The Quest for a Transnational Patent System in Europe

A Preliminary Reconstruction

Alex Jettinghoff

Introduction

Patent law has long been a marginal legal topic, an arcane specialism of a small community of legal experts. This state of affairs changed considerably when, in the 1980s, the United States (US) started to place ‘property rights’ at the centre of its economic policy of industrial innovation.1 Subsequently, economic globalisation has made patenting a key competitive instrument in the armoury of many multinational corporations, such as the chemical, pharmaceutical, automotive and electronics industries. Patents, once granted, can be worth billions and thus invite conflicts between competing corporations, resulting in an increasing volume of litigation. The community of patent law experts has grown correspondingly. In Europe, interest in patenting and patent litigation has experienced a similar increase, but this has so far not produced the institutional reform that made a huge difference in the US: a single patent with a unitary patent jurisdiction (as provided by the Court of Appeals for the Federal Circuit).

The current patent system in Europe is the product of international law.2 So far, it has not really been a transnational system, but a hybrid construction. Because it is an international patent authority that grants the patent, it is not a national patent but a ‘bundle’ of national patents. However, for all practical purposes it has most of the characteristics of a national patent. The territory within which the patent is valid (after registration) and has to be enforced is that of the individual Contracting State. This is not what the uninitiated would expect of a ‘Single Market’. One is likely to wonder why there is no EU-wide Community patent regime? Its advantages appear self-evident. The territory of a Community patent would be that of all the Member States of the European Union (EU) and possibly a number of associated states. Thus, a single patent system could save the patentees granting fees and application time. A single patent jurisdiction would provide legal unity in respect of the validity and infringement of patents in all Member States, and would be more cost efficient.

The truth is that, over a period of several decades, the European Community has failed to produce a unified, transnational patent regime. Not for lack of trying, though, as we shall see. Efforts have been made to create such a regime since the

1 Jaffe 2000.
2 In this paper, ‘European’ (bundle) patent or patent jurisdiction refers to the current patent regime (based on international law). The patent regime that is expected to replace the current system is called the ‘Community’ or ‘EU’ (single) patent or patent jurisdiction (based on EU law).
The Quest for a Transnational Patent System in Europe

1960s. This history can teach us something about how and why it can be difficult to provide the European Internal Market with an institution that to the outsider would appear indispensable to it. This paper attempts to provide a preliminary reconstruction of the unsuccessful history of this remarkable policy project. The reconstruction of this particular legal history may help to inform two theoretical issues. The first concerns the question of power and influence in the EU, in particular within the configuration of stakeholders involved in the decision-making (or lack of it) on this policy issue. The second involves the agenda-setting mechanisms of recent decades.

The following section outlines the approach and method of this reconstruction and the main traits of the present structure of the patent system in Europe. Section 3 summarises the history of the European patent policy resulting in this patent structure. In Section 4, the subsequent initiatives to create a Community patent system are reviewed, while Section 5 attempts to assess the relative influence of the various stakeholders, including the legal experts involved, and the agenda-setting mechanisms of this policy project.

**Approach and Sources**

*The Configuration of Stakeholders*

European patent policy, like various other international and transnational policy domains, is the result of the initiatives and decisions of a number of stakeholders. Who are the likely stakeholders here?

*National Governments and European institutions.* These two are likely to be the key players in this history. National governments are often considered the most decisive actors, and there is some research to back this up. At the constitutional level, Moravcsik has shown that Member-States have been the main decision-makers at several critical junctures of the Community history. Their decisions were mainly motivated by national economic self-interest and less by geopolitical considerations. The influence of the Community institutions proved to be considerably less than is often suggested. At the level of Community legislation, the research of Thomson and Hosli found that a focus on the Member States (in the Council of Ministers) gives the best prediction of actual decision-making. Nevertheless, they concluded that the EU institutions tend to wield considerable influence (at least equivalent to one big Member State). Interestingly, their results point out that the weight of this influence depended on the decision-making procedure. When unanimity is required (as is the case in this history), the influence of the EU institutions tends to be less than otherwise.

