Draft dated 13Th April 2011

Fordham Intellectual Property Conference 2011

The situation of the proposed unitary European Patent after the Opinion of the Court of Justice on the proposed European and Community Patents Court

by John Temple Lang[1]

The proposed European Union Patent

The "European Patent", which is in fact a bundle of national patents, has been in existence since 1977. The "European Union Patent" (now "EU Patent"), formerly known as the "European Community Patent" does not yet exist. It would be a single unitary patent, applying in all EU Member States, or, in light of the failed attempts to create it by way of legislation, at least in all EU States participating in the measure creating it (enhanced cooperation). It has always been thought important that there should be a unified patent court system to apply the Community or EU Patent. Since filings for a EU Patent would be handled by the European Patent Office (as well as the current "European Patent") in order to benefit from the experience previously acquired by this body, the setting up of the EU Patent will require the assent of the non-EU States that are parties to the European Patent Convention that set up the European Patent Office.

The strongest single reason for a unitary patent and a single patent court is to reduce the cost of parallel litigation concerning national patents. The cost of a case in the four EU States where most patent litigation occurs (Germany, France, the U.K. and the Netherlands) has been estimated at €310,000 to €1,950,000 at first instance, and €320,000 to €1,390,000 on appeal. The savings to litigants that would result from avoiding duplication of cases have been estimated to be €148 million to €289 million per annum by 2013.

The cost saving expected from a single patent court would be in addition to the cost savings expected from having a unitary EU patent. At present the bundle of national patents in the European Patent costs up to nine times as much as patents in the USA or Japan (mostly, in translation costs). A unitary patent would be much less expensive. (The Commission says ultimately €680, rather than €32000 for all member States).

The defects in the present system and the need for a single Patent Court in the EU

There are several serious defects in the present system:

- Expense and cumbersome procedures mean that the average European patent is only in force in 5 Member States
- litigation is needed in multiple jurisdictions
- if different results are reached, there is no mechanism for reconciling them
- there is no incentive to resolve different results through settlements

[1] Cleary Gottlieb Steen & Hamilton LLP, Brussels

- therefore, there is much scope for forum shopping
- procedural gaps, such as the absence of injunctions applying in more than one State
- separate revocation and infringement proceedings.
- the absence of EU-wide compulsory licences.
- cases take longer in some States than in others
- some States have no specialized patent courts

All of these features should be corrected by an appropriately designed single Patent Court.

The question for the Opinion of the European Court of Justice

The Court was asked whether the draft international agreement intended to set up a "European and Community Patents Court" was compatible with the EU Treaties. It was only in 2009 that it was suggested, for the first time, that a single Patent Court should have jurisdiction over both the unitary European Community Patent (now named "European Union Patent") and the European Patent (the bundle of national patents).

The Commission had proposed that in the future a Community Patent would be granted by the European Patent Office. It would have a unitary and autonomous character, that is, one patent would be granted for all the EU Member States, which would be separate from national patents. The effects would be the same in all EU Member States, and the patents could be granted, transferred, declared invalid or lapse only for the whole area.

A draft international Agreement between the EU Member States, the EU itself, and non-EU States that are parties to the European Patent Convention had also been drawn up, creating the European and Community Patents Court. The Court would consist of a patent court of first instance (comprising a central division and local and regional divisions) and a court of appeal. The new Court would deal with both the unitary EU Patents and the European Patents.

The draft Agreement obliged the proposed Court to respect EU law and to base its judgments on the Agreement, directly applicable EU law, including the proposed Regulation on the Community Patent, and the national laws of contracting States implementing EU law, the European Patent Convention and national laws implementing it, and any international agreements on patents binding on all the contracting States.

The proposed Court was to have exclusive jurisdiction over actions for infringement, declarations of non-infringement, claims for revocation, grant or revocation of compulsory licences, and other proceedings between private parties.

When a question of interpretation of the EU Treaties or the validity or interpretation of acts of the EU institutions is raised before the proposed Court, it may (and if there is no appeal within the proposed Court, it must) refer the question to the European Court of Justice, the judgment of which would bind the Patent Court.

Opinion 1/09, March 8, 2011, of the European Court of Justice

The Court gave its Opinion on the proposed Court (the "PC") with all of the judges participating, after consulting all the Advocates General in a closed session, giving the Opinion the maximum weight. The Opinion is clearly written, firm and concise.

