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Games Multinationals Play in the
European Patent System

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GAMES MULTINATIONALS PLAY IN THE EUROPEAN PATENT SYSTEM

*Alex Jettinghoff**

Abstract

The paper explores the ways in which multinationals try to make the European patent system work for them. Creative patenting and strategic litigation are established and successful tools of these Repeat Players. However, during the struggle about the formation of an EU patent system they appear to have met their match in some other Repeat Players, especially some powerful Member States. The role of patent legal experts is highlighted.

Key words

Multinationals and European patents, patenting strategies, strategic litigation, European judicial cooperation, Unitary Patent & UPC, patent legal experts

1. 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 U.S. started to place 'property-rights' at the centre of its economic policy of industrial innovation.¹ Subsequently, economic globalization has made patenting a key competitive instrument of many multinational corporations, as in e.g. the chemical, pharmaceutical, automotive and electronics industries. Granted patents can be worth billions and thus invite conflicts between competing corporations, resulting in an increasing volume of litigation. In Europe, interest in patenting and patent litigation has experienced a similar increase, creating rewarding opportunities for scholars and a variety of legal practitioners.

Multinationals (being the exemplary Repeat Players²) will be inclined to exploit all opportunities current patent regimes around the world have to offer to exploit their patents (or to attack those of others). The focus of this paper is the games multinationals play in the European patent system. The current patent system in Europe offers interesting opportunities for such games.

Acquiring a patent in Europe probably is not very different from procedures elsewhere. Within the framework of the European Patent Convention (EPC) of 1973, a corporation that wants an invention patented can apply for

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1 Jaffe 2000.

2 Galanter 1983, or more appropriately 'artificial persons': Galanter 2006.

the grant of a patent, which is valid in the Contracting States that have joined the EPC. The application is directed at and thoroughly scrutinized by the administrative section of the European Patent Organization (the European Patent Office – EPO – in Munich). The EPO conducts a ‘search’ and ‘examination’ to establish whether the claimed invention is new (there is no ‘prior art’), whether the invention involved an inventive step and is susceptible of industrial application. Within a period of nine months anyone can oppose the validity of a granted European patent (on a limited number of grounds) with one of the Opposition Divisions of EPO. When the Opposition Division finds the opposition admissible, the patentee can react to the grounds of opposition and even amend his patent. Hearing of the parties may take place before a decision is made. The patent is then either maintained (amended or not) or revoked.

A European peculiarity concerns the litigation phase. When a patent is granted, the firm obtains a ‘European patent’. It is a so-called ‘bundle patent’, which means that the patent is valid in all Member States of the European Patent Convention that the patentee has designated during its application for the patent. The validity of patents and patent infringement both have to be contested in national courts.³ An important consequence of this system is that the examination of validity or infringement issues are the exclusive jurisdiction of the national courts of the countries where the patent is registered. Since there is no final European judicial authority, for patentees (or those that want to challenge a patent) this often means that they have to start litigation in multiple jurisdictions to protect their patents or to contest the validity of those of competitors. This system appears to make little sense in a common market and, indeed, a unitary patent and jurisdiction within the framework of the EU has been in the making for decades. Also this trajectory of European legislation offers an opportunity for big business to try to mend the new system to their preferences.

The Munich patenting procedure, the patent courts in the countries of Europe and the EU legislature in Brussels are legal arenas where particularly multinational corporations throw their weight around, consolidating and promoting their considerable interests. They will be observed using the possibilities of the system to the hilt, displaying all the capabilities Galanter attributed to ideal typical ‘Repeat Players’. Although these practices are often only known to insiders, some research is available that makes these ‘games’ a little more transparent to a wider audience. In essence this is a small study of the power of multinationals, its potential and its limits within the three arenas mentioned: the

3 A patent can be challenged before a national court, during the EPO opposition proceedings or after the patent is maintained. When an EPO opposition procedure is in progress, some courts are obliged to stay proceedings until the EPO procedure is concluded (e.g. Germany). In other countries the court has discretion to allow validity proceedings to proceed or to stay proceedings pending opposition in Munich (e.g. United Kingdom, Netherlands).

patenting procedure in Munich, the patent courts in the countries of Europe and the EU legislature in Brussels.

