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When Judicial Dialogue Needs Strong Institutional Commitments: The Peculiar Case of the Creation of the Unified Patent Court

by

Jacopo Alberti*

Abstract

(French version below)

Created in 2013 after a troubled and long standing debate, the Unified Patent Court (UPC) is a 'Common Court' of 25 EU Member States that will adjudicate on 'classical' European Patents and on the new European patents with unitary effect. Albeit the UPC has been established through an international agreement outside the EU legal order, it has to fully apply and respect EU Law and its primacy and it can (or, in some cases, has to) refer preliminary ruling to the ECJ. Moreover, its Member States are responsible for UPC's action pursuant to Article 258-260 TFEU and are liable for damages occurred for infringements of EU Law made by the UPC. Therefore, the UPC has a very peculiar nature that makes it a unique construct in the field of international courts and a new actor in the EU system of judicial protection. Should its establishing Agreement enter into force, the UPC will inspire the creation of other 'common jurisdictions' in other fields lying on the border between international and EU Law. However, future dialogue between the ECJ and the UPC will have to deal with some controversial issues that might require some innovative approaches in ECJ jurisprudence and some caution on the part of the UPC. Despite all the efforts made to mitigate the international origin of the UPC, it remains a fundamental anomaly in the system of EU Courts, and it clearly demonstrates that the current EU system of judicial protection requires profound reconsideration.

Keywords: Unitary patent, Preliminary ruling, International law, Primacy, EU judicial protection, Differentiated integration

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Résumé

Créée en 2013, après un débat long et troublé, la Juridiction Unifiée du Brevet (JUB) est une « juridiction commune » de 25 États membres de l'UE qui statuera sur les brevets européens « classiques » et les nouveaux brevets européens à effet unitaire. Bien que la JUB ait été créée par un accord international, en dehors du système de l'ordre juridique de l'UE, elle doit appliquer et respecter le droit de l'UE y compris le principe de primauté. Elle peut (et, dans certains cas, doit) renvoyer à la CJUE (questions préjudicielles). En outre, les États membres de l'UE sont responsables de l'action de la JUB au sens des articles 258-260 du TFUE aussi bien que des dommages survenus en cas de violation du droit communautaire commise par la JUB. Par conséquent, la JUB est d'une nature très particulière qui en fait une construction unique dans le domaine des tribunaux internationaux aussi bien qu'un nouvel acteur dans le système juridictionnel de l'UE. Dans le cas où l'accord constitutif entrera en vigueur, la JUB pourra inspirer la création d'autres juridictions communes dans d'autres domaines qui se situent à la frontière entre le droit international et le droit de l'UE. Cependant, le dialogue à venir entre la CJUE et la JUB devra faire face à certaines questions controversées qui pourraient nécessiter des approches novatrices dans la jurisprudence de la CJUE et dans certains comportements prudents par la JUB. Malgré tous les efforts déployés pour atténuer son origine internationale, la JUB reste fondamentalement une anomalie dans le système juridictionnel de l'UE et sa création démontre clairement que ce système nécessite maintenant une reconsidération profonde.

Mots-clés : Brevet européen à effet unitaire, Renvoi préjudiciel, Droit international, Primauté, Système juridictionnel de l'UE, Intégration différenciée

When Judicial Dialogue Needs Strong Institutional Commitments: The Peculiar Case of the Creation of the Unified Patent Court*

I. Introduction

In a multi-speed Europe, international judges may well be found not only outside the EU legal order, but also at the very heart of the EU.

The most prominent example of this is the Unified Patent Court (UPC), created after a long-standing debate in 2013 through an international agreement[1] signed by 25 of the 27 States, which were, at that time, members of the EU. It has not yet entered into force, since the ratification process is still pending. The EU itself has not signed the Agreement, which is open only to EU Member States; it does not belong to the *acquis communautaire* and, therefore, Croatia does not participate in the UPC, since it has not yet signed the Agreement. Interestingly enough, the other two non-participating Member States (Spain and Poland) are not the same two States that decided not to participate in the enhanced cooperation on the European Unitary Patent Protection Package[2] (i.e. Spain and Italy; it bears noting that the latter has recently changed its position and now participates in the cooperation[3]).

Therefore, the UPC Agreement is a prominent (and rather complex) example of differentiated integration. Poland participates in the two Regulations on the substantial rules on patent protection and on its translation arrangements, both adopted through enhanced cooperation, but has not signed the Agreement establishing the Court that will adjudicate on those patents – even if the Regulations shall not apply as long as the Agreement does not

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[1] Agreement on a Unified Patent Court, signed in Brussels on 19 February 2013, in OJ C 175, 20 June 2013, p. 1.

[2] 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, OJ L 361, 31 December 2012, p. 1 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, OJ L 361, 31 December 2012, p. 89.

[3] Commission Decision (EU) 2015/1753 of 30 September 2015 on confirming the participation of Italy in enhanced cooperation in the area of the creation of unitary patent protection, OJ L 256, 1 October 2015, p. 19.

enter into force. Spain has a more coherent position, refusing the participation in both the substantial rules and the judicial protection system.

The UPC Agreement lies at a crossroads among international, EU and national law, since the UPC can base its decisions on all these different sources of law[4]. European patents with unitary effect are, indeed, not purely EU patents, but European patents, granted by the European Patent Office, which have a unitary effect on the territories of a group of Member States according to Article 142 of the European Patent Convention[5].

Oddly enough[6], the 'special agreement' requested by Article 142 for this purpose has not materialized as an international treaty, but by the above-mentioned EU Regulations, according to which the so-called 'unitary patent' is enacted. Therefore, this kind of patent is inextricably linked to the EU legal order and has to respect, above all, the EU rules on the Internal Market.

Despite this tangled context of international and EU Law, two issues stand out as surprising. *In primis*, the 'unitary patent' is granted by an international agency to which the EU is not a party and which is composed of 38 Member States, including 10 non-EU States, and not by a national administration or by an EU institution. This point has interesting repercussions for the EU institutional structure[7], which may affect the future dialogue between the ECJ and the UPC only indirectly and thus will not be dealt with here.

In secundis, the judicial authority that will be called to adjudicate over the new European Patent Protection System is not an EU Court or, at least, not an ordinary EU Court. The UPC does not belong to the institutional framework of the Court of Justice of the EU (hereinafter, following the most common abbreviation, ECJ) to the same extent that, for instance, a specialized court established according to Article 257 TFEU does; nor can it be seen as a classical national Court, which, according to Article 19 (1) TEU, participates in "[providing] remedies sufficient to ensure effective legal protection in the fields covered by Union law".

[4] Art. 24 UPC Agreement.

[5] Convention on the grant of European Patents, signed in Munich on 5 October 1973.

[6] The possibility for an EU Regulation to be characterized as a special agreement for the meaning of Art. 142 of the European Patent Convention is an interesting topic that cannot be discussed here. See ULLRICH Hanns, "Harmonizing Patent Law: The Untamable Union Patent", in Max Planck Institute for Intellectual Property & Competition Law Research Paper, No. 12-03.

[7] The Member States participating in the enhanced cooperation are not accountable for the European Patent Office's action to the same extent they are for the UPC (see further below, in this §). Indeed, the Regulation does not provides for non-contractual liability for damage resulting from an infringement of EU Law by the Office or an individual/collective responsibility of the Participating Member States pursuant to Art. 258-260 TFEU. Instead, Art. 9 (2) of the EU Regulation provides for the setting up of a Select Committee within the European Patent Office, made by representative of the Participating Member States and the Commission, for ensuring the governance and supervision of the activities related to the tasks conferred to the Office. The UPC has jurisdiction, pursuant to Art. 32 (1) (i) of its establishing Agreement, on acts enacted by the Office carrying out the tasks referred to in Article 9 of Regulation (EU) No 1257/2012 (i.e., those related to unitary patents). Therefore, the protection against EPO's decision seems to rely fully on the UPC, on its willingness to adhere to the interpretation of EU Law made by the latter and by the ECJ and on the political influence of the Select Committee. For a broader overview on this topic, see ECJ, case C- 146/13, *Spain v. Parliament and Council* [2015] ECLI:EU:C:2015:298 and ECJ, case C-147/13, *Spain v. Parliament and Council* [2015], ECLI:EU:C:2015:299, that deemed this delegation of power as compatible with the Treaties.

On the contrary, Article 1 of the UPC Agreement describes the UPC as 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". However, since it is created by a multilateral treaty and, therefore, rests on international law, the UPC remains a very peculiar judicial authority: a new kind of international law jurisdiction and a *tertium genus* between EU and national jurisdiction. It seems likely, therefore, that – should the Agreement successfully pass the ratification procedure – the UPC will soon become a very peculiar actor for the ECJ to deal with.

In any case, it bears noting that the UPC is supposed to deal with issues that ultimately fall under the competence of the ECJ. For this reason, during the negotiations (and especially after the negative approach taken by the ECJ in the opinion 1/09[8]) many tools have been envisaged to assure that future dialogue[9] between the UPC and the ECJ will not undermine the autonomy of the EU legal order and the special function given by Treaties to the ECJ for this purpose. The two judges may well interact through the preliminary ruling system; the Contracting Parties of the UPC are jointly and severally liable for actions of the UPC for the purpose of Article 258-260 TFEU and for damage resulting from an infringement of EU Law by the UPC; lastly, the UPC is bound to apply Union law in its entirety and shall respect its primacy. Because of these features, the UPC is an international judicial authority with a very peculiar nature, which will be analysed in detail (at § 3) after a brief introduction about the complex dynamics that have influenced its creation (at § 2).