While these two stakeholders have formal standing in Community decision-making, the next two have only informal influence.

---

Organised industry. There is a growing body of literature on business as a political actor in Community decision-making.\(^5\) This literature tends to assign business interests considerable influence on EU policy making. This is due to the fact that institutions like the Commission and the European Parliament depend heavily on ideas and knowledge provided by outsiders. However, this does not necessarily mean that business lobbies have captured the EU institutions. The Commission, for example, strictly defines the information and expertise it will use. This means that business influence on EU policy is indirect and depends on gatekeeping by the EU institutions, especially where the Commission is concerned.

Epistemic Communities. During fieldwork, I detected traces of an international network of patent law experts (judges and lawyers), which appeared to be involved in the working of the present European patent system and the construction of a single EU patent and EU patent jurisdiction. This network of patent law experts can be regarded as an example of what is known in political science as an ‘epistemic community’. It was Peter Haas who coined this concept for networks of professionals ‘with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or policy area.’\(^6\) Within the context of the EU, legal experts are omnipresent and influential, but often as part of the institutional machinery.\(^7\) The network of patent experts mentioned here is a group of professional outsiders. That such outsiders, when applying consistent pressure to the right spot, can exert considerable influence is evidenced, for instance, in the study by Solanke of cause lawyers and their impact on the EU race equality law.\(^8\)

In order to find a provisional explanation for the decision-making process on this issue, this paper attempts to discover, on the basis of the sources used, which stakeholders played a key role in the successive decision-making cycles in this policy area. Obviously, it might be expected that the national governments and the EU institutions will prove to be the main actors in the play, but we have to be more specific: which countries and institutions (and in what coalitions) were proponents or opponents of a Community solution? And how can this configuration of support and opposition have produced non-decision over such a long period of time on an issue that appears so central to an Economic Community?

Dynamics of Agenda Setting
A Community patent regime was on the agenda from an early period in the Common Market’s existence. Even after the establishment of the current European patent regime in 1973, the Community patent regime did not completely disappear from the agenda. The issue reappeared several times in the form of upgraded proposals and a new round of decision-making. Because the issue has had such a long life, it may be worthwhile examining (as far as the data allow) the dynamics of its Community and EU agenda setting. Princen and Rhinard suggest an inter-

---

\(^5\) See e.g. Greenwood 2003; Coen & Richardson 2009.
\(^6\) Haas 1992, p.3.
\(^7\) Jettinghoff & Schepel 2004.
\(^8\) Solanke 2004.
esting distinction between initiatives from 'high politics' (from political leaders in the European Council) or 'low politics' (from experts in Commission Expert Groups or Council Working Parties). They suggest that both mechanisms have a different logic. The 'high politics route' is typically initiated by political leaders due to a politically salient event; the European Council then agrees on the response to the event; this response is relayed to the lower levels of decision-making in the EU: the political momentum may override any institutional or other inertia. The 'low politics route' is typically initiated in epistemic communities out of professional concerns; their response comes in the form of technical proposals from Expert Groups or Working Parties; and these proposals are moved to higher levels of EU decision-making, where the impetus that has gradually built up secures entrance onto the agenda. The underlying structure of these ideal types is a model of four stages of an ‘issue career’: initiation, specification, expansion and entrance. Our history may challenge these ideal-typical distinctions.

**Collected Data**

This reconstruction of the history of the Community Patent and Patent Jurisdiction has been conducted primarily on the basis of existing data. For Section 3 I have drawn largely on available (mainly legal) texts mentioning the early history of this policy issue. A drawback of the legal sources is that lawyers tend to be more interested in what exactly changes and less in why it does so. Nevertheless, they provide at least the historical sequence of events and occasionally a glimpse of the why and how of the changes. A variety of sources were used for Section 4. The European institutions involved disclose all official documentation and communication on the Internet. Furthermore, some insiders have occasionally published their views on developments. Obviously, these authors are not academic historians but stakeholders (patent lawyer, judge or European Patent Office (EPO) official). They sometimes offer rare and fascinating reports on backstage maneuvering, but may be somewhat biased. Lacking more objective studies, at this stage they would be sorely missed. Finally, to complement these data, the paper draws on a few interviews with Dutch insiders.