The Court said that the Opinion was given on the basis of the EU Treaties that came into force in 2009, the Treaty on the European Union and the Treaty on the Functioning of the European Union, (the "Lisbon Treaties"). The key question concerned the powers of the proposed Court relating to the future Community Patent, not the existing European patent.

Article 262 TFEU envisaged that the Court of Justice could be given some of the powers proposed for the Patent Court, but Article 262 is "not the only conceivable way of creating a unified patent court".

The Court went on to make a series of important statements about the essential features of the existing EU judicial system, which relies heavily on national courts of EU Member States. They now have jurisdiction in patent cases under EU law, and the Court stressed the fundamentally important legal duties of national courts under Article 4(3) TEU to cooperate with the EU Institutions and to provide a complete and comprehensive range of legal remedies:

- *64. Since the draft agreement establishes, in essence, a new court structure, it is appropriate to bear in mind, first, the fundamental elements of the legal order and judicial system of the European Union, as designed by the founding Treaties and developed by the case-law of the Court, in order to assess whether the creation of the PC is compatible with those elements.*
- *65. It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, inter alia, Case 26/62 van Gend & Loos [1963] ECR 1, 12 and Case 6/64 Costa [1964] ECR 585, 593). The essential characteristics of the European Union legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (see Opinion 1/91 [1991] ECR I-6079, paragraph 21).*
- *66. As is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States.*
- *67. Moreover, it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties (see Opinion 1/91, paragraph 35).*
- *68. It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and*

respect for European Union law (see, to that effect, Case C-298/96 Oelmühle and Schmidt Söhne [1998] ECR I-4767, paragraph 23). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law (see, to that effect, Case C-432/05 Unibet [2007] ECR I-2271, paragraph 38 and case-law cited)

- *69. The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (see Case 244/80 Foglia [1981] ECR 3045, paragraph 16, and Joined Cases C-422/93 to C-424/93 Zabala Erasun and Others [1995] ECR I-1567, paragraph 15).*
- *70. The judicial system of the European Union is moreover a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions (see, inter alia, Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 40)"*

The Opinion then described the proposed Patent Court, stressing its international character, outside the legal system of the EU:

- *71. As regards the characteristics of the PC, it must first be observed that that court is outside the institutional and judicial framework of the European Union. It is not part of the judicial system provided for in Article 19(1) TEU. The PC is an organisation with a distinct legal personality under international law.*
- *72. In accordance with Article 15 of the draft agreement, the PC is to be vested with exclusive jurisdiction in respect of a significant number of actions brought by individuals in the field of patents. That jurisdiction extends, in particular, to actions for actual or threatened infringements of patents, counterclaims concerning licences, actions for declarations of non-infringement, actions for provisional and protective measures, actions or counterclaims for revocation of patents, actions for damages or compensation derived from the provisional protection conferred by a published patent application, actions relating to the use of the invention before the granting of the patent or to the right based on prior use of the patent, actions for the grant or revocation of compulsory licences in respect of Community patents, and actions for compensation for licences. To that extent, the courts of the contracting States, including the courts of the Member States, are divested of that jurisdiction and accordingly retain only those powers which are not subject to the exclusive jurisdiction of the PC.*
- *73. It must be added that, in accordance with Article 14a of the draft agreement, the PC, in carrying out its tasks, has the duty to interpret and apply European Union law. The draft agreement confers on that court the main part of the jurisdiction ratione materiae held, normally, by the national courts, to hear disputes in the Community patent field and to ensure, in that field, the full application of European Union law and the judicial protection of individual rights under that law".*

The Court explained that there was no objection in principle under EU law to an international court, if it were given a new jurisdiction over an international agreement to which the EU is a party, and if it did not take jurisdiction away from the existing EU legal systems:

- *74. As regards an international agreement providing for the creation of a court responsible for the interpretation of its provisions, the Court has, it is true, held that such an agreement is not, in principle, incompatible with European Union law. The competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinion 1/91, paragraphs 40 and 70).*
- *75. Moreover, the Court has stated that an international agreement concluded with third countries may confer new judicial powers on the Court provided that in so doing it does not change the essential character of the function of the Court as conceived in the EU and FEU Treaties (see, by analogy, Opinion 1/92 [1992] ECR I-2821, paragraph 32).*
- *76. The Court has also declared that an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order (see Opinion 1/00 [2002] ECR I-3493, paragraphs 21, 23 and 26).*
- *77. However, the judicial systems under consideration in the abovementioned Opinions were designed, in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements concerned. Further, while providing particular powers to the courts of third countries to refer cases to the Court for a preliminary ruling, those systems did not affect the powers of the courts and tribunals of Member States in relation to the interpretation and application of European Union law, nor the power, or indeed the obligation, of those courts and tribunals to request a preliminary ruling from the Court of Justice and the power of the Court to reply".*