Notwithstanding all the checks and balances introduced to assure sound interaction between the two courts, having an international judge – *rectius*: a *common* Court of several Member States established by an international treaty – different from the ECJ ruling on EU Law clearly remains a fundamental anomaly in the EU system of judicial protection. Moreover, the fact that the UPC results from the driving forces of a new example of differentiated integration in Europe enhances the complexity of this new judicial system of patent protection. The 'common trait', which makes the UPC a peculiar judge in the field of international judiciaries, seems a well-fledged structure that may ensure a sound development of patent protection law. However, the future dialogue between the ECJ and the UPC will have to deal with some controversial issues that will be analysed in detail below (at § 4).

Lastly, it is worth reflecting on what the UPC's creation implies for the EU system of judicial protection (see § 5), both internally, with regard to the evolution of the system of EU Courts, and externally, with regard to the possibility that the UPC might become a model

[8] ECJ, opinion 1/09, *European and Community Patent Court* [2011], ECR I-1137.

[9] While the expression 'judicial dialogue' is usually intended for describing non-hierarchical relations between Courts that lie on the same level, in this article it will be used in a broader meaning: as it will be discussed below, *de iure* the UPC is rather clearly subordinated to the ECJ (even if, *de facto*, there are some elements which need to be carefully assessed for taking an ultimate position on the matter).

for establishing common judicial authorities in other fields that lie at the border between international and EU Law.

II. The creation of the Unified Patent Court

The idea of establishing a unitary patent protection system in Europe dates back to 1975 or even the signing of the Rome Treaties. It has led to several projects both at the international and Community/EU levels, the only one of which to have entered into force and remain operative today being the well-known, afore-mentioned European Patent Organization. For our purposes[10], however, is worth focusing only on some of the recent dynamics that strongly influenced the creation of the UPC.

First, the UPC was an option B for both Member States and EU political institutions[11]. Option A was the creation of a European and Community Patent Court: a single tribunal able to adjudicate on both European patents and truly EU patents, which would have been established by a mixed Agreement among the EU, its Member States and the Third States participating in the European Patent Organization.

However, in the Opinion 1/09 of 8 March 2011, delivered pursuant to Article 218 (11) TFEU, the ECJ rejected this proposal, deeming the draft international treaty to be incompatible with EU Treaties. Echoing its previous Opinion 1/91 on the EEA Agreement[12], the ECJ stated that the European and Community Patent Court would have threatened the autonomy of the EU legal order and the homogeneity of its interpretation "by conferring on an international court posed outside the institutional and judicial framework of the EU an exclusive jurisdiction [in the field of patent protection]"[13].

Therefore, after Opinion 1/09 was handed down, all the efforts of negotiators[14] have been focused on keeping future patent jurisdiction within the institutional and judicial framework

[10] The bibliography on the topic is extremely rich. For some brief and recent historical overviews on the matter, see (*inter alia*) ULLRICH Hans, "National, European and Community patent protection: time for reconsideration", in Ohly A. Klippel D. (eds), *Geistiges Eigentum und Gemeinfreiheit*, Tubingen, 2007; T. JAEGER, *The EU patent:* cui bono et quo vadit*?*, in *CML Rev.*, 2010, p. 63 et seq.; T. JAEGER, R. HILTY, J. DREXL, H. ULLRICH, *Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the 2009 Commission Proposal for the Establishment of a Unified Patent Judiciary*, in *IIC - International Review of Industrial Property and Competition Law*, 2009, p. 817 et seq; M. Scuffi, *Il Tribunale unificato dei brevetti: evoluzione storica, ordinamento e regole*, in C. Honorati (ed.) *Luci e ombre del nuovo sistema UE di tutela brevettuale*, Torino, 2014, p. 73 et seq. See also Commission of the European Communities, Communication to the European Parliament and Council "Enhancing the patent system in Europe", COM (2007)165 final, April 3rd, 2007. Please note that the subsequent events (the Opinion 1/09 of the ECJ and the negotiation of the UPC Agreement), not mentioned in the aforementioned bibliography, will be briefly discussed in the present and in the following §. For a view on the topic at the beginning of the negotiations on the Community patent, see F. K. BEIER, *Stand und Aussichten der europäischen Rechtsvereinheitlichung auf dem Gebiete des gewerblichen Rechtsschutzes*, in *Gewerblicher Rechtsschutz und Urheberrecht - Internationaler Teil*, 1969, p. 146 et seq.

[11] See R. Baratta, *The Unified Patent Court – What is the 'common' trait about?*, in C. Honorati (ed.), *Luci e ombre del nuovo sistema UE di tutela brevettuale*, cit., p. 102.

[12] ECJ, Opinion 1/91, *EEA Agreement* [1991], ECR I-6079.

[13] Opinion 1/09, cit., at para. 89.

[14] For an exhaustive and very pragmatic description of the different options open to negotiations after the Opinion 1/09 and, therefore, all the several other dynamics that have influenced the choice to establish a 'Benelux Court-style' jurisdictions for patents (which cannot be analyzed in detail here), see R. Baratta, *The Unified Patent Court – What is the 'common' trait about?*, cit., p. 106.

of the EU *as little as needed*. In fact, as reported by many distinguished scholars[15] and institutions[16], sometime between 2011 and 2012 stakeholders and a growing number of Member States began struggling against the ECJ's influence in the field of patent protection.

Thus, the new patent jurisdiction has been negotiated by balancing, on the one hand, the desire for a tailor-made Court well isolated from the ECJ's influence and, on the other hand, the need to comply with the conditions set by that Court in Opinion 1/09 for avoiding any risk of (further) incompatibility with EU Treaties. Following a suggestion made by the same ECJ[17], the negotiators have taken as example the Benelux court.

As a result, some EU Member States have agreed on a multilateral treaty open to the accession of EU Member States only (even those which have decided not to participate in the enhanced cooperation on substantial matters[18]), but not to the EU, for the creation of a Unified Patent Court to adjudicate on 'classical' European patents and European patents which, according to Article 142 of the European Patent Organization Agreement, have a unitary effect on the territories of some EU Member States.

As mentioned above, Spain decided not to participate also in this 'third pillar' of the European Patent Protection Package. Italy, on the contrary, participated in it since the beginning, because the UPC would have adjudicated also on 'classical' European patents and, therefore, it would have maintained an autonomous, albeit minor, function even without participating in the enhanced cooperation on the European patents with unitary effect. However, as already mentioned, Italy has recently made its position somewhat more coherent by deciding to participate in the enhanced cooperation. Poland took a step back at the end of the negotiations and decided not to participate in the UPC, fearing the possibility of bad consequences for the Polish economy[19]. Croatia is widely expected to join both the enhanced cooperation and the UPC, but for the time being there has been no official declaration of this purpose. A thorough analysis must take into consideration that Croatia's participation might enhance the so-called 'Malta problem'[20], i.e. the possibility of reducing the number

[15] F. Dehousse, The Unified Court on Patents: the new Oxymoron of European Law, Egmont Paper 60, 2013, Gent, *passim*; T. Jaeger, *Shielding the Unitary patent from the ECJ : a rash and futile exercise*, in IIC, 2013, p. 389 et seq.; J. Pachenber, Unitary patent and unified court – what lies ahead?, in IIC: Journal of Intellectual Property Law & Practice, 2013, p. 480 et seq.

[16] House of Commons – European Scrutiny Committee, *The Unified Patent Court: help or hindrance?*, Sixty–fifth Report of Session 2010–12, volume II, p. Ev-9w.

[17] Opinion 1/09, at para. 81.

[18] Art. 84 (4) UPC Agreement.

[19] The Polish government decided not to participate in the UPC Agreement on the basis of cost-benefit analysis commissioned to Deloitte (Analysis of prospective economic effects related to the implementation of the system of unitary patent protection in Poland, 1 october 2012, available at http://www.uil-sipo.si/uploads/media/UPP-Analiza-PL.pdf) that showed that the full implementation of the Unitary Patent Package might entail losses for several billion euros for Polish economy. See, on this point, Zawadzka Zofia, *The unitary patent protection : a voice in the discussion from the Polish perspective*, in IIC: international review of industrial property and competition law, 2014, p. 383 et seq. For an interesting analysis of what can be learned from the Polish experience (especially by Italy), see V. Cerulli Irelli, Il Tribunale unificato dei brevetti: rischi e compatibilità con il nostro ordinamento, in Il diritto industriale, 2013, p. 393-405.

[20] This issue goes beyond the scope of the present research and therefore will not be discussed in detail. on this point see L. Sandrini, *La convenzione di Monaco sul brevetto europeo e I suoi rapporti con il "pacchetto brevetti"*, in C. Honorati (ed.), *Luci e ombre del nuovo sistema UE di tutela brevettuale*, cit., p. 60-61; the issue has also been discussed online on several blogs, which might well give interesting hints for setting the general scene: see http://unitary-patent.blogspot.it/2013/04/the-malta-problem-for-requesting.html and https://ipcopy.wordpress.com/2013/01/25/why-malta-could-inadvertently-block-your-unitary-patent/. In brief, the problem is as follows. According to Art.

of patent applications eligible for unitary effect because of the provision contained in Article 3 (1) of Regulation (EU) No 1257/2012. Indeed, one possible interpretation of this provision is that any European patents whose applications were filed before the accession of Malta to the European Patent Organisation (or Croatia, in case the latter participates in the 'Unitary Patent Protection Package') cannot benefit from unitary effect. A potential solution might well be – leaving aside legislative or judicial interventions – simply allowing the passage of time, in order to reduce the amount of European patents that may raise this problem. It cannot be ruled out that Croatia's inertia in joining the 'Unitary Patent Protection Package' might be[21] due to this issue.

