Integration by Courts: The Role of the CJEU in the European Patent System: Reconciling the Single Market with Human Rights Concerns?

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INTRODUCTION

The Unified Patent Court (UPC):

➢ a Crucial Step for the Construction of the European Intellectual Property System?

“[…] The creation of a European court specialized in patent matters will be a tremendous boost for the completion of the European patent system”.

Benoît Batistelli, President of the European Patent Office

“[…] As a first specialised court common to the Member States in the patent litigation area, the Court will open a new chapter in the history of both the patent system and judicial cooperation in the EU”.

Michel Barnier, Vice-President of the European Commission

➢ … or a Serious Reason for Concern?

“Functionality concerns […] arise from the failure to overcome fragmentation of jurisdiction for patents in Europe and from the manifold compromises in the Agreement which hamper the effectiveness of the UPC”.

Among the important challenges that need to be addressed are:

I. The role of the CJEU in the European patent system

II. Reconciliation of the European patent system with the human rights law obligations
I. Assessing the role of the CJEU in the European patent system

✓ CJEU has played a key role in the development of common rules in the field of IP law through:
  ✓ jurisprudential recognition of EU competence to regulate in the field of IPRs,
  ✓ interpretation of certain key concepts of European IP law.

✓ However, CJEU has rarely decided on any patent law substantive provisions, national courts being the authority to decide on these matters.

1. Particularities of the unitary patent protection:

✓ granted under European Patent Convention (EPC): non-EU law act;
✓ unitary effect accorded by Regulation 1257/2012;
✓ implementation of EU law delegated to a non-EU institution (EPO);
✓ judicial review entrusted to an international court (UPC).
2. Coexistence of patent protection in Europe

- Inventors may choose between: a) national patents, b) “classical” European patents, and c) European patents with unitary effect.

Diagram:

- Invention
  - Application for a national patent before the National Patent Office (NPO)
    - National Patent
      - National Court
  - Application for a European Patent before the EPO (single procedure for EU and non-EU countries)
    - European Patent
      - Validation (translation) by NPO
        - «Optional» UPC jurisdiction during transitional period of 7 years (Art. 83 UPC)
      - 1 month after grant Request for Unitary Effect (in all 25 EU MS)
        - Mandatory UPC jurisdiction
3. UPC and the CJEU

a) Competence of the UPC

- Exclusive Competence: infringement and validity of European patents with unitary effect and European patents –after the expiry of the transitional period of 7 years- (art. 32 UPCA).

- Subject to obligations under EU law as any national court of EU Member States (art.1 para.2 UPCA).

b) References to the CJEU in the UPC Agreement

- Preamble (corresponding to articles 20, 21, 22):

  - “[…] the Court of Justice of the European Union is to ensure the uniformity of the Union legal order and the primacy of European Union law;

  - […] as any national court, the Unified Patent Court must respect and apply Union law and, in collaboration with the Court of Justice of the European Union as guardian of Union law, ensure its correct application and uniform interpretation; the Unified Patent Court must in particular cooperate with the Court of Justice of the European Union in properly interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Article 267 TFEU;
3. UPC and the CJEU (continued)

- **Preamble (corresponding to articles 20, 21, 22) (continued):**

  - [...] the Contracting Member States should, in line with the case law of the Court of Justice of the European Union on non-contractual liability, **be liable for damages caused by infringements of Union law by the Unified Patent Court, including the failure to request preliminary rulings from the Court of Justice of the European Union;**

  - [...] infringements of Union law by the Unified Patent Court, **including the failure to request preliminary rulings from the Court of Justice of the European Union,** are directly attributable to the Contracting Member States and infringement proceedings can therefore be brought under Article 258, 259 and 260 TFEU against any Contracting Member State to ensure the respect of the primacy and proper application of Union law”.

- **Sources of law for decisions of the UPC (art. 24):**

  Union law; Regulation No. 1257/2012 (creation of unitary patent protection) and Regulation No. 1260/2012 (translation arrangements); UPC Agreement; EPC; other international agreements applicable to patents and binding on all the Contracting Member States; national law.
3. UPC and the CJEU (continued)

CJEU does not have an appellate function and can only be active through preliminary rulings!

c) Sources of law for referral to the CJEU

- Unitary patent law:
  - Regulation 1257/2012 (creation of unitary patent protection): in particular, the application of the *principle of exhaustion of rights* to European patents with unitary effect in accordance with the *case-law of the CJEU*; and
  - Regulation 1260/2012 (translation arrangements);

- Substantive EU patent law: Directive 98/44/EC (biotechnological inventions) and Regulation 2100/94 (plant variety rights);


- Other EU Directives (expressly mentioned in art. 27, UPC Agreement): D. 2001/81/EC (veterinary medicinal products), D. 2001/83/EC (medical products for human use), D. 2009/24/EC (computer programs);

- Regulation 469/2009/EC (supplementary protection certificates for medicinal products).
3. UPC and the CJEU (continued)

d) References in the Preliminary set of provisions for the Rules of Procedure of the UPC (16\textsuperscript{th} draft, 31 January 2014)

- Questions to the CJEU (rule 266):
  - at any stage of the proceedings;
  - UPC \textit{considers} that a decision on the question is \textit{necessary} before it can give a judgment;
  - Court of 1\textsuperscript{st} instance \textit{“may”} (optional);
  - Court of Appeal \textit{“shall”} (mandatory).
4. The role of the CJEU in shaping the European patent system

a) Past dynamics: uncertainties during the drafting process

- The aim behind the UPC: creation of a specialized jurisdiction to deal with the particularities of patent law (legal certainty).