**A Brief History of the Current Patent System in Europe**

Because the recent developments of the plans for a Community patent and patent jurisdiction are rooted in the longer history of European patent policy, a brief summary of this history is called for. This also helps to bring important stake-

---

9 Princen & Rhinard 2006.
10 Idem, p.1122.
11 Two patent judges, one patent lawyer in a specialized law firm, two corporate (patent) lawyers of one multinational and an official of the Ministry of Economic Affairs: all insiders in the decision-making process.
12 As mentioned in Section 2, for the summary in this section I have drawn on: a Dutch legal handbook on patent law (Dorhout Mees 1998), two German theses (Telg 2005 and Schneider 2005) and a political science paper by Kranakis (2007).
holders to the fore. The present patent system in Europe is the result of a complex history because initiatives of international and transnational organisations have interacted.

1949-1963. International co-operation on patents was on the agenda when important European co-operative institutions were established after World War II. One of the first proposals originated in the context of the Council of Europe. It came from a French representative and concerned a plan for a European patent office. This ‘Longchambon plan’ of 1949 subsequently met with considerable objections: patents were considered to be a national prerogative. Although efforts were made to harmonise patentability criteria, the project seemed to become stranded permanently in around 1963. In the meantime, at the outset of the Common Market in 1958, the European Commission had suggested the creation of a Community patent system. ‘Industrialists’, keen on a better patent system, reportedly endorsed this initiative. The resulting draft of the Community Patent Convention (CPC) in 1962 encountered fundamental disagreements between Member States. An important issue was that some countries (notably France) were adamant that the system would be limited to the countries of the European Economic Community, while others (notably the Netherlands, mindful of its Anglo-Dutch corporations Shell and Unilever) insisted the system should be open to European countries that were not participants in the Common Market (the European Free Trade Agreement (EFTA) states, and especially the United Kingdom (UK)). So initiatives on this track also came to naught and the prospects for a Community patent system remained bleak until 1968.

1968-1973. The drafting of a worldwide patent treaty triggered new initiatives (the Patent Cooperation Treaty (PCT), drafted under strong US ‘guidance’). This proposed to upgrade patents in the Contracting States by requiring search and examination reports to accompany patent applications. These reports would be provided by a limited number of International Searching Authorities. The snag was that some countries (like France) did not require the national patent office to examine patentability and had no facilities for such examinations. Thus France would be forced to grant a large number of mainly American applications coming from the PCT system without having the facilities to examine patentability in order to filter these PCT applications. This prospect caused the French government to spring into action to ensure that PCT applications would be examined by a European Patent Office before they were granted. It took up the old CPC track and solved earlier problems by rallying sufficient support for a rather curious construction: the split of the 1962 draft CPC into (1) a proposal for a European patent office and patent granting procedure, which became the 1973 European Patent Convention (EPC) and which could be joined by European Community Member States and EFTA states alike; and (2) a proposal for a Community Patent Convention on top of the EPC, to arrange for a common patent for the Community states only. (This became the 1975 CPC, which eventually failed to enter into force.) This dual approach was probably necessary because of the uncertainties (in
the late 1960s) surrounding the Common Market membership of the UK. Without this membership, which occurred only in 1973, a Community Patent Convention was as doomed as it had been in 1962.

After 1973. The EPC came into force in 1977 and the EPO rapidly became a success. Within a decade, more than half of the patent applications deposited in Europe were addressed to the EPO, bypassing the national patent offices. In the meantime, the Community pursued its efforts to reach an agreement on the CPC by means of successive intergovernmental conferences in Luxemburg. The intention was that the integration of the patent system would be completed with a unitary patent and a common court of appeal. Eventually, these efforts proved unsuccessful. An agreement was reached, but two of the nine Member States eventually did not ratify the convention (Denmark and Ireland due to 'constitutional objections'). 14 1973 was crucial for the fate of the Community patent regime because the intergovernmental patent regime rapidly assumed the status of common practice. The Community solution was shelved for a considerable time. This episode suggests that France had a continuing preference for a Community patent system and only opted for a European patent system as a safety net in case the preferred option failed. In French thinking, this choice safeguarded 'the influence of France (and Europe) in the world of international patenting.' 15