In any case, the Agreement on the UPC will take effect after France, Germany, the UK, and ten other Contracting Parties deposit their instrument of ratification[22]. For the time being, France and seven other Signatory States have completed the ratification process. EU institutions have already amended the so-called Brussels I Regulation[23], removing an important obstacle for the common Court's entry into operation, so that the UPC – like any national jurisdiction – will benefit from the regime of recognition and enforcement of judgments in civil and commercial matters provided for by the above-mentioned regulation[24].

III. The peculiar nature of the Unified Patent Court

The UPC will consist of a Court of First Instance, a Court of Appeal and a Registry (the latter two will be seated in Luxembourg). The 'political' management of the UPC will be innovatively entrusted, for the most part[25], to an Administrative Committee made up of

3(1) of Regulation (EU) No 1257/2012, "A European patent granted with the same set of claims in respect of all the participating Member States shall benefit from unitary effect in the participating Member States provided that its unitary effect has been registered in the Register for unitary patent protection. A European patent granted with different sets of claims for different participating Member States shall not benefit from unitary effect". Therefore, if an EU Member State participating in the 'Unitary Patent Protection Package' was not a Member of the European Patent Convention when the application was filed (as is the case for Malta, that joined the European Patent Organisation in 2007, or Croatia, in case it will participate in the enhanced cooperation, since it has joined the European Patent Organisation in 2008), an European patent granted before these dates cannot benefit from unitary effect according to the above mentioned Art. 3, since it has been granted with different sets of claims for different participating Member States. In fact, the original patent application could not include some States – let's assume Malta, or also Croatia, in case it will participate in the enhanced cooperation – because at that time those States were not participating in the European Patent Convention.

[21] It has also to be pointed out that Malta participates in the enhanced cooperation and has already ratified the UPC Agreement, despite the possible decrease of European patents eligible for unitary effect because of its participation in the 'Unitary Patent Protection Package'. Moreover, even if Croatia would not participate in the aforementioned legal framework, the future accession to the EU of other States like Macedonia (which joined the European Patent Organisation in 2009) or Serbia (2010) would again bring up the intensification of the 'Malta problem'. Thus, it seem reasonable to argue that Croatia's inertia reflects a broader set of problems, which unfortunately have yet to be made explicit in the public domain.

[22] Art. 89 UPC Agreement.

[23] Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, OJ L 163, 29 May 2014, p. 1.

[24] See on this topic M. Sellens, *The Relationship between the Brussels I recast and the agreement on a Unified Patent Court, specially focusing on patent infringement: when reality exceeds fiction*, in J.-S. Bergé, S. Francq, M. Santiago (eds), *Boundaries of European private international law*, 2015, Bruylant, Bruxelles; P. A. De Miguel Asensio, *Regulation (EU) No. 542/2014 and the international jurisdiction of the Unified Patent Court*, in *IIC : international review of industrial property and competition law*, 2014, p. 868 et seq.

[25] See Art. 11 of the UPC Agreement. With the Administrative Committee have also been established, for managing purposes, an Advisory Committee, a Budget Committee and a Presidium composed by judges.

representatives of each of the Signatory States and the Commission, which only has observer status. The Administrative Committee will usually decide by a ¾ majority and each representative has one vote.

The Administrative Committee has no power to directly affect the judges' decisions and, as a result, the independence of the judicial body seems to be fully satisfied. However, the former has relevant powers for managing the UPC, since it has to adopt the Rules of Procedure[26] and the financial regulations[27], and it establishes the remuneration of the President of the Court of Appeal, the President of the Court of First Instance, the judges, the Registrar, the Deputy-Registrar and the staff[28]. These provisions strike a clear line between the management of justice (granted to the Administrative Committee and, to a lesser extent, other intergovernmental bodies) and its delivery (granted to the judges); therefore, it cannot be ruled out that the former may have an indirect influence on the latter's behaviour.

Moreover, the budget of the UPC shall be adopted by a Budget Committee[29], which is also made up of representatives of the Contracting Member States who must decide, for this particular set of issues, by the same ¾ majority[30].

The Court of First Instance is made up of local divisions (at national level), regional divisions (serving at least two Signatory States) and a central division. This latter division will be located in Paris, with two thematic sections in London (chemistry and human necessities patents) and Munich (mechanical engineering patents). There will also be a Patent Mediation and Arbitration Centre (in Ljubljana and Lisbon, respectively) and a Training Centre for judges (in Budapest). As Dehousse rightly points out, "the unified court of patent appears as the most dis-unified international court, as far as its management is concerned"[31].

As already noted, the UPC is a unique judicial construct in the field of international law and a new actor in the EU system of judicial protection. The power to adjudicate in the field of patent protection (with regard only to 'classical' European patents and those having unitary effect, since national patents remain under the jurisdiction of national courts) is devolved to an integrated judicature, to which the Signatory States delegate the common task of interpreting and developing EU patent law[32].

The creation of the UPC shows that, in specific cases, the ECJ is only open to dialogue with other international judges when strong institutional commitments are put in place. These features make the UPC very peculiar; they have to be discussed in detail, before

[26] See Art. 41 of the UPC Agreement.
[27] See Art. 33 of UPC Statute, which is attached to the UPC Agreement as Annex I.
[28] See Art. 12 of UPC Statute.
[29] See Art. 26 of UPC Statute.
[30] See Art. 13 of the UPC Agreement.
[31] F. Dehousse, *The Unified Court on Patents: the new Oxymoron of European Law*, cit., p. 26.
[32] R. Baratta, *The Unified Patent Court – What is the 'common' trait about?*, in C. Honorati (ed.), *Luci e ombre del nuovo sistema UE di tutela brevettuale*, cit., p. 109.

analysing whether its 'common trait' is able to guarantee the uniform interpretation of EU Law as well as its primacy.

In addition to the fundamental structural change according to which the UPC Agreement is open only to EU Member States, the most relevant provisions with regard the protection of the full application of EU Law are introduced in chapter IV of the UPC Agreement. In brief, these provisions aim to guarantee: *(i)* respect for EU Law as a source of law and for its primacy; *(ii)* the possibility to have access to the ECJ for interpreting the relevant provision of EU Law and/or for sanctioning infringements of EU Law made by the UPC, in particular through the preliminary ruling procedure, infringement proceedings and the non-contractual liability of Member States for breaching of EU Law.

In particular, according, to Article 20, "the Court shall apply Union law in its entirety and shall respect its primacy". Moreover, while listing the UPC's sources of law, Article 24 makes explicit reference to EU Law as the first basis upon which the UPC is to base its decisions. An even more detailed provision on primacy is included in the preamble, which recites that "the primacy of Union law […] includes the TEU, the TFEU, the Charter of Fundamental Rights of the European Union, the general principles of Union law as developed by the Court of Justice of the European Union, and in particular the right to an effective remedy before a tribunal and a fair and public hearing within a reasonable time by an independent and impartial tribunal, the case law of the Court of Justice of the European Union and secondary Union law". Curiously, this list does not include the international agreements to which the EU is a Contracting Party, even if they also have primacy (though under the specific conditions set out by the ECJ[33]). However, this should not be problematic since the broad language of Article 20 clearly covers all sources of EU Law.

According to Article 21, "the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular". Moreover, it is expressly stated that the "decisions of the ECJ shall be binding on the UPC". The supervisory role of the ECJ is also recognized in the preamble, which affirms that "the ECJ is to ensure the uniformity of the Union legal order and the primacy of European Union law".

Finally, Article 22 and 23 extend the classical regime of Member States liability to the UPC in cases of infringement of EU Law. In particular, Article 22 establishes collective liability of all Signatory States for damage resulting from an infringement of EU law by the Court of Appeal (therefore, exhaustion of internal remedies before suing the Signatory States is

[33] The case-law on the value of international agreement in the EU legal order is quite rich; see, in particular, ECJ, case 181/73, *Haegemann* [1974], ECR 449; ECJ, case C-265/03, *Simutenkov* [2005], ECR I-2596; ECJ, case C-344/04, *IATA* [2006], ECR I-403; ECJ, case C-308/06, *Intertanko* [2008], I-04057; ECJ, case C-366/10, *Air transport association of America* [2011], ECLI:EU:C:2011:637; , On this point, see A. MIGNOLLI, *Art. 216 TFUE*, in A. Tizzano (ed.), *I Trattati dell'Unione europea*, 2014, Milan, p. 1779.

explicitly required), in accordance with *Köbler* jurisprudence and subsequent case-law concerning the non-contractual liability of Member States for damage caused by their national courts breaching Union law[34]. According to Article 23, "Actions of the Court are directly attributable to each Contracting Member State individually, including for the purposes of Articles 258, 259 and 260 TFEU, and to all Contracting Member States collectively".

Although these provisions indisputably belong to the legal culture of the EU Member States and of the EU system of judicial protection, their application in practice seem not very plausible and more detailed rules would have been probably needed. One may think, for instance, to the legal hurdles that will be faced by a national judge for condemning collectively all the Signatory States of the UPC; or to the difficulties of the same ECJ (and of the Commission) to sue (together? individually?) the Signatory States according to Article 258 TFEU and then possibly to calculate the financial penalties for each Signatory State (according to which coefficient?).