But, the Court said, the proposed Patent Court was different from the international courts that had previously been considered compatible with EU law, because it would have jurisdiction over a large body of EU law:

- *78. By contrast, the international court envisaged in this draft agreement is to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law, in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the FEU Treaty concerning the internal market and competition law. Likewise, the PC may be called upon to determine a dispute pending before it in the light of the fundamental rights and general*

principles of European Union law, or even to examine the validity of an act of the European Union.

- *79. As regards the draft agreement submitted for the Court's consideration, it must be observed that the PC:*

  – *takes the place of national courts and tribunals, in the field of its exclusive jurisdiction described in Article 15 of that draft agreement,*
  – *deprives, therefore, those courts and tribunals of the power to request preliminary rulings from the Court in that field,*
  – *becomes, in the field of its exclusive jurisdiction, the sole court able to communicate with the Court by means of a reference for a preliminary ruling concerning the interpretation and application of European Union law and*
  – *has the duty, within that jurisdiction, in accordance with Article 14a of that draft agreement, to interpret and apply European Union law.*

- *80. While it is true that the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States, nonetheless the Member States cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned.*
- *81. The draft agreement provides for a preliminary ruling mechanism which reserves, within the scope of that agreement, the power to refer questions for a preliminary ruling to the PC while removing that power from the national courts.*
- *82. It must be emphasised that the situation of the PC envisaged by the draft agreement would differ from that of the Benelux Court of Justice which was the subject of Case C-337/95 Parfums Christian Dior [1997] ECR I-6013, paragraphs 21 to 23. Since the Benelux Court is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union, its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union.*
- *83. It should also be recalled that Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States. The preliminary ruling mechanism thus established aims to avoid divergences in the interpretation of European Union law which the national courts have to apply and tends to ensure this application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States. Further, the national courts have the most extensive power, or even the obligation, to make a reference to the Court if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of European Union law and requiring a decision by them (see, to that*

effect, Case 166/73 Rheinmühlen- Düsseldorf [1974] ECR 33, paragraphs 2 and 3, and Case C-458/06 Gourmet Classic [2008] ECR I-4207, paragraph 20).

- *84. The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order.*
- *85. It follows from all of the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties".*

The Court added another consideration, that there would be no solution if the proposed Patent Court made a serious mistake of EU law, since its judgments would not be subject to appeal to the Court of Justice or to infringement proceedings under the EU Treaties. No mechanism was provided for resolving any conflict between the Court of Justice and the proposed Patent Court over a question of EU law, however it might arise:

- *87. …… where European Union law is infringed by a national court, the provisions of Articles 258 TFEU to 260 TFEU provide for the opportunity of bringing a case before the Court to obtain a declaration that the Member State concerned has failed to fulfill its obligations (see Case C-129/00 Commission v Italy [2003] ECR I-14637, paragraphs 29, 30 and 32).*
- *88. It is clear that if a decision of the PC were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States".*

The Court then reached its conclusion:

- *89. "Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law"*

In consequence, the Court held that the proposed agreement to set up the Patent Court is not compatible with the two European Union Treaties.

Comments on the Opinion

In short, the Court said that the draft agreement was contrary to the EU Treaties because it would deprive national courts of EU Member States of jurisdiction in patent cases

under EU law, but made it clear that it was possible to create a unified patent court in some other ways.

In substance, the Court regarded the proposed Court as an international court, to be given exclusive jurisdiction replacing that of the national courts of Member States, over a potentially very large number of cases. This is because the proposed Court is "outside the institutional and judicial framework of the EU" (para.71).

This can fairly be described as a constitutional approach, saying that the role of EU Member States national courts in the judicial system of the European Union is so important that it may not be taken away, even in an apparently specialized area, and given to a court outside the EU legal order.

Clearly the Court of Justice dislikes international judicial arrangements with non-EU States that overlap or interlock with the existing Treaty-based EU court system, or that could give rise to conflicting judgments, or that would involve giving away part of the principal jurisdictions created by the EU Treaties.

It is clear that there could be no objection to one EU Member State having a single court with exclusive jurisdiction over patent cases. Nor could there be any objection to two or more EU States sharing a jointly-constituted court, since such a court already exists (the Benelux court), mentioned in the Opinion.