The Renewed Quest for a Transnational Patent Regime in Europe

The EPC was an achievement compared to the results of the Community efforts, but this patent regime had some significant drawbacks. Patenting and patent protection were very costly thanks to translation and litigation costs, and the regime did not provide for legal unity (through a common court of appeal) and thus invited forum shopping. 16 One initiative to remedy this last complaint is worth mentioning here. It is the initiative of European patent judges to convene in regular symposia to harmonise

---

13 ‘In April 1970 a Gallup poll showed that only 15 percent of the British electorate were in favor of a further bid to join the Common Market. ... It might therefore have come as something of a surprise to most voters to learn that, within two weeks after the [1970 AJ] election, two of Heath’s senior ministers would be in Brussels to begin with Britain’s negotiations for entry and that, within three years, without any electoral mandate, Britain would have become a full member of the European Community.’ Booker & North 2003, p.134.

14 Dorhout Mees 1998, p.20 The Dutch had ended their obstruction of a Community solution because the UK became a Member State in 1973 and their bi-national corporations were therefore safeguarded.

15 Kranakis 2007, p.706. ‘French government officials during these years were openly Machiavelian in their efforts to find ways to curb US business domination in France and Europe. The French government did not want to be dependent upon the expertise of the US patent-office examiners for the PCT’s international searches; and it also did not want to be an inconsequential player in a transnational patent culture that increasingly privileged examination systems.’ Idem, p.707.

16 Capasso 2006, p.4ff.
the interpretation of European patent law. Starting in 1982, they have met in a long series of two-yearly symposia to this end, establishing an example of horizontal legal harmonisation. One of the side effects of these meetings has in all likelihood been that European patent judges developed into a judicial network that facilitated easy international contacts. This network will reappear later in a more political role. Political efforts to deal with these problems continued after the stranding of the Luxemburg Conferences.

The Making of EPLA: 1999-2003. The proposal that eventually seemed most promising, receiving most support from industry and patent law experts alike, was an optional protocol to be attached to the EPC for an integrated system of patent jurisdiction (European Patent Litigation Protocol). In 1999, at the invitation of the French government (curiously, considering its preference for a EU solution), Paris, hosted an International Conference of the Contracting States of the EPC to discuss European patent litigation. The Conference mandated a Working Party on Litigation (WPL) to present a draft for an optional protocol. The WPL produced a structure paper (outlining the structure of the court’s organisation), which was discussed at a second Intergovernmental Conference in 2000. This conference consented to the WPL paper and agreed to the formation of a subgroup that would produce a draft proposal to be submitted to the WPL, eventually to be called the ‘European Patent Litigation Agreement’ (EPLA). This subgroup submitted drafts of EPLA and of the Statute of the European Patent Court at the end of 2002.

The main elements of EPLA and the EPC Statute that made them attractive were: EPLA was optional, provided for an Appeal Court and thus for legal unity, and it secured the involvement of competent judges. The WPL discussed and amended the drafts and in 2003 indicated that the drafts were completed. However, the WPL postponed further initiatives on the draft, ‘in view of the work being done by the European Union to introduce a Community patent with a judicial system of its own’. This is an interesting but so far insufficiently explained move. The WPL may have preferred a EU solution or may just have called the EU’s bluff. It is also possible that this EPLA operation, which started later than the Community initiative, was intended to influence Community proposals.