In any case, it bears noting that, somewhat paradoxically, the Signatory States have explicitly affirmed, in an international treaty that lies outside the EU legal order, two fundamental principles of EU Law (primacy and non-contractual liability of Member States for breaching EU Law) that are either not recognized at all in EU Treaties (as is the case for non-contractual liability of Member States) or are only barely acknowledged there (as for primacy, which is only hinted at in Declaration No 17). This renders even more peculiar the already unusual nature of the UPC, which certainly is a "unique construct in the landscape of judiciaries stemming from international treaties"[35].

IV. Future dialogue between the UPC and the ECJ: some controversial issues

Notwithstanding all the 'checks and balances' mentioned in the previous paragraph, having an international judiciary different from the ECJ ruling on EU Law clearly remains a fundamental anomaly in the EU system of judicial protection. Moreover, the UPC will be a ground-breaking innovation, in that it will require 25 Member States to be jointly or severally liable for actions by the UPC, which does not belong to any one national legal order, but is a Common Court to all those Member States.

The UPC 'common trait' seems to be a well-fledged structure that may ensure the sound development of patent protection law, at least from a theoretical perspective. However, because of the innovative nature of the UPC and its troubled creation, the relationship between the ECJ and the UPC will certainly call for special attention.

[34] See, in particular, ECJ, case C-224/01, *Köbler* [2003], ECR I-10239; ECJ, case C-173/03, *Traghetti del mediterraneo* [2006], ECR I-5177. For a recent case, see also ECJ, case C-160/14, *Ferreira da Silva*, ECLI:EU:C:2015:565.
[35] R. Baratta, *The Unified Patent Court – What is the 'common' trait about?*, cit, p. 116.

In the absence of any judicial precedent between the two Courts, for the time being it seems worth identifying some issues that may become highly controversial in future judicial dialogue and reflecting on whether the 'common trait' that mitigates the international origins of the UPC really do present some level of risk for the uniform application of EU Law.

Should the UPC Agreement enter into force, one controversial issue might well be that of the interpretation of the substantive rules of patent protection that have been placed in the UPC Agreement and, therefore, outside the EU legal order. Indeed, the political forces that have pushed to limit as much as possible the ECJ's influence on the European patent with unitary effect (see above, at § 2), obtained to transfer some of the rules on the right to prevent the direct and indirect use of an invention and the limitations of the effects of a patent from Article 6-8 of the Draft EU Regulation to Article 25-27 of the UPC Agreement. This relocation was carried out through an unprecedented intervention of the European Council in the legislative process[36] in order to limit the ECJ, a Court that is not specialized in patent protection, in controlling the application and the scope of those rights. However, the general principle on uniform protection (Article 5 (2) thereof) has been left in the EU Regulation, and is then implemented by the specific provisions transferred in the UPC Agreement.

This fragmentation of substantive rules among different sources of law reveals all the political uncertainties that surrounded the creation of the UPC and will not help the relationship between the two Courts. Since the specific rights on prevention and limitation of effects fall outside ECJ's jurisdiction, the UPC will have more room to interpret and develop these rights, which lie at the heart of patent protection and may well collide with the fundamental freedoms of the Internal Market.

However, through its preliminary ruling mechanism the UPC will be bound to develop jurisprudence that is fully coherent with EU Law and, in particular, with the general principle on uniform protection affirmed in Article 5 of the EU Regulation. Even if the ECJ has no jurisdiction over Article 25-27 of the UPC Agreement, through a preliminary ruling the UPC may refer questions about whether a given interpretation of Article 25-27 is compatible with Article 5 of the EU Regulation. Therefore, as usually happens with regard to national legislation, the ECJ will have the possibility to influence and control the interpretation of those substantive rules transferred in the UPC Agreement. So any threat to the uniform application of EU Law posed by the fragmentation of substantive rules should be solved by the mechanism of dialogue envisaged by the UPC Agreement.

Furthermore, it is worth mentioning that in a recent judgment the ECJ, by virtue of the entry into force of the Lisbon Treaty and the establishment of EU exclusive competence

[36] See on this point C. Honorati, *Il diritto applicabile dal Tribunale unificato: il coordinamento tra fonti e I rapporti tra accordo TUB e regolamento (UE) n. 1257/2012*, in C. Honorati (ed.) *Luci e ombre del nuovo sistema UE di tutela brevettuale*, Torino, 2014, p. 119 et seq.

in the field of the commercial aspects of intellectual property, has prepared the ground to extend its role in the field of patent protection.

In the *Daiichi Sankyo*[37] case, the ECJ amended its previous self-restraint[38] with regard the substantive patent provisions of the TRIPS Agreement and affirmed its primacy in the interpretation of these rules. This may well have fundamental repercussions for the ECJ's capability to influence EU patent law, since the TRIPS Agreement contains minimum standards intended to harmonize the patent law of WTO Member States as well as specific rules on prior users' rights and exceptions[39]. The substantive unitary patent rules are fragmented among national, international and EU Law[40]; in addition, 'classical' European patents and national patents alongside the unitary patents will continue to exist within EU territory. Therefore, through its acquired interpretative jurisdiction over the TRIPS Agreement, the ECJ may lay the foundations for a uniform and coherent framework for patent protection, preventing further fragmentation.

According to Dimopoulos and Vantsiouri, in this way the ECJ "can act as the single, ultimate judicial authority in the European Union, ensuring coherence and consistency in the interpretation of the different regimes of patent infringement rules"[41]. While it is too early to properly evaluate whether this scenario will ever really materialize, it is already possible to say that such an outcome would fly in the face of those who wanted to restrain the ECJ's influence on the development of patent law. In any case, removing some substantive rules from the EU Regulation on unitary patent is an approach that raises some doubts[42], not only because it seems illogical to transfer substantive rules on patents from the 'substantive regulation' to the 'procedural' one, but also because leaving gaps in the former, which belong to the EU legal order, gives the ECJ the possibility to fill those gaps with greater room for interpretation. As others have already pointed out, "as cases as old as *van Gend* and *Costa* already tell us, […] the ECJ actually has more room for proactive law-making where an act contains blanks than where it states guidelines"[43].

A second point that deserves attention is the capability of the Signatory States to effectively control and be accountable for actions by the UPC. As mentioned above, the UPC shall apply EU Law and respect its primacy. For these purposes, the UPC can (or, under certain

[37] ECJ, case C-414/11, *Daiichi Sankyo* [2013], ECLI:EU:C:2013:520.
[38] For the previous jurisprudence of the ECJ with regard to the interpretation of the patent provisions included in the TRIPS Agreement, see ECJ, case C-431/05, *Merck Genericos* [2007] ECR I-7001.
[39] See Art. 27-34 of TRIPS Agreement.
[40] The substantial rules of the unitary patent are contained not only in the already mentioned two EU Regulations, adopted through enhanced cooperation, and in the UPC Agreement, since these text are strongly connected with the European Patent Convention. Moreover, several rights included in the Regulation (EU) No 1257/2012 make references to national law (see, by way of example, Art. 5 (2-3), Art. 7 (1), Art. 10). See L. Sandrini, *La convenzione di Monaco sul brevetto europeo e I suoi rapporti con il "pacchetto brevetti"*, in C. Honorati (ed.), *Luci e ombre del nuovo sistema UE di tutela brevettuale*, cit., p. 49 et seq.; C. Honorati, *Il diritto applicabile dal Tribunale unificato: il coordinamento tra fonti e I rapporti tra accord TUB e regolamento (UE) n. 1257/2012*, cit.
[41] A. Dimopoulos, P. Vantsiouri, "Of TRIPS and traps : the interpretative jurisdiction of the Court of Justice of the European Union over patent law", in European Law Review, 2014, p. 230.
[42] For an interesting analysis in this regard, see T. Jaeger, *Shielding the Unitary patent from the ECJ : a rash and futile exercise*, cit., p. 389 et seq.
[43] Ivi, p. 391.

circumstances, shall) refer preliminary rulings to the ECJ, like any national court under Article 267 TFEU. Should the UPC nevertheless breach EU Law, the Contracting Member States will be sanctioned through infringement proceedings or their non-contractual liability.

In contrast with this framework, it is worth noting that, pursuant to Article 36 of the UPC Agreement, "the budget of the Court shall be financed by the Court's own financial revenues and, *at least* in the [7 years] transitional period *as necessary*, by contributions from the Contracting Member States" (emphasis added). The wording of this provision is rather ambiguous, since it is not clear whether and to what extent the budget of the Court could be financed through national contributions. From the negotiations, it seems that the Court is intended to be self-financing from court fees in the long run[44]. Signatory States will be required to make special contributions to the budget in the event of a financial shortfall[45].

On the one hand, it is clear that the Court's own financial resources play an important role in protecting the UPC's 'commonness' trait by assuring that no Signatory State becomes more important than others and that no Signatory State hinders the activity of the UPC by withholding its financial contribution. Nevertheless, on the other hand, every international organization – even if it is structured as a "common court" of its Member States – that enjoys its own resources is, by definition, more independent and less accountable vis-à-vis its Member States.

Moreover, given the fact that the Signatory States are financially accountable for any breaches of EU law by the UPC, one could argue that, without Signatory States participation in the budget, the infringement proceedings and the Signatory States' non-contractual liability will have a far less dissuasive effect on the UPC. What would be the Signatory States' ultimate weapon to force the UPC to change its mind, if the UPC is financially independent? Or, from a slightly different angle, how can the EU be sure that the Signatory State will not pursue a different interpretation of EU Law by their Common Court, if the sanctions coming from an infringement proceeding or State non-contractual liability do not directly affect the UPC?