2. Sources

This paper draws mainly on three sources. The first is a report from the European Commission of its investigation into the patent practices in the pharmaceutical industry.⁴ The second is a research paper on the caseload of the Patent Section of the District Court in The Hague (Netherlands) and on the outlook of its judges, of patent lawyers and litigating firms on the work and settings of the Patent Section.⁵ And the third is a reconstruction of the history of the long quest for a European Union patent system.⁶

3. The patenting game

Understandably, corporations are very secretive about operations that they consider to be of strategic importance. This normally means that information concerning their patenting practices is hard come by, unless on some rare occasion insiders or authorities reveal them. Some years ago, one such occasion occurred, when the European Commission published an investigation into patent practices in the pharmaceutical industry. Their report sheds some light on how big pharma tries to make the most of the patenting procedures of the European Patent Organization. These findings will be reported shortly, but first some elementary information on how competition in this industry works.

War in pharma land

The pharmaceutical industry can be divided into two sections. A larger part of the industry consists of 'innovative' ('originator', 'brand') drug producers, i.e. corporations that develop and exploit drugs they have invented. To this category belong some household names as Pfizer, GlaxoSmithKline, Novartis, Roche and various others.⁷ They form a group of giant global corporations with yearly sales ranging from 60 to 30 billion dollars. For these firms, patents have become of eminent importance. Patents are temporary monopolies, granted and protected by the government, for the exploitation of inventions such as drugs in exchange for disclosure of the invention. The reasoning behind this institution is that patents allow the inventors to regain the expenses made for their invention, in exchange for sharing its secrets. Usually, the fact that big pharmaceutical firms focus on ailments that have a wide prevalence (blockbusters) is ex-

4 European Commission 2009.

5 Jettinghoff 2010. The research project was part of a larger project commissioned by the Dutch Council for the Judiciary, concerning five instances of judicial specialization.

6 Jettinghoff 2011.

7 Source: Fischer & Breitenbach 2007, 18.

plained by referring to the huge developing costs.⁸ The hunt for blockbusters by means of mergers and acquisitions is also the driving force behind the consolidation of the industry, resulting in the circle of pharma giants.

A smaller part of the industry consists of so-called 'generic' firms, i.e. corporations that produce drugs that have run out of patent. They also are global corporations like Teva, Sandoz, Merck and Ratiopharm.⁹ Their total sales are generally a factor 10 smaller than those of the 'innovative' firms.

According to insiders the competition in this industry is rather fierce, sometimes likened to economic warfare. The steps to be made in the development of new drugs, like research, scientific publications, clinical trials, registration, patenting and marketing, appear all as frontlines for competitive contestation – not only between innovative firms, but also between innovative and generic firms.¹⁰ Here we will consider the way in which patenting can be an instrument in this clash of giants.

Patenting tricks of the trade

Of course, the big pharma corporations use the European patenting facilities in a regular way, as it was intended, but more than occasionally they try to go beyond that. How they do this has been revealed in some detail in 2009 in a sector inquiry by the DG Competition, a department of the European Commission, the EU bureaucracy.¹¹ One ploy is the so-called 'patent thicket' and is used by innovative firms to protect their patents against an invalidation attack from generic firms.¹² This is done by applying for a great number of patents for effective ingredients that come close to the one that is patented or that add something to the base patent (different dosages, other applications or additives). This makes the outcome of the invalidation attempt of the generic firms insecure.

Another ploy is called the creation of 'divisionals', i.e. when an applicant splits off a number of narrower patents applications from the parent patent application. When it is created, the divisional can stay alive on its own. Even when the parent application is refused, each individual divisional application has to be assessed.¹³

A last example of the patent ploys used by the innovative industry is called 'evergreening' (see the figure below).