It is also clear that the Court does not see any objection to courts outside the EU having a right to refer questions to the Court. This was accepted in the Court's two Opinions on the EEA Agreement (Opinion 1/91, [1991] ECR I-6079, Opinion 1/92, [1992] ECR I-2821). But only on condition that the Court's answers were binding on the courts that asked for them.

In fact there probably was at least one other objection to what was proposed. It is very difficult to see how the law that the proposed Court was to apply would relate to and interlock with EU law, or how the proposed Court would be able to apply EU law (on the unitary Community Patent) and the law of the European bundle of patents simultaneously, even in the same cases between the same parties. It had never previously been suggested that a single Court should be responsible for applying the different rules to the two kinds of patents, as it would be obliged to do, and it seems unlikely that it would have been satisfactory. The Court of Justice is well aware that even national courts of EU States do not always refer questions of EU law to the Court when they ought to, and probably did not feel confident that a new international patent court could be relied on to do so. This objection would not have been as decisive and clear as the reasons given in the Court's Opinion.

It is interesting to contrast the Court's objections to the proposed Patents Court with the Court's relationship with the EFTA Court under the European Economic Area Agreement, which has been remarkably satisfactory and successful, largely due to the skill of the EFTA Court.

The solution to the question of the European Patent Court?

If the proposed Court were redesigned as a shared national court of EU Member States, on which non-EU States would be allowed to confer jurisdiction if they wished, the same objections would not arise. The measure setting up the Court would be an EU measure, and the proposed court would be within the judicial system of the EU. The practical result might not be very different, as far as the jurisdiction of the Court is concerned, but the concept and the approach would be different in fundamental respects, because the composition of the Court would be different. A shared Court of EU Member States would be composed of national judges of EU States. An international court would include judges of non-EU States. It is understandable that the Court of Justice thought it incompatible with the Treaties to take away the jurisdiction of EU national courts to apply EU law in patent cases between parties in the EU and to confer it on an external Court.

Further Questions and Implications

The Opinion is a set-back for the EU patent plans, for several reasons. First, it makes it impossible to proceed with the setting up of the Patent Court before the adoption of the unified EU patent. Second, it gives Member States opposed to the adoption of the unified EU patent by the majority of EU States an additional objection. Third, it means that the principal non-EU States (the three EEA States, Iceland, Norway and Liechtenstein, and Switzerland) will have to wait to see what new proposals are made for one or more Patent Courts, to see how satisfactory those proposals would be for them.

Apart from the question of the European Patent Court, there are several other legal questions, not finally resolved.

1) Would it be worthwhile for the Member States that want to have a unified European patent to adopt it, without a single European patent court?

However, European industry would be less interested in the unitary patent if it were not linked to a single patent court. It is considered important not only to have a single court deciding any given case (which is often the situation already under the EU rules on jurisdiction) but to ensure that the court in question (which would decide the case for the whole of the EU) has the necessary specialised technical expertise and legal knowledge. Only a single patent court system can ensure this, and can avoid forum shopping, conflicting judgments, and different results in different States.

Since the unitary EU Patent would be administered by the European Patent Office, it could not be adopted without the assent of the non-EU States that are parties to the European Patent Convention which set up that Office.

2) Would it be permissible for some but not all of the EU Member States to adopt the unified European Union patent, without the agreement of the minority States?

The Council requested the consent of the Parliament to a draft decision aimed at authorising enhanced cooperation for creating a unitary patent protection system in the EU. (Council Press Release, February 14, 2011; EP Press Release, February 15, 2011). This was in accordance with the agreement in principle, with several Member States disagreeing strongly, for a majority of EU States to adopt the unitary patent. The Opinion necessitates reconsideration of the future judicial structure, but from a strictly legal viewpoint does not seem to alter the possibility for the majority States to go ahead with the unitary patent. This is linked to the question of the legal basis, mentioned below. The Commission has now made a proposal on these lines (April 13, 2011).

But "enhanced cooperation" by a majority of EU Member States is probably not possible for the setting up of a single EU Patent Court. This is because enhanced cooperation is not permitted for matters under exclusive EU competence, and several aspects of the proposed court, in connection with jurisdiction and court remedies, are already subject to exclusive EU competence, due to EU measures already adopted.

3) How would the three EEA States, Iceland, Norway and Liechtenstein, and Switzerland, fit into the unified patent structure, and in due course the single European patent court?

The first question, presumably, would be whether the four non-EU States wished to accede to the EU Patent. One key issue in that context would be whether the Patent Court included judges from States other than the EU Member States. If, as suggested above, the solution would be a shared court of the EU States, it is not easy to see how that could be reconciled with including judges nominated, formally or informally, by non-EU States. On the other hand, the non-EU States would probably be reluctant to submit their litigants to the jurisdiction of a Patent Court in which they had no right to nominate any judges. It would be impossibly complicated and unsatisfactory to have additional judges sitting as members of the Court when companies from the four non-EU States were involved. If that were suggested, it would in practice mean the formation of two Courts. It would also create serious difficulties when non-EU companies were on one side but not on the other: would the additional judges sit?

4) Would it be possible to envisage a shared court of both the EU Member States and the three EEA States?

The EEA States have always had their own Court, the EFTA Court, which is distinct from the European Court of Justice, the jurisdiction of which is essentially limited to the EU Member States, and to international agreements to which the EU is party. It would be a big step for the three EEA States to agree to nominate judges to a new Patent Court primarily or exclusively responsible for the EU Patent, and primarily composed of judges nominated by EU States, even if the EEA States wished to become parties to the EU Patent (which they might prefer not to do). In any case, the Court of Justice might consider it contrary to the EU Treaties to have an EU Patent Court composed partly of judges nominated by non-EU States.

5) If a Patent Court shared by EU Member States were set up for the unified EU patent, would it be possible for the same Court to exercise jurisdiction over the European Patent (as distinct from the EU Patent), as far as non-EU and non-EEA States were concerned ?

This is, of course, an additional aspect of the last questions, immediately above. The answer in theory seems to be that EU law would allow jurisdiction over the European Patent (which would be the bundle of national patents of States not parties to the EU unitary Patent) to be conferred on the EU Patent Court. But there seems to be little chance that the non-EU States would do this, since they would have no right to nominate judges to an EU court. In any case it might be unsatisfactory for the same Court to exercise two confusingly similar jurisdictions.

6) What are the correct legal bases for EU measures setting up a unitary EU patent and a patent court?

Article 118 TFEU (on setting up European intellectual property rights, by qualified majority vote if necessary) could be used, or perhaps by Article 352 (ex-308 EC, supplementary measures, by unanimity). Article 262 TFEU envisages EU measures to confer jurisdiction on the Court of Justice in disputes concerning European intellectual property rights. A measure under Article 118 would apply throughout the EU. "Enhanced cooperation", involving less than all of the member States, is based on Article 20 TEU and Articles 326-334 TFEU.

As it seems that there must be separate courts for the unitary EU Patent and the European bundle of patents, the risk of divergent results may have to be accepted. Arrangements will also be needed to relate the European Patent Office's own procedures for dealing with patent disputes with the judicial arrangements for the unitary EU Patent.

Conclusion

In short, the practical effect of the Opinion, in this extraordinarily complicated situation, is to make it unrealistic to envisage a single Court with jurisdiction over both the unitary EU Patent and the bundle of national patents called the European Patent. As happened as a result of the Court's two Opinions on the EEA Agreement in 1991 and 1992, it will be necessary to have one court for the EU Member States, and another, if thought appropriate, for the non-EU States. The unitary EU Patent clearly needs a single Court to be fully effective. The European Patent has functioned, expensively, without a single court. The three EEA States would probably prefer to be treated in the same way as other non-EU States.

The task of dividing the existing draft documents into (1) separate EU measures dealing with the EU Patent and a single EU Patent Court, and (2) a revised agreement on a separate court for the European Patent does not seem technically or legally difficult. A separate EU Patent Court, appropriately constituted, could be given all the powers intended to be given to the court which was considered incompatible with the EU Treaties. But delay is likely to occur while the non-EU States consider whether they want to sit up their own patent

court and if so whether to set up a new court, or (possibly) if some of them would use the existing EFTA Court. (There are 35 States which are parties to the European Patent Convention. Clearly not all the non-EU States would use the EFTA Court). It has an excellent reputation, but is not a specialized patent court. The judges are nominated only by the three EEA States, Iceland, Liechtenstein and Norway, but not by e.g. Switzerland, an important State in the context of patents, which is not a party to the EEA Agreement.

On April 13, 2011 the European Commission adopted a proposal for a unitary patent which would apply in the 25 member States taking part in the enhanced cooperation procedure. There will be a separate proposal later on the Patent Court.

Discussions of all these questions are going on actively at present. But the number of interests involved is so great that no agreed solution can be expected soon.