EU Proposals: 1997-2003. In 1997 the European Commission (EC) had started on the Community track with the presentation of a ‘Green Paper on the Community patent and Community patent jurisdiction’. It is unclear who (beyond the EC) or what motivated this initiative at this particular juncture. The reactions to this ini-

17 Luginbühl 2002, 2ff. See also: Breier (1983) and Brinkhof (1997).
18 This is confirmed by one of the interviewees who said that: ‘This had the result that contacts between specialized patent judges became much easier. Before, it was unthinkable to just call someone. Now this is very easy. Also e-mail made it simple. It is an important network.’
19 The ‘Protocol’ became an ‘Agreement’ later, to make the ‘European patent judiciary’ independent of EPO in order to safeguard judicial independence.
20 Luginbühl 2002, p.5-7.
21 At the same Conference an Agreement was reached concerning the reduction of translation costs, the so-called ‘London Agreement’.

Dit artikel van Boom Lemma Tijdschriften is gemaakt voor Radboud Universiteit Nijmegen 59665+65441
tiative were sufficient for the EC to start working out a draft ‘Regulation on the Community patent’. In 2000 the EC submitted its draft to the Council. Bones of contention there were (again) primarily the language issues and the design of the patent jurisdiction. A revised draft stranded in March 2004 in the Competitiveness Council, where no agreement on the details of the agreement could be reached. Internal Market Commissioner Bolkestein clearly voiced Commission frustration over the outcome, blaming protectionist interests.\textsuperscript{22} The EC also submitted drafts on the Community Patent Court and appeals before the Court of First Instance of the EU in December 2003. Since the Community Patent was stranded, there was little point discussing these drafts.\textsuperscript{23}

That this proposal failed is hardly surprising. The patent world had changed considerably since 1973. The European patent regime was well established. It had developed into a booming sector, assisted by an internationally oriented and vocal epistemic community. The EU proposals promised no significant improvement of the current patent regime. The EU language requirement would make a patent very expensive, and the proposed patent jurisdiction was no match for the EPLA proposal.\textsuperscript{24}

\textit{Community Attack on EPLA: 2005-2007}. Faced with this development, the EPC-WPL resumed its work on EPLA and produced an amended draft on the basis of the draft of 2003. The network of European patent judges (mentioned earlier) agreed in 2006 on principles relating to EPC Rules of Procedure. This is the so-called Second Venice Resolution, referring to a meeting of European patent judges in 2006 in Venice. The meeting was initially organised by the EPLAW, an organisation of experienced patent lawyers, founded in 2000. The judges and lawyers were supporters of EPLA and had worked out a set of principles relating to the rules of procedure of the European Court provided in EPLA.

In the same year the EC tried to reanimate the Community initiative with a Consultation of stakeholders. The Commission received an overwhelming response of more than 2,500 reactions. At a Commission hearing later in July it became evident that a majority of the user organisations (organised industry, patent attorneys and patent law experts) preferred EPLA to the Community proposals. The EC concluded that: ‘Both industry and patent attorneys seem to favor the Community’s involvement in the EPLA. This preference flows from the general opinion that the existing patent system based on EPO and the EPC works well and outstanding problems relate to the lack of unitary jurisdiction.’\textsuperscript{25}

\textsuperscript{22} Commission Press Communiqué, 12\textsuperscript{th} March 2004.
\textsuperscript{23} Or, as Commissioner Bolkestein put it (according to the Communiqué mentioned above), they were as useful ‘as a pair of skis in the desert’. COM(2003) 827 final, 2003/0326(CNS) and COM(2003) 828 final, 2003/0324(CNS).
\textsuperscript{24} It proposed, inter alia, a Centralized Community Patent Court, attached to the Court of First Instance of the EU, i.e., no local presence except for possible hearings in other Member States (MS) where the Court has its seat at the time; proceedings to be conducted in the official EU language of the MS where the defendant is domiciled, i.e., the use of many languages; and a Court considered by the patent law community as being unequipped for fact finding and technical questions.
\textsuperscript{25} Pagenberg 2007, p.806.
The Commissioner of DG Internal market at the time (McCreevy) spoke out in favour of EPLA. The echo of this consensus was heard for several months during various conferences in Europe. Suddenly, dark clouds started to gather over the EPLA supporters. On 4 October 2006, the European Parliament approved a motion from a coalition of left-wing parties that was very critical of EPLA, probably under the impression that big business and their legal counsel had overly dominated the discussion on this issue and obstructed the EU initiatives. It stated that the EP: ‘(5) Believes that the creation of a non-EU European Patent Judiciary (EPJ) and a non-EU European Patent Court (EP Ct) pursuant to EPLA would call into question the commitment of its contracting states (that are also Member States) to the Community courts and the Single market. ... (13) Requests the Commission to ask the European Court of Justice for an opinion on the EU-related aspects of the possible conclusion of the by Member States in the light of overlaps of the EPLA with the acquis communautaire ...’