8 In reality these costs are dwarfed by the recourses spent on marketing.

9 Fischer & Breitenbach 2007, 25.

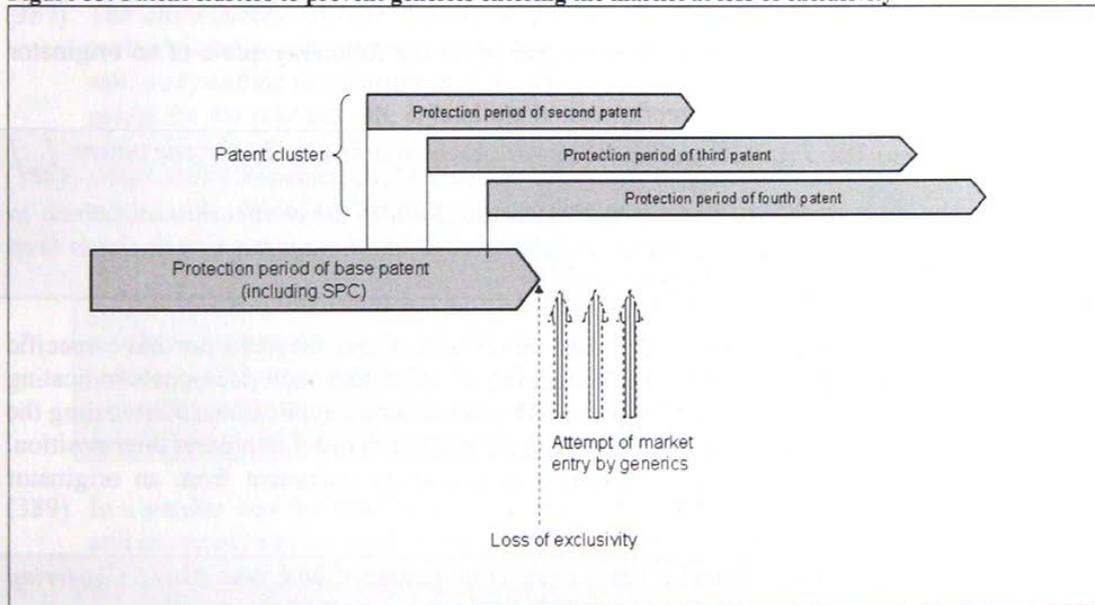
10 See generally: Goldacre 2012.

11 European Commission 2009.

12 Op.cit., 185.

13 Op.cit., 192.

Figure 53: Patent clusters to prevent generics entering the market at loss of exclusivity



Source: Pharmaceutical Sector Inquiry

This means that when a drug begins to run out of patent, the patentee tries to prolong the duration of the monopoly by giving a twist to the original effective ingredient in the drug (different dosage, another application or an additive) and then trying to secure a new patent for it. Of course, such a move, if successful, stands to earn the company a great deal of money. Also it is detrimental to the generic companies who could have taken over production (and to patients who otherwise would have to pay less for the drugs). Consequently, the generic producers tend to go into opposition with the Board of Appeal in Munich and if this fails, usually litigation is the next step.

Similar tactics seem to be used in other parts of the world, but not always with success. In 2013 for instance, the Indian Supreme Court supported an earlier decision to deny a patent for a cancer drug (Gleevec) applied for by the Swiss innovator Novartis, reasoning that that the claimed patent lacked novelty and enhanced efficacy.¹⁴ Patient associations in India applauded the decision, stating that this meant that generic firms were allowed to continue to sell the drug for less than one-tenth of the price Novartis normally asks.

Opposition

A patent expert from a multinational food producer explained that computers constantly monitor the EPO data about new patents in their sector. When patents come dangerously close to a patent of the firm, the new patent is attacked in the opposition procedure. Approximately 10% of the patents

14 See: <http://ipkitten.blogspot.nl/2013/04/public-health-and-ip-in-india-novartis.html>.

granted by EPO are opposed. The prevalence of opposition increases with patent value and in areas where large patent portfolios are held.¹⁵ These are indications for a strong presence of multinationals in the opposition procedures. This looks like an interesting topic for further exploration.

4. Playing the court facilities

From the perspective of the multinational corporations patent litigation is often a 'global' campaign, managed by a team at corporate level. This team decides on the strategy to be followed, concerning the argumentation and the selection of jurisdictions.¹⁶

Strategic litigation

Selecting a jurisdiction needs special attention in Europe, because – as mentioned before – for decades there has been no unitary patent jurisdiction available. Patents have been defended or challenged in national jurisdictions. This condition has offered opportunities for forum shopping, depending on the requirements of the case.