How the rules on financing will be implemented is still under negotiation. Ensuring a sound balance between court revenues and Signatory State contributions will be fundamental.

Finally, the issue remains whether, in the light of EU Treaties and the jurisprudence of the ECJ, any future requests by the UPC for preliminary rulings will be admitted by the ECJ. The UPC Agreement itself has not been referred to the ECJ for an opinion on its compatibility with the EU legal order because Article 218 TFEU provides for this procedure only

[44] See House of Commons – European Scrutiny Committee, *The Unified Patent Court: help or hindrance?*, Sixty–fifth Report of Session 2010–12, volume I, p. 13; F. Dehousse, *The Unified Court on Patents: the new Oxymoron of European Law*, Egmont Paper 60, 2013, Gent, p. 33.
[45] See Article 36 (4) of the UPC Agreement.

in case of mixed agreement. Moreover, only few weeks after handing down Opinion 1/09 on the European and Community Patent Court in the *European School* case[46] the ECJ consolidated a negative view of the possibility for an international judicial body to refer a preliminary ruling[47]. In addition to the 'classical' factors already set out in the *Dorsch* case[48] (such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent, which all seem to be easily fulfilled by the UPC), the ECJ observed that the wording of Article 267 TFEU refers to 'a court or tribunal of a Member State'. In other words, the referring tribunal has to lie within the institutional and judicial framework of a Member State or a group of Member States and should not play an ancillary role in favour of any other kind of organization (as the internal dispute settlement body of the European School Organization did).

In light of this, all the aforementioned provisions that clearly state the 'common' nature of the UPC seem capable of rendering the UPC 'a court or tribunal of a Member State'. The UPC does not have an international legal personality (as the previous European and Community Patent Court did), but simply enjoys "legal personality in each Contracting Member State and […] the most extensive legal capacity accorded to legal persons under the national law of that State"[49]. Thus, its character seems not to be that of an autonomous organization set up by the Signatory States to achieve certain targets. Though the presence of some substantive rules on patent protection in the UPC Agreement can appear confusing, the UPC Agreement does not expressly confer on the UPC an autonomous competence for developing European Patent Law. On the contrary, this competence remains within each Member State (and, of course, the EU), and the UPC is structured simply to carry out the common task of adjudicating on the outcome of the development of European Patent Law made by the EU and its Member States.

It has been argued that this should not be enough for deeming the UPC 'a court or tribunal of a Member State'. Indeed, in the *European School* case the ECJ offers, as a positive example of a common jurisdiction that can refer preliminary rulings, the Benelux Court (echoing its earlier Opinion 1/09, where the Court made the same example, albeit for different purposes). In presenting this precedent, the ECJ highlighted that, "the procedure before the Benelux Court is a step in the proceedings before the national courts"[50]. Thus, according

[46] ECJ, case C-196/09, *Miles* [2011], ECR I-5105.
[47] See on this point R. Baratta, *National Courts as 'Guardians' and 'Ordinary Courts' of EU Law: Opinion 1/09 of the ECJ*, in *Legal Issues of Economic Integration*, 2011, p. 317.
[48] ECJ, case C-54/96, *Dorsch Consult* [1997] ECR I-4961.
[49] Art. 4 UPC Agreement
[50] ECJ, case C-196/09, *Miles* [2011], cit., para. 41.

to Gruber[51], since the procedure before the UPC is autonomous from national proceedings, a referral for a preliminary ruling issued by the UPC will not be admitted by the ECJ.

However, this opinion may take too strict an approach to the ECJ's jurisprudence and may be overemphasizing a statement by the ECJ that could simply be deemed an *obiter dictum*. The UPC has strong links to the judicial systems of the Member States even if it is not a step in the proceedings before the national courts: its decisions will be valid and enforceable throughout the territory of each Signatory State and, thanks to the amendment of the Brussels I regime, the whole EU[52].

In any case, the ECJ will have the final word on this issue, should the UPC enter into force, as soon as any UPC related action is brought before it. Though the long history of EU Patent instructs us to be cautious, it would be unlikely (and even schizophrenic[53]) for the ECJ to reject a referral for a preliminary ruling from the UPC. This is not because, should this happen, the ECJ would waste an important tool for supervising and inspiring the UPC's jurisprudence, but rather because it would called into question the legitimacy of the whole UPC Agreement. Indeed, the latter cannot do without the preliminary ruling, which the ECJ clearly placed at the heart of the EU system of judicial protection in Opinion 1/09[54].

V. The UPC in perspective: the implications of its creation for the EU system of judicial protection

In addition to its peculiar nature, the UPC will also bring several important innovations to the EU system of judicial protection. The following aspects deserve special attention in order to fully evaluate the broader implications of UPC's creation.

The UPC will be highly decentralized in EU territory; after decades of discussion surrounding the possible decentralization of judicial protection in the Community/EU[55], the UPC could certainly become an interesting example in this regard. It will be composed not only of legally qualified judges but also of technically qualified judges, both of which will have a high level of expertise in the field of patent protection, reinforced by specific *ex ante* and ongoing training. In exceptional circumstances, judges may express dissenting opinions separately from the decision of the Court[56]. The 'political' management of the Court will be

[51] J. Gruber, *Das Einheitliche Patentgericht: vorlagebefugt kraft eines völkerrechtlichen Vertrags?*, in *Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil: GRURInt.*, 2015, p. 325.
[52] See above at § 3, in particular at footnote 22.
[53] It is worth recalling that, as already mentioned above, the same ECJ suggested to the Member State the model of the Benelux Court for amending the draft international treaty on the European and Community Patent Court (see Opinion 1/09, cit., at para. 81).
[54] Opinion 1/09, cit., at para. 79-85. See on this point R. Baratta, *National Courts as "Guardians" and "Ordinary Courts" of EU Law: Opinion 1/09 of the ECJ*, cit., *passim*.
[55] Recently, the issue seemed to have gone beyond the horizon of the literature; for an exception see, also as a general overview of the issue, M. Condinanzi, Corte di giustizia e Trattato di Lisbona: innovazioni strutturali ed organizzative, in Bilancia Paola, D'Amico Marilisa (eds.), La nuova Europa dopo il Trattato di Lisbona, 2009, Milan, Giuffré, in particular p. 210-211 and footnote 13.
[56] Art. 78 UPC Agreement.

entrusted to the already analysed Administrative Committee[57], leaving the judges to deliver justice, not manage its delivery. The UPC Rules of Procedure will be written *ex novo*[58]. Finally, as mentioned above, parties coming before the Court shall pay court fees fixed by the Administrative Committee balancing the principle of fair access to justice with the objective of a self-financing Court with balanced finances. It has been suggested that, "this is the first time that the European institutions open a real reflection about the costs of justice"[59]. This is not entirely true, since several Boards of Appeal entitled to review the decisions of their respective EU agencies require the payment of appeal fees, the amount of which is determined by balancing the need to guarantee sound financing for the agency and the desire to avoid excessive taxation on users, especially SMEs[60]. However, the Boards of Appeal are administrative bodies whose task is to provide an independent review of agencies' decisions; as will be discussed further below, they are not judicial organs (in fact, their decisions can be challenged before the ECJ). Therefore, in those cases the settlement of appeal fees can be read into a broader reflection on the costs of providing the service for which the agency has been established, and on the desirableness of enhancing the functional autonomy of the same agencies. On the contrary, the UPC is a true judicial body and will be the first 'Court common to EU States', which will require appeal fees[61]. This, then, is another innovation brought by the UPC.

The fact that all these novelties have been introduced in the system of EU Courts pursuant to an international treaty placed outside the EU legal order seems to be a clear signal of the inadequacy of the EU system of judicial protection laid out in Nice[62] to satisfy the current needs of the Member States. Despite the fact that the system was affirmed in Lisbon, where it was made even more complex with the added requirement of accession to the ECHR, it

[57] See above, at § 3.

[58] See, on this point, M. Tavassi, *Le Rules of Procedure e i rapporti tra Tribunale unificato e giudice nazionale*, in C. Honorati (ed.), *Luci e ombre del nuovo sistema UE di tutela brevettuale*, cit., p. 183 et seq.

[59] F. Dehousse, *The Unified Court on Patents: the new Oxymoron of European Law*, cit., p. 33.