This was a straightforward confrontation. Subsequently, however, EPLA was dealt a fatal blow in true cloak and dagger style.27 There is only one source for what happened: a report by prominent German patent lawyer and EPLAW and WPL-subgroup member Pagenberg. He hardly qualifies as an objective reporter, but his report – even if it is only partly true – is revealing. At the meeting of heads of state on 20 October 2006 in Finland, Commissioner McCreevy was expected – as he had announced – to draw conclusions from the consultation and the hearing in Brussels on European patent policy. A proposal to support EPLA was expected, but the Commission Communication that was tabled during the meeting suggested only a Community patent and Community litigation. Several heads of state were not amused. A few days later the French government distributed a short paper simply stating its preference for a Community solution for the patent system in Europe and ‘patent litigation ... based on the existing jurisdictional structure in the EU’.28 Pagenberg wrote in dismay: ‘It is already surprising that a single country can block the overwhelming vote of 350 user groups and 2500 submissions with a short paper that until today, more than ten months later, does not contain any concrete proposal and not even an explanation of whether it would be legally possible. Yet even more surprising is that a government is able to do this against the unanimous vote of its own industry, its own judges and its own patent practitioners, and that the Commission immediately obeys and stops all its work.’29

27 According to Pagenberg 2007, p.809: ‘This was the work of the French Justice Department that, in cooperation with the General Secretariat of the EU Commission, succeeded in changing the text without the knowledge of the Commissioner.’ This statement is difficult to credit and needs further confirmation.
28 In an interview published in the Gazette du Palais in December 2006, Marc Guillaume, Director of Civil Affairs at the French Ministry of Justice, clarified the Ministry’s position. He argued that EPLA would be an optional system and thus did not ‘accord’ with Community legal order. EPLA would be an ‘inextricable system and risk irreconcilable decisions’ on infringement and validity issues. This would harm innovation in Europe. www.managinggip.com/ Managing Intellectual Property, Weekly News – January 9, 2007.
29 Pagenberg 2007, p.810.
This French intervention ended EPLA’s career and left some bruised feelings. In May 2007, the German Bundesrat passed a resolution to move the German central government to support EPLA and only to agree to changes in the existing patent system if these changes improved the status quo for the patent users in Europe. So the EC had to do considerably better than make vague suggestions.

Working on a Compromise. At the instigation of the EU Presidency (and probably also as a consequence of the appointment of a new Director of the Directorate Knowledge Economy in the DG Internal Market, Margot Fröhlinger30), the Council Working Party started to meet more frequently. The proposed way forward was to aim to merge earlier proposals for a Community Patent Jurisdiction and EPLA.31 This document suggests that the ‘rules of procedure ... should also reflect the work carried out in the context of EPLA, such as the Second Venice Resolution of the IPJA.’32 The new initiative resulted in progress on the Community patent as well as on Community patent litigation. On 28 April 2008 the Council Working Party received a proposal from the Presidency that tried to tackle to two remaining issues affecting the Community patent: the translation arrangements and the distribution of patent fees.33 Then, on 14 May 2008 a first ‘draft Agreement on the EU Patent Judiciary’ was ready for discussion by the Council Working Party.34 The EC encouraged this progress by creating a group of patent experts (consisting of five judges and five patent lawyers representing seven different countries) that would convene between Council Working Party meetings to discuss new proposals.35 Here we meet again members of the IPJA and EPLAW.

