

Kluwer Patent Blog

‘Unified Patent Court could create true checks and balances in European Patent law’

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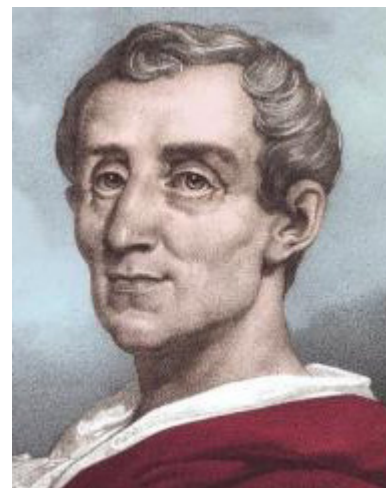
The creation of the Unified Patent Court (UPC) means that there will finally be a judiciary to control the very strong executive power of the European patent system, the European Patent Office, Jens Schovsbo, [Professor at the Centre for Information and Innovation Law of the University of Copenhagen](#), told Kluwer IP Law in an interview.

According to Schovsbo, the need for better judicial control in the European patent system is twofold. ‘Firstly, the institutional design of the European patent system provides for a weak legislator, a very strong executive – the European Patent Office (EPO), whereas a normal, central and effective judiciary is missing completely. It doesn’t necessarily mean that things go bad, but the usual constitutional checks and balances are lacking.

Secondly, the practice is that EPO decisions are controlled piecemeal. Only national courts can judge on the validity of patents which have been granted by the EPO, within their own national jurisdictions. UK courts, German courts, Dutch courts make decisions, but there is no single voice forming. The UPC will be able to overrule decisions at a European level, and can have a watch-dog function vis-à-vis the EPO.’

This doesn’t mean at all that checks and balances within the EPO, particularly the independence of the Boards of Appeal from the EPO management, are redundant, Schovsbo thinks. He is very interested to see how the three main judicial powers in the European patent field, the EPO, the UPC and the Court of Justice of the European Union (CJEU) will influence each other in the upcoming years.

‘It has been tried to keep the CJEU outside the future patent system, but it will still have competence in areas of EU law including the Biotech Directive. It will be interesting to see whether the CJEU – which is known for being activist and policy making – will seek to assert broader competences than the ones envisaged in the set-up of the system.



The French political philosopher Charles Montesquieu (1689–1755) developed the separation of powers theory

Also a working relationship between the UPC and the EPO must be found. The system has been designed with great autonomy for the UPC and the power to overrule decisions from the EPO relating to patentability etc. Even though the hierarchy is clear on paper – with the UPC as the central decision maker and watch-dog – it will take time for clear positions to develop in the UPC system. As seen from a policy point of view changes that affect the power of institutions will always cause problems’.

Schovsbo thinks it will probably take ‘a generation’ before a truly new unified patent system emerges and the different actors have found their place. Will European patent law improve due to the UPC? ‘That depends very much on the time perspective one has’, is his cautious reaction, despite having stressed the importance of a stronger judiciary. Schovsbo has always been in favor of the idea of a European patent court, but he is very critical about the way the UPC has been designed. ‘It is far from what I had in mind. I don’t think it is good to have so many local and regional divisions. It will certainly not help simplifying and streamlining judicial decisions and creating a truly Unitary Patent system.’

Moreover, he agrees with critics who say that the system is pro-claimant and pro-patent holders, and that the swift procedure of the UPC will cause [problems for defendants](#). Only big companies will be able to respond quickly to claimants, he thinks, but for SMEs this will generally be very difficult, if not impossible.

Patent litigation under the UP system will most likely increase and so will the costs of administering the new patent system post grant, Schovsbo says: ‘The costs of running a system logically increase when the number of rights goes up. The Unitary Patent system gives patent holders many extra rights, but also the need to protect these and the need to administer and navigate them. There will most likely be many extra cases and establishing “safe zones” will be more difficult. We’ll have to wait and see how attractive the industry thinks this all is. Who really needs patent protection in 25 countries? Trolls, attracted by the possibility of obtaining pan-European injunctions, may be encouraged to try their luck.’

The UPC will have an extremely specialized jurisdiction and its judges are likely to become highly specialized in patent law and patent litigation. Because of the often very complex technological issues underlying patent disputes, patent law is a natural subject for a specialized court.

No doubt huge benefits are gained by subjecting patent law to a specialized court. Experiences in the past, for instance with the Court of Appeals for the Federal Circuit (CAFC) in the US, have shown however that the specialization comes at a cost. By its design the UPC will be biased towards technology-based values, according to Jens Schovsbo. He thinks it is important to recognize this risk and to mitigate its effects by making sure that the training of UPC judges will not only cover technicalities and patent law, but touch on broader ethical and cultural issues as well.

‘In its functioning, the Court should be aware of the risk of tunnel vision. Finding ways to engage in a dialogue with broader circles and not just patent specialists is going to be important. The current European patent “mess”, with judges in the UK and Germany making different decisions, has certain advantages. Courts influence each other and help develop jurisdiction in this way. It is “work in progress”. Under the UPC, this single court will create a whole new patent culture on top of the current systems which have developed over many years. It is important that the UPC considers national experiences as a pool of knowledge and lets the outside world know how it is

thinking.’

Schovsbo is one of the contributors to the book [Transitions in European Patent Law – Influences of the Unitary Patent Package](#).

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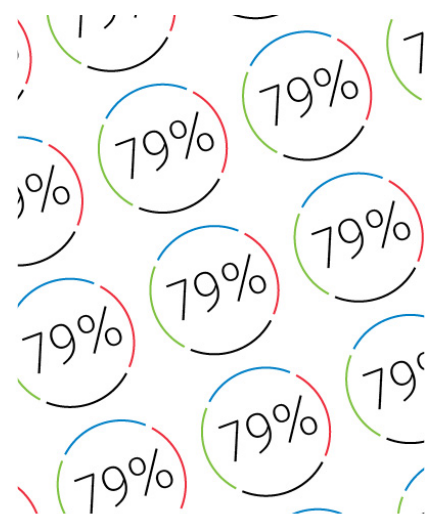
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