[60] The most prominent examples in this regard are the Board of Appeal of the Office for the Harmonisation in the Internal Market (see the reflection on this point made by the Commission in its Communication "The financial perspectives of the Office for Harmonisation in the Internal Market", 22 December 2006, COM(2006)865 final and the Commission Regulation (EC) No 2869/95 of 13 December 1995, OJ EC No L 303 of 15.12.1995, p. 33, as subsequently amended); that of the Community Plant and Variety Office (see the Commission Regulation (EC) No 1238/95 of 31 May 1995, OJ L 121, 1.6.1995, p.31, as subsequently amended); that of the European Aviation Safety Agency (see Commission Regulation (EU) No 319/2014 of 27 March 2014, OJ No L 93 of 28.3.2014, p. 58); the one of the European Chemicals Agency (see Commission Regulation (EC) No 340/2008 of 16 April 2008, OJ L 107 17.4.2008, p. 6, as subsequently amended). On the contrary, no appeal fee is explicitly provided for in the Rules of Procedure of the Joint Board of Appeal of the European Supervisory Authorities (since they are not published in the OJ of the EU, see decision No 2/2012 of the Joint Board of Appeal, available at http://www.eba.europa.eu/documents/10180/15733/1_Rules_of_Procedure.pdf/6f607767-8d00-464a-8448-4f730671d7bc); however, according to Art. 11 thereof, the President may direct the parties "to cover the costs of the appeal, as defined in Article 25, including without limitation the cost of transcribing hearings, conference phone and video links". At the very end of the spectrum lie the Joint Supervisory Body of Europol (see Art. 28 of the Act No 29/2009 of the Joint Supervisory Body of Europol of 22 June 2009, OJ C 45, 23.2.2010, p.2) and Eurojust (see Art. 25 of the Act of the Joint Supervisory Body of Eurojust of 23 June 2009, OJ C 182, 7.7.2010, p. 3); even if they are a rather peculiar Board of Appeal, for reasons that will be mentioned further below, it bears noting that there the procedure shall be free of charge. Finally, it is worth mentioning that no decision has already been taken with regard the Appeal Panel of the Single Resolution Board, which is not yet fully operative.

[61] As is well known proceedings before the ECJ are free of charge: see Art. 143 of the Rules of Procedure of the Court of Justice, Art. 139 of the Rules of Procedure of the General Court, Art. 108 of the Rules of Procedure of the Civil Service Tribunal.

[62] The literature on this point is extremely rich. See, *ex multis*, H. Rasmussen, Remedying the crumbling EC judicial system, in Common Market Law Review, 2000, p. 1071 et seq.; The Report by the Working Party on the future of the European Communities' Court System, January 2000, available at http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf; Nascimbene, Bruno (ed.), *Il processo comunitario dopo Nizza*, 2003, Milan, Giuffré.

seems that several ideas of the 'Nice system' of judicial protection now have been fully dismissed.

With particular attention to the most relevant elements of the UPC saga, the idea of establishing a specialized court pursuant to Article 257 TFEU has failed. The ECJ itself played an important role in this regard, opposing the creation of new specialized courts after the Civil Service Tribunal with its proposition for amendments to its own Statute presented during the UPC negotiations and in the aftermath of ECJ Opinion 1/09[63]. It is well known that this negative attitude towards specialized courts still prevails, as demonstrated by the ECJ's last proposal to double the number of judges of the General Court and abolish the Civil Service Tribunal[64], which has been very recently adopted by the Council and the Parliament[65]. While the official argument for avoiding the creation of any new specialized courts has always been the risk to the uniform application of EU Law and the inadequacy of the review procedure to prevent it[66], fear of inflating the importance of the General Court has certainly played a role. Empowerment of the General Court, however, was precisely the "Copernican revolution"[67] introduced by the Nice Treaty, which should have placed that Court at the very heart of the EU system of judicial protection, leaving to the Court of Justice "*l'examen de questions qui présentent un intérêt majeur pour l'ordre juridique communautaire*"[68].

Therefore, one might wonder whether the failure to implement certain provisions introduced by the Nice Treaty is due only to the inefficiency or inopportunity of those provisions or whether they may also be due to a lack of separation between the political and judiciary powers. It bears mentioning that the Member States seem to have changed their approach to judiciary governance, since the UPC Agreement clearly indicates that the Administrative Committee (made up of representatives of the Signatory States) is the driving force in the management of the UPC. On the contrary, as Dehousse interestingly points out[69], the ECJ is managed by the general reunion of the Court (the judicial organ) and its specific registrar. Since the EU lacks a clear political authority, including in the field of justice, it seems that the ECJ has expanded its role also with regard the management of justice. Although such

[63] The ECJ expressly stated (just few weeks after the Opinion 1/09) its opposition to the creation of new specialized courts in the Proposition of the Court of Justice of the EU of 28 March 2011 for amendments to its own Statute and to Annex I thereto, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf.

[64] See the Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court, attached at the EU Council working document No 14448/1/14 REV 1 of 20 November 2014.

[65] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 341, 24 December 2015, p. 14.

[66] See, in addition to the footnotes 63 and 64, C. Curti Gialdino, *Il raddoppio dei giudici del Tribunale dell'Unione: valutazioni di merito e di legittimità costituzionale europea*, in *Federalismi.it*, p. 19-20.

[67] K. Lenaerts, *La réorganisation de l'architecture juridictionnelle de l'Union européenne: quel angle d'approche adopter?*, in M. Dony, E. Bribosia (eds.), *L'avenir du système juridictionnel de l'Union européenne*, Bruxelles, 2002, p. 52.

[68] Ivi, p. 51.

[69] F. Dehousse, *The Unified Court on Patents: the new Oxymoron of European Law*, cit., p. 29, 30, 37.

a dynamic is not new in the EU legal order[70], it is not consistent with the principle of the rule of law and the balance of powers. The refusal of some Member States and stakeholders to confer new competences upon the ECJ in the field of patents may also be seen as an attempt to start tackling this issue.

The creation of the UPC could also signal the Member States' desire to have more room to experiment with new solutions in the field of judicial protection. The UPC, as just mentioned, will bring several innovations with regard the court's composition, the appointment of judges, the possibility to ensure the judges' expertise through training, the (perhaps even excessive) decentralization of the premises, and, last but not least, the specific rules on the proceedings before the Court.

It is difficult to take an ultimate position on how these innovations will affect the EU system of judicial protection.

On the one hand, despite its international origins and the disputes that surrounded its creation, the UPC seems to enhance the supranational character of the EU system of judicial protection, which is now equipped with an almost federal body based in Luxembourg and Paris (or London and Munich for certain fields) with branches located in each Signatory State (or group of Signatory States, in the case of Regional Divisions rather than Local ones).

On the other hand, however, certain features hint at the opposite conclusion. The recourse to international law instead of EU Law for dealing with EU-related matters implies deep mistrust of the Member States in the institutions and in the procedures that they have agreed upon for enhancing the European cooperation. Moreover, the existence of a separate international convention establishing a common Court to adjudicate on 'EU related acts' could complicate any revision of the EU system of judicial protection, conferring a stronger position on the Member States in the negotiations. The role that the European Patent Office will acquire in the field of the unitary patent may also create some complication in case of future reforms. Finally, it bears noting that the UPC Agreement includes some specific provisions that seem to hint at protecting a certain degree of 'intergovernmentalism' in the UPC. One may consider, by way of example, the fact that the Signatory States have already agreed upon the nationality of the first President of the Central Division (namely, the nationality of one of the States that host it)[71].

Thus, the only thing that can surely be inferred from the creation of the UPC – should its establishing Agreement enter into force, of course – is that the system of EU Courts will

[70] See, for instance, what is happening in the different field of finance and economics, with the growing (and highly disputed) influence exercised by the ECB due to the lack of a strong political authority for dealing with the euro crisis; see, as a recent issue in this field, ECJ, case C-62/14, *Gauweiler* [2015], ECLI:EU:C:2015:400.
[71] See Art. 14 (2) of the UPC Agreement.

have a very peculiar precedent that will influence future reforms, either inspiring or hindering them.

For this reason, by way of conclusion, and given the failure of the specialized courts, it is worthwhile to compare the UPC's creation with other two tools recently developed in the EU legal order to satisfy the extant need for a technical, expert, and specialized jurisdiction in EU-related matters.

Firstly, it bears noting that, in the recent years, the EU system of judicial protection has experienced another innovation: the creation of the aforementioned Boards of Appeal operating within, but independently from, certain EU Agencies. This option is an alternative to the UPC model and deserves a brief analysis, since it brings some peculiarities of the latter to light.

The internal Boards of Appeal have long remained a prerogative of the Office for the Harmonisation in the Internal Market[72] (established in 1993) and the Community Plant Variety Office[73] (1994). Now several other agencies have one: the European Aviation Safety Agency[74] (2002), the European Chemicals Agency[75] (2006), the Agency for the Cooperation of Energy Regulators[76] (2009), the three European Supervisory Authorities[77] (2010) and the Single Resolution Board[78] (2014). Europol and Eurojust have internal Boards of Appeal as well, but they are unusual, since their decisions cannot be challenged before the ECJ; therefore, they will not be discussed here. However, they are another example of decentralized and specialized control over a specific kind of EU policies.

As mentioned above, the Boards of Appeal cannot be called truly judicial bodies, since they serve the administrative function of adjudication over the decisions of the agency[79]. The General Court has stated that there is a "continuity in terms of their functions between the [agency] and the Board of Appeal"[80]. Although this determination was made with particular regard for the Office for the Harmonization in the Internal Market, it seems that it may also be extended to other agencies.

[72] See Regulation (EC) No 207/2009 of the Council of 26 February 2009, *OJ* L 78, 24.3.2009, p.1.
[73] See Regulation (EC) No 2062/94 of the Council of 18 July 1994, *OJ* L 216, 20.8.1994, p. 1, as subsequently amended.
[74] See Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008, OJ L 79, 19.3.2008, p.1, as subsequently amended.
[75] See Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006, OJ L 396, 30.12.2006, p.1, as subsequently amended.
[76] See Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009, OJ L 211, 14.8.2009, p.1, as subsequently amended.
[77] The European Supervisory Authorities are the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Market Authority, established with Regulations (EU) No 1093, 1094 and 1095/2010 of the European Parliament and of the Council of 24 November 2010, OJ L 331, 15.12.2010, p. 12, 48 and 84, as subsequently amended.
[78] See Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014, OJ L 225, 30.7.2014, p. 1.
[79] L. DI LUCIA, "I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona", in Rivista trimestrale di diritto pubblico 2013, p. 323 et seq.
[80] GC, case T-163/98, *The Procter & Gamble* [1999], at para. 38.