When the chances for winning the case look good, a few national jurisdictions with a large national market and with a judiciary of good reputation are selected (usually Germany, UK, France and the Netherlands among them).¹⁷ The idea is that success in these jurisdictions is enough to scare off infringements in other countries. Sometimes, litigation is started in succession (a kind of 'litigation wave'), in the hope that a positive outcome in the first case will have a positive influence on the next ones. When the outcome is more uncertain, one can choose a small market as a test case or opt for a jurisdiction with a slight bias (e.g. pro patentee or pro domestic corporations) that might favor the plaintiff. Also the need for speed can inform the selection of countries, because not all countries provide facilities for speedy procedures.¹⁸

In the case that a competitor accuses a corporation of patent infringement, the latter can choose for a preemptive action. A famous example is the so-called 'Italian torpedo'.¹⁹ The clue of this action is the slow pace of some jurisdictions, particularly Italy. The corporation files for a declaration of non-infringement with the appropriate court in Italy. This case is then expertly procrastinated and in the mean time the courts of other countries, where infringement proceedings can be initiated, have to stay proceedings until the Italian

15 Harhoff & Reitzig 2004.

16 Jettinghoff 2010.

17 The sector inquiry of DG Competition reports an average of 5 countries.

18 Speedy proceeding are available by France and the Netherlands.

19 Franzosi 1997, 2002.

court has reached a decision. In this way the cases in other countries can remain undecided for years on end and thus ‘torpedoed’.

Unanimously, industry (multinationals as well as SMEs) and patent legal experts deplore the lack of a unitary patent and patent jurisdiction in Europe. The system is not only expensive for its users, it is also possible that judges in different countries have come to opposing conclusions in the same case. To prevent this risk, the European patent judges have done what judges do in such circumstances: they have co-operated.²⁰ Starting in 1982, the European patent judges come together in Munich every year to discuss difficult cases to harmonize their decision-making. A side effect of these meetings has been that the European patent judges have developed excellent international relations. They are informed about each other’s decisions and if cases are submitted simultaneously in various jurisdictions, contacting colleagues is not uncommon. These judges have even founded an association (‘International Patent Judges Association’) that was to play an active role in the formation of the unitary patent and patent jurisdiction.

Enforcement

A caseload analysis of the Patent Section of the District Court in the Hague revealed a relatively large number of summary proceedings on the docket, almost 75% of them filed by the same Italian plaintiff and Dutch law firm.²¹ The judges, asked about these cases, dismissed them as irrelevant – mainly because they often ended with an in absentia verdict – but had heard that an electronics firm was behind these cases. The Dutch electronics firm was not hard to trace and its patents and standard department happily confessed to employing this Italian firm, in order to protect their rights (based on a standard for sound technology) against piracy.²² This Italian entity raided electronics fairs in Amsterdam and searched containers in Rotterdam, looking for unlicensed products using this particular technology. Detected equipment was seized and - after filing a case - released if the pirate had agreed to a license or otherwise – after acquiring a court order - destroyed. The in-house lawyer of the electronics firm was very satisfied with the revenues that resulted from these activities.²³

20 Breier 1983, Brinkhoff 1997.

21 Jettinghoff 2010.

22 This can be done on the basis of the EU Anti-piracy Regulation of 2003.

23 This might be an example of in-house counsel in the role of entrepreneur, a category suggested by Nelson & Nielsen 2000.

5. Changing the rules: the EU solution

The story of the Community patent system cannot be easily told in a condensed form because it covers a long time, knows a dialectical development and is complicated by behind-the-scenes bureau-political maneuvering. For more than forty years, efforts have been made to establish a European Community patent and patent jurisdiction. Time and again the initiative stranded and time and again the plan was rekindled. One might conclude that international business had little influence on this dossier, but matters are not that simple.

The plans for a European patent (the current 'bundle patent') and a Community patent have been in competition since the founding of the European Economic Community. It appears that particularly France has had its hands on the switchboard. On the outset of the Common Market in 1958, the European Commission had suggested the creation of a Community patent system. 'Industrialists', keen on better patent system, reportedly endorsed this initiative.²⁴ The resulting draft of the Community Patent Convention (CPC) in 1962 met with fundamental disagreements between Member States. An important issue was that some (notably France) were adamant that the system should be limited to the countries of the EEC, while others (notably the Netherlands, mindful of its Anglo-Dutch corporations Shell and Unilever) insisted the system to be open to European countries that were not participants in the Common Market (members of the European Free Trade Agreement (EFTA)). Lacking unanimity, initiatives along this track came to naught and the prospects for a European patent system remained bleak until 1968.

A new window opened as an indirect result of the plans for a Patent Cooperation Treaty (PCT) looked to become successful. This worldwide treaty (drafted under strong US 'guidance') 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 hitch 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 applications coming from the PCT system without having the facilities to examine patentability in order to filter these PCT applications. This prospect made the French government bolt into action, to ensure that PCT applications would be examined by a European Patent Office before they would be granted. It took up the old CPC-track and solved earlier problems by rallying sufficient support for a 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), which could be joined by European

24 Kranakis 2007.

Community Member States and EFTA states alike, and (2) a proposal for a Community Patent Convention (CPC) on top of that EPC, to arrange for a common patent for the Community states only.

The EPC came into force in 1977. In the mean time, 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.²⁵ That was a crucial moment for the fate of the Community patent regime, because the alternative - more intergovernmental – patent regime quickly started to become entrenched. Within a decade, more than half of the patent applications deposited in Europe were addressed to the EPO, bypassing the national patent offices.

A consequence of this entrenchment was that the forces around patent practice in Europe developed into two opposing coalitions. On the one hand we find the champions of a EU-solution. First among these is France, supported by the EC (and later the EP).²⁶ The motives of the European institutions seem rather transparent, because after all the EU is their mission. The motives of France however are not so transparent. Why has it pursued this agenda over so many years with such tenacity? It has always presented itself as a principled champion of the Community solution. One suspects an ulterior motive, but can only guess about its nature. The data suggest that the European patent system was diverging too much from the French geopolitical strategy to give the Community (perceived as extension of France) a strong position in the world and especially in relation to the United States. This motive surfaced earlier at the occasion of the PCT negotiations and probably is still be active.

On the other hand we find important patent countries such as Germany, the UK and the Netherlands (supported by industry and patent law experts), clinging to this established European patent system and making the promotion of a Community patent system an uphill battle.²⁷ The motives of this EPC coalition

25 An agreement was reached, but two of the nine Member States eventually did not ratify the convention (Denmark and Ireland because of constitutional objections). Cf. 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 consequently their bi-national corporations were safe.

26 The best window of opportunity for this group emerged in 1973 and during the Luxemburg conferences just mentioned.

27 To the frustration of this coalition, 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 a tandem of French and EC policy operators. The bureau-political antics displayed by these players are – if true – astonishing (if not hilarious). Fans of cloak-and-dagger stories in EU politics will enjoy: Pagenberg 2007. This development

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seem fairly straightforward: they demanded serious improvements on the existing system or else.

This struggle seems to have run its course in 2012 when an Agreement on a Unified Patent Court was signed. Before this happened, several major obstacles had to be skirted. One important issue was the translation costs of a Community patent. EU-law requires that all official documents are available in all the languages of the Member States. Of course, this would make a Community patent very expensive. After a failed attempt in 2003, the advent of the Lisbon Treaty agenda of the 'knowledge economy' offered a new opportunity. A new draft agreement was advanced for consideration in the Council in early 2009.²⁸ As insiders had hoped, the Council 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 in special regulation. The proposals of the Commission for a language regime presented on 1 July 2010 met with fierce opposition from Spain and Italy. They were outraged by the proposal that the Community Patent system would work according to the language arrangement of the (EPC) 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 for a unanimous decision failed in November 2010. In despair, a group of 12 countries decided to opt for the new possibility of 'enhanced co-operation' under the Lisbon Treaty, which enables some Member States to implement the new patent regime, while others may follow later. In the mean time, all other Member States except Spain and Italy have joined the original 12.

A further delicate issue was the role of the Court of Justice of the European Union (CJEU). The Community coalition demanded a full involvement of the EU jurisdiction in patent litigation, i.e. of the CJEU. This was absolutely unacceptable for multinational industry and patent legal practice, because they had some experience with its involvement in EU trademark law and were not impressed by the results. In extremis, after many skirmishes, a shaky compromise was made on this issue.²⁹

A last sticky issue was the seat of the Court of First Instance. Major contenders were Munich, London and Paris. True to form, also this issue was resolved by compromise: the central division of the Court of First Instance will

gave the proponents of a EU-solution a new opportunity for action, but now they had to reckon with the demands of Germany and the UK.

28 Council Working Document 7928/09.

29 The preamble of the Agreement now states that 'the Unified Patent Court must in particular cooperate with the CJEU in properly interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Article 267 TFEU'. So it seems to depend on the Court of First Instance or the Court of Appeal in Luxembourg whether the CJEU will be involved or not. Council 16351/12.

have its seat (surprisingly) in Paris, with specialised sections in London (human necessities and chemistry + metallurgy) and Munich (mechanical engineering, lighting, heating, weapons, blasting). The Court was supposed to start on January 2014, but this has been delayed.

What about the influence of multinational industry? Both big industry and SMEs have made their preferences known to decision makers at all levels. The European Commission has organized hearings for this purpose and has harvested numerous reactions on these occasions. Multinational industry was very vocal, not only themselves but also by means of their organizations or their international law firms. Their preferences, especially when in agreement, seem to have pulled considerable weight with the transnational drafters and decision-makers.³⁰ We find the preferences of industry and patent practice more or less translated especially into the language regime, the position of the CJEU and the assurance of the expertise of the judges. But these preferences had to be squared with the demands of powerful Member States (like France) and EU institutions, which have different objectives than industry. The final compromises, e.g. about the rules of procedure, are still in progress.

6. Concluding remarks

Multinational firms may not account for most of the patents granted or of patent litigation, but as frequent users they make a big imprint on the patent system in Europe.

In patenting, the 25 top patent applicants are all multinationals of household-name status. And they seem most likely to use the opposition procedure to protect their patents. The use made of the patenting system by the innovative pharma industry seems an extreme case, not so much gameplay as endemic to the industry, connected to its business model. The evergreening tactics are reported to serve a marketing strategy aimed at the successful promotion of brand loyalty for existing blockbuster drugs. Apparently, this marketing strategy brings in more revenue than is expected from investing in research and development.³¹ That is not to say that other industries are necessarily more scrupulous, maybe they just have different business models.

In patent litigation, big corporations offer an ambiguous picture. In the 599 patent cases decided during 2002-2007 by the Dutch Patent Court, 27% of the plaintiffs and 17% of the defendants were big corporations.³² But the mul-

30 Also some national positions appear to be informed by several stakeholders, among them representatives from industry. The Netherlands offers an example. The Dutch official that 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. Jettinghoff 2011.

31 See: Light & Lexchin 2012; they report a ratio of basic research to marketing of 1:19.

32 Jettinghoff 2010.

tionals seem to dominate the image of the Court. That was my impression when I was invited to witness a hearing in an *Actavis vs Novartis* trial. In attendance were a big audience (for a private law hearing), bigwig lawyers and technical experts, simultaneous translation in English of the hearing (conducted in Dutch), two of the three judges were lawyers as well as chemical engineers, hearing lasted a whole day – this was a well furnished hearing indeed. One of the judges whispered that the stakes of this trial might be half a billion. My impression was that the judges had selected this case to show me the real business of the patent Court.

In the quest for a Community patent and patent jurisdiction, big business was not among the decision makers. The Member States and the EU institutions, serving in this endless dossier as motors and brakes, dominated the whole story. However, big business preferences seriously informed decision-making, although not always in the desired fashion. The new patent system in Europe will not end the playing of litigation games by multinationals. The complexity of the judicial machinery that has been created probably will offer ample opportunities for the same and also for new games.

In conclusion, one suggestion for further research: the patent legal experts. They are a collection of patent attorneys, in-house counsel, lawyers, judges and professors. They are active in patenting (patent attorneys and lawyers), in litigation (in-house counsel, lawyers, judges and professors) and in European legislation (all) and have definitively an international outlook. Their presence around the European political arena was an interesting surprise. The patent law experts have a low profile in the high politics of this story, but are very present in its 'low politics', inside the machine rooms of (national and transnational) working groups, expert panels and conferences. We have to be careful not to underestimate their influence. Especially, these patent law experts had considerable influence in defining the parameters for the design of a Community Patent Litigation arrangement, thus solving issues that otherwise might easily have been stumbling blocks for an agreement. They constitute a most interesting epistemic community.

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