- The issue: fear that the inclusion of substantive law provisions (e.g. Arts. 6-8: right to prevent the direct use of the invention, right to prevent the indirect use of the invention, limitation on the effects of the European patent with unitary effect) into the Draft Regulation 1257/2012 would imply too much control by the CJEU (non-specialized court) on the application and scope of those rights.

- The alternative: Arts. 6-8 were removed from the Draft Regulation.

b) Current situation: the scope of intervention of the CJEU

- At present, Regulation 1257/2012 covers only two substantive patent law features:
  - exhaustion of rights (Art. 6); and
  - the statement of open licensing before the EPO (Art. 8).

- Similar provisions to Arts. 6-8, Draft Reg. 1257/2012 have been included in Arts. 25-27 of the UPC Agreement, not being subject of CJEU judicial review.
I. Assessing the role of the CJEU in the European Patent System (continued)

4. The role of the CJEU in shaping the European patent system (continued)

c) Future perspectives: opportunities to ensure a balanced patent law regime

- Although the Unitary Patent Package leaves many questions unanswered, the CJEU can still play a role in safeguarding coherence and consistency in patent law:

  - CJEU could still be called upon to rule ultimately on the scope and application of an EU-based right irrespective of whether those powers are envisaged in the Regulation or not (T. Jaeger, “Shielding the unitary patent from the ECJ: a rash and futile exercise”, IIC 389 (2013)).

  - “The existence of multi-layered and multi-jurisdictional patent protection can result in inconsistencies and fragmentation, which CJEU can remedy via the use of its interpretative jurisdiction over TRIPS”, in conformity with its exclusive competence over commercial aspects of IP under art. 207 TFEU (see A. Dimopoulos and P. Vantiouri “Of TRIPs and traps: the interpretative jurisdiction of the Court of Justice of the EU over patent law”, E.L.Rev. 2014, 39(2), 210-233).

  - Moreover, it is necessary that the CJEU safeguards the proper balance of rights in accordance with the general principles of EU law on free movement of goods and services, free competition (EU competition law) and human and fundamental rights.
II. RECONCILING THE SINGLE MARKET WITH HUMAN RIGHTS CONCERNS

The sources of Human Rights law in Europe:

- the European Convention on Human Rights,
- the Charter of Fundamental Rights of the EU,
- the Member States’ constitutional traditions.

But also international treaties: Art. 27 UDHR and Art. 15 ICESCR.

The influence of Human Rights law on European legal order continues to grow:

- Charter of Fundamental Rights of the EU enters primary EU legislation (Art. 6(1) TEU).
- EU accedes in the future to the European Convention on Human Rights (Art. 6(2) TEU).
- CJEU, ECtHR, EPO and national courts gradually use fundamental rights to interpret European and domestic IP law (patent law not being an exception).
II. Reconciling the Single Market with Human Rights Concerns (continued)

In the light of these developments, the question is:

Where to find the guidelines for a human-rights compliant approach in the field of European patent law?

In order to reconcile the single market with human rights concerns, the UPC can draw inspiration from existing judicial practice in the field of patent law and human rights of:

1. the CJEU,
2. the ECtHR,
3. the EPO Boards of Appeal,
4. national courts (including, but not limited to constitutional courts).
II. RECONCILING THE SINGLE MARKET WITH HUMAN RIGHTS CONCERNS (CONTINUED)

1. Court of Justice of the European Union (CJEU)

- Interpretation of moral exclusions from patentability of inventions in the Biotech Directive 98/44/EC in the light of the right to human dignity:

  ➢ C-34/10, Brüstle [2011]:
  A very wide reading of the moral exclusion on “uses of human embryos for industrial or commercial purposes” (Art. 6(2)(c) of the Biotech Directive) claimed by the Court to be necessary to comply with respect for human dignity;
  As a result, the process which involves removal of a stem cell from a human embryo, entailing the destruction of that embryo, cannot be patented in EU.

