

**Patent Session 2A: The European Unitary Patent and the Unified Patent Court**  
**Thursday 24 April 2.30-3.30 p.m.**

**Judge Allan Rosas, CJEU**

**“The creation of an EU unified patent litigation system especially in the light of Opinion 1/09 of the CJEU of 8 March 2013” - Summary**

- Opinions of the CJEU relating to international dispute settlement systems: Opinions 1/91 and 1/92 (draft agreement on the European Economic Area), Opinion 2/94 (accession to the European Convention on Human Rights), Opinion 1/09 (draft agreement on the establishment of a unified patent litigation system), Opinion 2/13 pending (draft agreement on the accession of the EU to the European Convention on Human Rights)
- The draft agreement considered in Opinion 1/09, “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 [have deprived] courts of Member States of their powers in relation to the interpretation and application of European Union law and the [CJEU] of its powers to reply, by preliminary ruling, to questions referred by those courts” Opinion 1/09, para 89); compare with the situation relating to the Union trade mark and the harmonization of national trademarks
- The CJEU held that the draft agreement was incompatible with the basic Treaties establishing the Union, the Treaty on European Union and the Treaty on the Functioning of the European Union, as it would “[have altered] 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” (ibid, para 89)
- Among the essential characteristics of the EU legal order, “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” (ibid, para 65), the Court mentioned not only the principles of primacy and direct effect but also the fact that “the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States” (ibid, para 66) and that “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” (ibid, para 69)
- the CJEU pointed out that the patent litigation system envisaged would have differed from that of the Benelux Court of Justice (Belgium, Netherlands, Luxembourg), which “is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union” and its decisions “are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union” (ibid, para 82)

- This alternative (the Benelux model”) has been followed in the Agreement on a Unified Patent Court, signed by 25 of the then 27 EU Member States on 19 February 2013 (OJ 2013, C 175/1); the Unified Patent Court “shall be a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States” (Article 1(1) of the Agreement) and the Agreement refers, inter alia, to the primacy of Union law over the laws of the Member States (Article 20), to the obligation of the Unified Patent Court to cooperate with the CJEU to ensure the correct application and uniform interpretation of Union law (Article 21), to the joint and several liability of the Contracting Member States for damage resulting from an infringement of Union law by the Court of Appeal of the Unified Patent Court (Article 22) and to the individual and collective responsibility of the Contracting Member States, including for the purposes of infringement actions which can be brought against Member States under Articles 258, 259 and 260 of the Treaty on the functioning of the European Union
- In Joined Cases C-274/11 and C-295/11, Italy and Spain brought an action for annulment of Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection; the actions were dismissed by judgment of the CJEU of 16 April 2013; pending cases C-146/13 and C-147/13 brought by Spain against Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, respectively