Since the Nice Treaty entered into force, it has widely been considered the possibility to evolve the existing Boards of Appeal into fully-fledged specialized courts pursuant to Article 220 TEC. It is worth noting that the 1st Declaration annexed to the Nice Treaty specifies that, "the Luxembourg Government undertakes not to claim the seat of the Boards of Appeal of the Office for Harmonisation in the Internal Market (trademarks and designs), which will remain in Alicante, even if those Boards were to become judicial panels within the meaning of Article 220 of the Treaty establishing the European Community". Given the failure of the idea of establishing specialized courts, one may now wonder whether the several Boards of Appeal currently existing in the EU legal order may be to some extent considered substitutes of the specialized courts that were never created. The two kind of bodies are clearly different in nature; however, it is certainly worth reflecting on whether the Boards of Appeal might eventually evolve into a new kind of judicial body, acquiring more independence and impartiality while preserving their characteristic decentralization and technical expertise[81].

This potential evolution should be examined carefully in order to ensure the uniformity of the EU legal order and sound interaction between the Boards of Appeal and the ECJ. Beyond all these uncertainties, however, it bears noting that such an evolution would be strongly linked with the recognition of EU agencies in primary law and their endowment with decision-making power[82].

The UPC model seems to be an alternative option to the establishment of administrative Boards of Appeal. While the latter requires, by definition, the creation of a EU agency and, therefore, a more or less exclusive allocation of a certain policy field to the EU regulatory level, the former presents a very interesting option for all those policy fields where implementation still occurs entirely at the national level or where there is (like in patent protection) a legal framework that involves a great deal of intertwining among national, international, and EU Law. It is not by chance that the innovative political choice to create such a peculiar jurisdiction as the UPC has been made in tandem with another revolutionary decision, that of endowing an Office of an international organization in which the EU does not participate (the European Patent Organisation) with power to implement the EU Regulations on uniform patent protection[83].

In light of these facts, it bears noting that the UPC model may be used to ensure uniform application of EU Law by those tribunals that, even without belonging to the EU legal order, may well need to interpret it, and whose decisions may have great influence on the

[81] See, on this point, L. DI LUCIA, I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona, cit., in particular at p. 354.
[82] The future of EU agencies is far from clear. For a recent overview on this point, see J. Alberti, *Delegation of powers to EU agencies after the 'short selling' ruling, in Il Diritto dell'Unione europea*, 2015, p. 451 et seq.
[83] The topic cannot be discussed here; see, for a brief introduction, the case-law cited previously, at footnote 7.

Internal Market. A worthwhile example to note is that of international investment arbitration, especially in case of intra-EU Bilateral Investment Treaties. Though the interpretation and application of those treaties is inextricably linked with EU Law, arbitrators may not refer preliminary rulings to the ECJ[84]. Moreover, investors cannot challenge the treaties before the ECJ, which obviously has no jurisdiction over them[85]. In these cases, it bears asking whether the UPC experience could provide an interesting model for creating a tailor-made international tribunal, which, however, is linked to the EU system of judicial protection. The same considerations may also apply to those international organizations made up only of EU Member States, which may well apply EU Law, at least in relation to employment disputes.

Secondly, it is interesting to compare how the UPC Agreement deals with the need for specialization in the EU system of judicial protection with how it is being treated in the ongoing reform of the General Court. Here, the two options are clearly complementary. As mentioned above, the UPC has been conceived and designed taking into consideration the ECJ's clear willingness (and that of some Member States and stakeholders) to avoid the creation of a new specialised court pursuant to Article 257 TFEU. However, despite this community of interests, in the interinstitutional negotiations for the reform of the General Court the need for specialization has been tackled very differently, as it was, too, in the field of the Unitary Patent Protection.

In the UPC Agreement, the new jurisdiction's technical competency has been pursued in an almost maniacal way, also in part because of the aforementioned pressure applied by several stakeholders during the negotiations[86]. Consider, by way of example, the double composition of the judging panel (made up of legally qualified and technically qualified judges); the appointment procedure, inspired by the more 'supranational' standard conceived for the Civil Service Tribunal, which requires a high level of expertise in the field of patent protection; the provisions concerning the lifelong enforcement of this expertise through specific *ex ante* and ongoing training; and the multinational composition of the Court.

On the contrary, the proposal made in November 2014 by the ECJ (*rectius*: by the Court of Justice[87]) to reform the General Court reveals an opposite view on how to achieve the

[84] The literature on this issue is extremely rich. For a very recent contribution, see Jürgen Basedow, *EU Law in International Arbitration: Referrals to the European Court of Justice*, in *Journal of International Arbitration*, 2015, p. 367 et seq.
[85] This issue cannot be discussed in detail here; see on this point, G. Vallar, *L'arbitrabilità delle controversie tra un investiture di uno Stato membro ed un altro Stato membro. Considerazioni a margine del caso Eureko/Achmea v. The Slovak Republic*, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 849 et seq.
[86] See above, at § 3.
[87] As is well known, the position of the ECJ is not fully coherent, since the General Court does not fully support the Court of Justice's position on the reform of the same General Court. For a general overview on the point, see C. Curti Gialdino, *Il raddoppio dei giudici del Tribunale dell'Unione: valutazioni di merito e di legittimità costituzionale europea*, cit., *passim*. It still has to be evaluated which impact will have on this point the recent change in the Presidency of the Court of Justice.

specialization. In particular, it proposes the abolishment of the possibility to establish specialized courts, and it mentions only briefly the possibility to create specialised chambers of the General Court, without entering into detail about how to guarantee such a specialisation. The Commission, in its opinion[88] on the first proposal of the ECJ of March 2011, dealt more comprehensively with this point, proposing the creation of at least two specialised chambers[89] of the General Court and stating that, "during each partial replacement, three judges would be selected, having regard to the judicial qualifications required to sit in one of the specialised chambers to be established by the General Court"[90]. While this latter document reveals a slightly more in-depth attention to the issue, it still does not offer any insight into the procedures that would guarantee and enforce such specialisation, or on how to balance this goal with the extant need to isolate EU Courts from national pressures.

Indeed, it has been rightly pointed out that the specialisation of some chambers of the General Court may well rise crucial problems of "*politisation de l'attribution des portefeuilles judiciaires*"[91]. Therefore, such a possibility needs clear and detailed rules.

EU institutions have finally agreed on an amendment to the ECJ Statute[92], which contains no mention of specialisation. Specialised chambers will apparently be established later; however, no provision at all governs this possibility (neither to say whether, nor how they should be established). The "the *further* establishment of specialised chambers"[93] is briefly mentioned only as a topic of the report on the functioning of the General Court that the Court of Justice shall draw up, using an external consultant, for the European Parliament, the Council and the Commission by five years after the entry into force of this Regulation at the latest.

It is hard to find a reasonable justification for such a vast difference in pursuing a similar need for specialisation in the field of judicial protection. Competition, trademarks, and REACH related matters (these are indeed the policy fields that may be eligible for a separate examination in specialised chambers – plus the measure for freezing of funds in the field of CFSP, which, however, do not seem to require a high level of technical expertise[94]) are clearly different policy fields from patents. However, they all share a common need for technical specialisation, and they are all able (perhaps only with the exception of REACH related matters) to touch upon very sensitive issues of the Internal Market. Therefore, all these policy fields probably require more similar approaches in ensuring technical jurisdic-

[88] Commission Opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM(2011) 596 final.
[89] Ivi, at pt. 37.
[90] Ivi, at pt. 50.
[91] M. Van Der Woude, *Pour une protection juridictionnelle effective: Un rappel des objectifs de 1988 du TPICE*, in *Revue Concurrences*, 2014, n. 4, p. 11.
[92] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015, cit..
[93] Ivi., Art. 3 (emphasis added).
[94] For a general overview of the possible fields eligible for a specialised jurisdiction, see above at footnotes 64 and 88.

tion. While it is, of course, crucial to implement each system of judicial protection differently, in order to suit the particular characteristics of each sector, it is also important to start from a common legal framework. Comparing the UPC experience with the reform of the General Court, it seems that EU institutions are not developing a common framework at all for ensuring specialised legal protection, choosing very different paths for different policy fields. This approach reveals, once more, all the uncertainties surrounding the European integration process.

VI. Conclusion

The UPC is a unique construct among the judiciaries stemming from international law and will become a very peculiar actor in the EU system of judicial protection.

Future dialogue between the ECJ and the UPC will have to deal with some controversial issues that might require some innovative approaches in ECJ jurisprudence and some caution on the part of the UPC (and its Administrative Committee, for instance for the implementation of budget rules). However, the 'common trait' that makes the UPC so peculiar seems to be a well-developed structure, which may ensure the sound growth of patent protection law.

Nevertheless, the UPC remains fundamentally an anomaly in the system of EU Courts, and it clearly demonstrates that the system stemming from the Nice Treaty, which has never been fully implemented, has given way to very different praxis. Should the UPC Agreement successfully enter into force, its future inclusion in reformed EU Treaties certainly seems to be a desirable solution in the long run. The troubled creation of the UPC shows a certain degree of mistrust of the Member States with regard to the ECJ and is a clear signal that the EU system of judicial protection requires profound reconsideration.

