

Conclusion

What can be expected from the Opinion of the ECJ? A clear affirmative answer in favour of compatibility of the present Agreement is highly unlikely in view of the persistent questions and serious doubts concerning the lack of judicial EU control over the EPO granting procedure. Beyond this the controversial legal basis between the Member States about the court system as a whole, and particularly with respect to the combined jurisdiction for EU and EP patents will most probably be addressed by the Court and can hardly be resolved to the satisfaction of all Member States.

What then? If the EU patent is still the wish of a large part of European industry, then one should concentrate on finalizing the EU Patent Regulation first. Only afterwards – since the Parliament wishes to discuss a number of questions there – will it be worthwhile to think about an approach by which the court system could be “downsized” to its real needs, namely to provide a uniform answer for the Internal Market in case of infringements of an EU patent. While the functioning – and the interest of the users of this system – are being tested, things should remain as they are with respect to EP patents which can continue to be litigated before the national courts, with an option to also use the new EU courts, if the ECJ shows a way how this can be done without violating the Treaty. But there must be an option in particular for SMEs to continue using the familiar and less complex and probably less expensive national courts. It can be anticipated that many of the surprising contradictions between the Member States which were voiced during the hearing on basic legal issues will slowly dissipate once all parties see that their concerns have been taken care of and that not one class of users is put into a less favourable position than it had before. For the moment the “patent bundle” tied between the Regulation and the Agreement has proven too heavy to find an easy solution.