In early 2009 these efforts resulted in a draft agreement that was considered fit for Council decision-making.36 The proposed construction was that the EU would become a contracting entity in the European Patent Convention. European patents thus would also be Community patents. The European Patent Office would undertake the administration of the Community patents. A unified patent litigation system was proposed that would review both Community and European Patent disputes. The European and EU Patents Court (EEUPC) was to comprise a Court of First Instance and a Court of Appeal. The Court of First Instance would have one central and several local or regional divisions. Judicial panels would have an international composition. As insiders had hoped, the Council (during the Swedish Presidency) reached an agreement on the main features of the future patent system along these lines in December 2009. The tricky subject of the translation arrangement was to be resolved by special regulation.

---

30 Several interviewees spoke highly of her drive and openness.
31 Council document 14492/07.
32 The International Patent Judges Association (IPJA) was founded in 2005.
33 Council document 8928/08. The solution to the translation problems was expected to come from computerized translations.
34 Council document 9124/08.
During the course of 2010 new obstacles to progress appeared. The proposals of the Commission for a language regime, presented on 1 July 2010, encountered fierce opposition from Spain and Italy who were outraged by the proposal that the Community Patent system would work according to the language arrangement of the London Agreement, i.e., that the EU patents would be examined and granted in one of the three working languages: English, French and German. All efforts to reach a unanimous decision failed in November 2010. In despair, a group of 12 countries decided to opt for the possibility of ‘enhanced co-operation’ that enables some Member States to implement the new patent regime while others may follow later. Since November 2010, all other Member States except Spain and Italy have joined the original 12. The European Court of Justice was asked, following the 2006 request of the European Parliament (EP), for an opinion on the draft proposal and decided in March 2011 that the agreement on unified patent litigation is incompatible with the EU treaties. At the time of writing, the EC appears to be undaunted, stating that it welcomes the decision since it will help in finding a solution. The introduction of a truly transnational patent regime in Europe seems close.

Concluding Analysis

The data collected for this history are far from complete. On several points further research is needed. Nevertheless, the available data suggest some preliminary answers to the theoretical issues raised in Section 2.

The first issue concerns the distribution of power and influence among the stakeholders involved. As expected, the main players appear to be the Member States and some EU institutions. To be more specific, on the one hand we find the champions of the principle of an EU solution. Among them, France takes pride of place, supported by the EC (and later the EP). France’s unwavering preference for a Community solution appears to be the engine driving this story, and the country’s tenacity in promoting the issue is impressive. The best window of opportunity for this group emerged in 1973, when two agreements were reached: one on a Community Patent and one on a European Patent. The Community Patent Convention remained unratified by Ireland and Denmark. Perhaps these countries, that had just joined the Common Market in 1973, were at that time not prepared to accommodate this kind of decision. However, the European Patent Convention was ratified and was on its way to becoming a huge success. On the other hand we find important patent countries, such as Germany and the UK (supported by their industry and patent law experts), clinging to this established European patent system, making the furtherance of a Community patent system an uphill battle. To the frustration of the last group, an initiative to improve the European patent regime by means of a single patent jurisdiction (EPLA) was effectively (and mysteriously) torpedoed in 2006, allegedly by French and EC policy operators in tandem. This gave the proponents of an EU solution a new opportunity for action, but now they had to reckon with the demands of Germany and the UK. The efforts of a Council Working Party (under the guidance of the DG Market)
have been directed towards grafting the EPLA improvements on to earlier EU proposals. The new version of the EU patent regime seems now to be close to success, in spite of the explicit opposition of Spain and Italy who object to the proposed language regime. Their motives are not hard to understand: they want to maintain their languages in the patent system. Moreover, the position of countries like Germany and the UK (informed by their industry and patent law experts) is transparent: they are demanding EPLA like improvements ‘or else’.

The motives of the European institutions seem straightforward, too, because the EU is their mission. France’s motives are harder to fathom. The country has presented itself as champion of the Community solution, which is evidently true. One suspects an ulterior motive, but can only guess as to its nature. The data suggest that the European patent system was moving too far away from the French geopolitical strategy to give the Common Market a strong position in the world, especially in relation to the United States. This motive had surfaced earlier on the occasion of the PCT negotiations and may still be active.  