Moreover, comparing the UPC experience with other recent developments in the EU system of judicial protection (the creation of administrative Boards of Appeal for an internal review of EU agencies' decision and the reform of the General Court), it is strikingly clear that the need for specialisation in dealing with certain EU policy fields is being handled very differently, according to the relative political necessity. Also with regard to judicial protection, the European integration process is evolving along very different lines, depending on the particular political characteristics of each policy field. Thus, the creation of the UPC might become a milestone, in the event that its establishing Agreement successfully enters into force, introducing a new kind of fragmentation into the EU system of judicial protection.

EU institutions and Member States should reflect on the reasons why the 'Nice system' of judicial protection has failed and a new, important jurisdiction on EU related matters has

been created outside the EU legal order. Indeed, tackling and solving these broader issues seems fundamental to assuring a sound relationship between the ECJ and the UPC.

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Bibliography

ALBERTI Jacopo, *Delegation of powers to EU agencies after the 'short selling' ruling*, in Il Diritto dell'Unione europea, 2015, forthcoming.

BARATTA Roberto, *National Courts as 'Guardians' and 'Ordinary Courts' of EU Law: Opinion 1/09 of the ECJ*, in Legal Issues of Economic Integration 2011, p. 317.

BARATTA Roberto, *The Unified Patent Court – What is the 'common' trait about?*, in C. Honorati (ed.), "Luci e ombre del nuovo sistema UE di tutela brevettuale", Torino, Giappichelli, 2014, p. 101.

BASEDOW Jürgen, *EU Law in International Arbitration: Referrals to the European Court of Justice*, in Journal of International Arbitration 2015, p. 367.

BEIER Friedrich-Karl, *Stand und Aussichten der europäischen Rechtsvereinheitlichung auf dem Gebiete des gewerblichen Rechtsschutzes*, in Gewerblicher Rechtsschutz und Urheberrecht - Internationaler Teil, 1969, p. 146.

BRANDI-Dhorn Matthias, *Some critical observations on competence and procedure of the unified patent court*, in IIC: international review of industrial property and competition law 2012, p. 372-389.

BROß Siegfried, *Einheitspatent und einheitliches Patentgericht im europäischen Integrationsprozess : verfassungsrechtliche Perspektive*, in Zeitschrift für geistiges Eigentum 2014, p. 89-105.

CERULLI IRELLI Vittorio, *Il Tribunale unificato dei brevetti: rischi e compatibilità con il nostro ordinamento*, in Il diritto industriale 2013, p. 393-405.

CONDINANZI Massimo, *Corte di giustizia e Trattato di Lisbona: innovazioni strutturali ed organizzative*, in Bilancia Paola, D'Amico Marilisa (eds.), "La nuova Europa dopo il Trattato di Lisbona", Milan, Giuffré, 2009, p. 207.

DEHOUSSE Franklin, *The Unified Court on Patents: the new oxymoron of European Law*, in Egmont Paper 60. Published also as *La juridiction unifiée du brevet: le nouvel oxymoron du droit européen*, in Govaere Inge, Lannon Erwan, Van Elsuwege Peter, Adam Stanislas (eds.), "The European Union in the world: essays in honour of Marc Maresceau", Nijhoff, Brill, 2014, p. 259-274.

DI LUCIA Luca, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, in Rivista trimestrale di diritto pubblico 2013, p. 323.

DIMOPOULOS Angelos, VANTSIOURI Petroula, *Of TRIPS and traps: the interpretative jurisdiction of the Court of Justice of the European Union over patent law*, in European Law Review 2014, p. 210-233.

GANDÍA SELLENS María Aránzazu, *The Relationship between the Brussels I recast and the agreement on a Unified Patent Court, specially focusing on patent infringement: when reality exceeds fiction*, in Bergé Jean-Sylvestre, Francq Stéphanie, Gardeñez Santiago Miguel (eds.), "Boundaries of European private international law", 2015, Bruxelles, Bruylant.

GRUBER Joachim, *Das Einheitliche Patentgericht: vorlagebefugt kraft eines völkerrechtlichen Vertrags?*, in Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil 2015, p. 323-326.

HONORATI Costanza, *Il diritto applicabile dal Tribunale unificato: il coordinamento tra fonti e I rapporti tra accordo TUB e regolamento (UE) n. 1257/2012*, in Honorati Costanza (ed.) "Luci e ombre del nuovo sistema UE di tutela brevettuale", Torino, Giappichelli, 2014, p. 119.

JAEGER Thomas, *Shielding the Unitary patent from the ECJ: a rash and futile exercise*, in IIC: International review of intellectual property and competition law 2013, p. 389.

JAEGER Thomas, *The EU patent: cui bono et quo vadit?*, in Common Market Law Review 2010, p. 63;

JAEGER Thomas, HILTY Reto, DREXL Josef, ULLRICH Hans, *Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the 2009 Commission Proposal for the Establishment of a Unified Patent Judiciary*, in IIC: International Review of Industrial Property and Competition Law 2009, p. 817.

LENAERTS Koen, *La réorganization de l'architecture juridictionnelle de l'Union européenne: quel angle d'approche adopter?*, in Dony Marianne, Bribosia Emmanuel (eds.), "L'avenir du système juridictionnel de l'Union européenne", Bruxelles, 2002, p. 49.

MIGNOLLI Alessandra, *Art. 216 TFUE*, in Tizzano Antonio (ed.), "I Trattati dell'Unione europea", Milan, Giuffré, 2014, p. 1779.

NASCIMBENE Bruno (ed.), *Il processo comunitario dopo Nizza*, Milan, Giuffré, 2003.

PACHENBER Joachim, *Unitary patent and unified court – what lies ahead?*, in IIC: Journal of Intellectual Property Law & Practice 2013, p. 480.

PARISH Matthew, *International Courts and the European Legal Order*, in The European Journal of International Law 2012, p. 141.

SCHOVSBO Jens, RIIS Thomas, SALUNG Petersen Clement, *The Unified Patent Court: pros and cons of specialization – Is there a light at the end of the tunnel (vision)?*, in IIC: International review of intellectual property and competition law 2015, p. 271-274.

SCUFFI Massimo, *Il brevetto europeo con effetto unitario e l'Unified Patent Court*, in Il diritto industriale 2013, p. 156-167.

SCUFFI Massimo, *Il Tribunale unificato dei brevetti: evoluzione storica, ordinamento e regole*, in C. Honorati (ed.) "Luci e ombre del nuovo sistema UE di tutela brevettuale", Torino, Giappichelli, 2014, p. 73.

TAVASSI Marina, *Le Rules of Procedure e i rapporti tra Tribunale unificato e giudice nazionale*, in Honorati Costanza (ed.), "Luci e ombre del nuovo sistema UE di tutela brevettuale", Torino, Giappichelli, 2014, p. 183.

ULLRICH Hanns, *Harmonizing Patent Law: The Untamable Union Patent*, in Max Planck Institute for Intellectual Property & Competition Law Research Paper, No. 12-03.

ULLRICH Hans, *National, European and Community patent protection: time for reconsideration*, in A. OHLY, D. KLIPPEL (eds), "Geistiges Eigentum und Gemeinfreiheit", Tubingen, 2007.

VALLAR Giulia, *L'arbitrabilità delle controversie tra un investiture di uno Stato membro ed un altro Stato membro. Considerazioni a margine del caso Eureko/Achmea v. The Slovak Republic*, in Rivista di diritto internazionale privato e processuale 2014, p. 849.

VÉRON Pierre, BOUCHE Nicolas, *La juridiction unifiée du brevet: une révolution dans le contentieux européen*, in Cahiers de droit de l'entreprise 2014, p. 43-49.

ZAWADZKA Zofia, *The unitary patent protection: a voice in the discussion from the Polish perspective*, in IIC: international review of industrial property and competition law 2014, p. 383.

Case law

ECJ, case 181/73, *Haegemann* [1974], ECR 449.

ECJ, Opinion 1/91, *EEA Agreement* [1991], ECR I-6079.

ECJ, case C‑54/96, *Dorsch Consult* [1997] ECR I‑4961.

ECJ, case C-224/01, *Köbler* [2003], ECR I-10239.

ECJ, case C-265/03, *Simutenkov* [2005], ECR I-2596.

ECJ, case C-344/04, *IATA* [2006], ECR I-403.

ECJ, case C-173/03, *Traghetti del mediterraneo* [2006], ECR I-5177.

ECJ, case C-431/05, *Merck Genericos* [2007] ECR I-7001.

ECJ, case C-308/06, *Intertanko* [2008], I-04057.

ECJ, case C-366/10, *Air transport association of America* [2011], ECLI:EU:C:2011:637.

ECJ, opinion 1/09, *European and Community Patent Court* [2011], ECR I-1137.

ECJ, case C-196/09, *Miles* [2011], ECR I-5105.

ECJ, case C-414/11, *Daiichi Sankyo* [2013], ECLI:EU:C:2013:520.

ECJ, case C- 146/13, *Spain v. Parliament and Council* [2015] ECLI:EU:C:2015:298.

ECJ, case C- 147/13, *Spain v. Parliament and Council* [2015], ECLI:EU:C:2015:299.

ECJ, case C-62/14, *Gauweiler* [2015], ECLI:EU:C:2015:400.

ECJ, case C-160/14, *Ferreira da Silva* [2015], ECLI:EU:C:2015:565.

GC, case T-163/98, *The Procter & Gamble* [1999], ECR II-2383.

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