  Dismissing the action brought by the Netherlands seeking annulment of the Biotech Directive on the ground that Art. 5(2), in providing for the patentability of isolated elements of the human body, undermined human dignity;
  The Court was of the opinion that, “as regards living matter of human origin, the Directive frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded” (para. 77).
II. RECONCILING THE SINGLE MARKET WITH HUMAN RIGHTS CONCERNS (CONTINUED)

2. European Court of Human Rights (ECtHR)

- Requirement of a *proportionate* application of patent laws as primarily governed by Art. 1 of the First Protocol to the ECHR (*protection of property*) – provision inherently limited by its social function. It provides for the possibility of restrictions of the right “in the public interest” (para. 1) and allows the State “to enforce such laws as it deems necessary to control the use of property in accordance with the general interest” (para. 2). See *e.g.*:

  ➢ *Smith Kline & French Lab. Ltd. v. the Netherlands (dec.), no. 12633/87 [1990]*:

  The European Commission of Human Rights stated that the grant under Dutch law of a compulsory license for a patented drug was not a violation of Art. 1 of the First Protocol. It considered that the compulsory license was lawful and pursued the legitimate aim of encouraging technological and economic development.
II. RECONCILING THE SINGLE MARKET WITH HUMAN RIGHTS CONCERNS (CONTINUED)

2. European Court of Human Rights (continued)

- Need to establish certain “procedural safeguards” compliant with the right to a fair trial (Art. 6(1) ECHR). See e.g. 6 cases challenging the authority of the EPO to review patent applications and register patents:


In each case the Court and the Commission found that the EPC provides for “equivalent protections” as regards Art. 6(1) ECHR (*inter alia* an appeal procedure staffed by legally and technically qualified members).
3. EPO Boards of Appeal

- Interpretation of exclusions from patentability of inventions on *ordre public* or morality grounds (Art. 53(a) EPC) in the light of **the prohibition of slavery** and **the right to liberty**:

  ➢ **EPO, T 0149/11, TBA Decision of 24 January 2013;**

  The case concerned the question of whether patenting a slaughtering device which involves an observer as an integral part of the invention violates the *ordre public*;

  “The Board considers that ‘ordre public’ must be seen in particular as defined by norms that safeguard fundamental values and rights such as the inviolability of human dignity and the right of life and physical integrity. [...] Fundamental rights and freedoms that underpin ‘ordre public’ are codified in Articles 4 and 5 of the European Convention on Human Rights [...] , according to which no one should be held in slavery, and everyone has the right to liberty and shall be deprived thereof only under certain circumstances. [...] [A] patent for an invention that includes one or more human beings among its features gives rise to serious concerns as to these fundamental rights and freedoms of the particular human beings that would be the subject of such a patent when commercialized, however far-fetched such an interpretation may seem. These serious concerns regarding human liberty and the prohibition of slavery lead the Board to conclude that claims [for such patents] contravene Article 53(a) EPC” (para. 2.5).
3. EPO Boards of Appeal (continued)

- **Freedom of expression** of professional representatives before the EPO:
  
  ➢ EPO, D 0012/88, Advertising by firm of patent agents, DBA Decision of 15 November 1990:

  The ban on advertising imposed on professional representatives before the EPO represents a balance between the right to freedom of expression on the one hand and, on the other, the need for the law to protect the reputation of others (i.e. here: to preserve the dignity of the profession of professional representatives before the European Patent Office) and the rights of others (here in particular: ensuring fairness in competition between members of the Institute of Professional Representatives before the EPO) (see para. 2.7).

- Different aspects of the right to a fair trial are dealt with in several decisions (referring not only to Art. 6(1) ECHR but also to the relevant case law of the ECtHR). See e.g.:

  ➢ EPO, J 0015/04, Possible reasons for exclusion/Mitsubishi Heavy Industries Ltd., 30 May 2006 (on the right to be heard); EPO, G 0001/05, Exclusion and objection (interlocutory decision), 7 December 2006 (impartiality of judges).
4. National Courts

- Not only the European courts and quasi-judicial bodies, but also national courts rely increasingly on fundamental rights in their interpretations of patent law. A recent example:

  ➢ **Constitutional Court of Belgium, BioPheresis Technologies Inc v. State of Belgium, No. 3/2014, 16 January 2014:**

  The sanction that the patent has no effect on the Belgian territory without possibility of restoration, when failing to provide a translation within the strict 3 month deadline, is held to be a disproportionate deprivation of property in view of the legislator’s aim to inform the public and a non-justified damage to the right to property of the patent holder. Such sanction is hence contrary to the Belgian Constitution’s property provision (Art. 16), read in conjunction with Art. 1 of the First Protocol to the ECHR (property protection).
CONCLUSION

- On paper, the CJEU has been awarded a limited role in the European Patent system: its influence will depend on the frequency of preliminary rulings.

- However, it is not sure that the Court will accept to stay in the limited role assigned by the UPC Agreement, as the “conquering spirit” of its past jurisprudence attests.

- The role of the CJEU could become crucial in the future by:
  - Securing the coherency of the system. Paradox: some of the deficiencies could “fixed” by the harmonizing effect of case law on certain issues, as European patent law (non EU law) will have several interferences with EU law.
  - Securing the acceptability of the system, in reconciling economic rationales with ethical principles, as the future UPC practice will have to be compliant with the requirements of European, but also national and international human rights law.
  - In the long run, leading the way to a future revision of the system and creation of a true EU Patent system.
Thank you!

Further readings:


