly are not bright. On the one hand, such an effort of profound re-conceptualization and reform of patent protection is a long term undertaking, which should have been begun years ago. On the other, the failure of the Community patent proposal makes the EPC/EPLA-alternative look more attractive than it actually is.¹⁷⁵ Its systematic weaknesses have been pointed out in the text¹⁷⁶. But it is not only these deficits or the likely introduction of the concept of a “géométrie variable” as a way to establish supranational patent protection, which makes the EPC/EPLA approach appear to be insufficiently supportive of market integration. There is, indeed, the additional risk that it will tend to fortify the already existing technological asymmetry within the Community¹⁷⁷.

Nevertheless, it has become likely that politics, faced with the choice between a long term and a short term approach, will prefer the latter on the assumption that it may serve as an interim solution until the time for the major reform is more favourable. That assumption is intrinsically weak, and it is so regardless of how much time the process of establishing the EPC/EPLA-alternative will take in reality¹⁷⁸. The reason is that the rules of any subsequent second reform of the system will apply only to patents granted under the then new regime while earlier granted patents must remain unaffected as well acquired titles of property for their entire life time of 20 years. The full effect of a reform, therefore, will be felt only in a generation’s period of time.

In addition, the institutions, which will have been created under the EPC/EPLA-system, in particular the European Patent Court, or which have been transformed or altogether dismantled, such as national patent offices, cannot easily be changed, replaced or resurrected. Instead of creating such paradoxical *faits accomplis par interim*, the Community would be better advised to urgently and massively engage in a broad process of fundamental reconsideration of its overall approach to patent protection in the European Union. Such a strategic rather than tactical move might ultimately transform the failure of the Community patent into an opportunity to meet the Lisbon goals, albeit with delay.

¹⁷⁵ See references *supra* n.2; European Parliament seems to be more sceptical, but is so for insufficient reasons, see *Süddeutsche Zeitung* of 29 September 2006.p.21 (“Neuer Streit um Patentstrategie”)

¹⁷⁶ see *supra* sub II.2.a),b)

¹⁷⁷ See *supra* n. 72,109. Whilst such “clustering” does occur on the national level as well, in the EU it becomes a political problem of regional cohesion. It may also go a long way to explain the political nature of the language issue: What are the benefits of a supranational patent system for countries which are still technologically weak and thus subject to essentially “foreign” patent exclusivity claims, if, in addition, these claims are made in a foreign language?

¹⁷⁸ It requires at least a diplomatic conference for the accession of the EU to the EPC with all its preparatory negotiations as well as a diplomatic conference for the EPLA Agreement (which possibly may be combined with a conference on the envisaged substantive revision/modernization of the EPC): then all these conventions and agreements have to be ratified by the EU, by 27 EU Member States and by all 31 EPC contracting States.