What about the influence of organised industry? Big industry and SMEs have made their preferences known at all levels. The European Commission has organised hearings for this purpose and has gathered numerous reactions on these occasions, from industrial enterprises themselves, their organisations or their international law firms. Their preferences, especially when in agreement, carry considerable weight with the transnational drafters and decision makers. But national positions also appear to be informed by several stakeholders, including representatives from industry. The Netherlands offers an example here: the Dutch official who participates in the Council Working Party regularly consults with a so-called ‘Commission of 8’, which counts among its members – apart from various legal experts – some corporate lawyers from the most prominent multinationals. It is likely that a similar form of consultation is active in other Member States. This means that the influence of business interests in this case is (contrary to what the literature suggests) not entirely controlled by the EC and the EP. In bypassing these EU lobby gatekeepers, business appears also to have direct access to the representatives of their home country in the Council Working Party, the body that drafts the Council proposals on this issue. The epistemic community of patent law experts appears to have a low profile in the high politics of this story, but to be very present in its ‘low politics’, inside the engine rooms of (national and transnational) working groups, expert panels and conferences. Inevitably, they follow the course of decision-making. First, we saw them working on the EPLA proposal in the subgroup of the Working Party Litigation. Then, when EPLA was derailed, they resurfaced in an expert group of a Council Working Party. However, we have to be careful not to underestimate the influence of the patent law experts. They have been very instrumental in constructing EPLA and its rules of procedure. After the stranding of EPLA, these designs were not just discarded. EPLA became the standard against which the qualities of all Community proposals were measured. In that sense these patent law experts had considerable influence on defining the parameters for the design

of a Community Patent Litigation arrangement, thus solving issues that otherwise might easily have been stumbling blocks to an agreement. Their involvement is justified by their commitment to an improved patent jurisdiction in Europe and is probably –especially where the EPLAW lawyers are concerned - also motivated by the interests of their multinational corporate clients.

The second theoretical issue concerns the agenda-setting mechanisms. The data available make it hard to reach firm conclusions on this. It is frequently unclear who initiated a particular initiative and why: the initiative to revive the Community solution in 1997 is a good illustration. Other data that allow an inside view, such as the Pagenberg report on the torpedoing of the EPLA, need further confirmation. However, something may be said about the ‘high politics’ and ‘low politics’ distinction mentioned in the literature. The first initiatives on international or transnational patent policy seem to have been mainly the product of ‘high politics’. Patent experts from business and legal practice seemed marginally involved in and even opposed to such proposals. In the 1980s, as explained above, patents became vitally important instruments in global industries and patent legal practice acquired an international outlook. This can be inferred from the formation of an international judicial network, a European organisation of patent lawyers and the involvement of this epistemic community in the ‘low politics’ of the Working Groups. Although the input of the patent legal experts has increased, the centre of gravity still seems to remain in the sphere of ‘high politics’, probably because of (French) geopolitical considerations.

This history would seem to defy simple schemes of agenda setting. There is no simple sequence of issue initiation, specification, expansion and entrance. At best, it is a series of such sequences, complicated by two peculiar elements. First, there is an alternation between the European and the Community solution, so that two mechanisms of agenda-setting are at work, sometimes simultaneously. Secondly, the subsequent proposals in both avenues seem to inform each other. There is a kind of learning process in time and in comparison. One feels that over the years proposals are fine-tuned to such an extent that they cannot fail. Nevertheless they do fail, and frequently. This history may be read as a catalogue of how international and transnational agenda setting and decision-making can fail.

Some examples, such the failure of the CPC in 1962, are easy to understand. Others, like the torpedoing of EPLA in 2006, are more mystifying. The basic mechanism underlying the more recent failures seems to be a balance of power between the two opposing groups of stakeholders (France and European institutions vs Germany, UK, supported by their patenting industry and legal experts). This suggests that transnational rule making, proceeding under similar conditions, is likely to have a long (if not unsuccessful) ‘issue career’.

References

The Quest for a Transnational Patent System in Europe


