DOI: https://doi.org/10.24833/0869-0049-2024-1-44-56

Исследовательская статья
УДК: 341.3
Поступила в редакцию: 09.02.2024
Принята к публикации: 18.03.2024

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К ПЯТИДЕСЯТИЛЕТИЮ ЕВРОПЕЙСКОЙ ПАТЕНТНОЙ КОНВЕНЦИИ (1973–2023 гг.)

ВВЕДЕНИЕ. *В статье представлен исторический обзор многолетнего процесса становления механизмов судебной защиты патентных прав, представляемых европейским патентом, который начался еще в 1950-х гг. и завершился началом деятельности Единого патентного суда в 2023 г. Показано, что создание подобных механизмов в пределах Евразийской патентной организации и Евразийского экономического союза может потребовать иных подходов из-за возможной централизации системы правовой охраны объектов промышленной собственности в рамках Евразийской патентной организации.*

МЕТОДЫ И МАТЕРИАЛЫ. *В качестве исследовательских материалов для данной статьи были взяты научные труды зарубежных и российских ученых и должностных лиц Европейского патентного ведомства и Евразийского патентного ведомства, правовые акты международного и регионального уровней и их проекты. Методологическую основу данного исследования составили общенаучные и специальные методы.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *В статье предлагается периодизация возникновения и становления механизмов разрешения споров по европейским патентам, раскрываются причины и предпосылки создания единой патентной судебной системы в Европе и намечаются направления дальнейших исследований в части изучения перспектив создания аналогичных механизмов в Евразийском регионе. Некоторые выводы, сделанные в настоящей статье, могут способствовать увеличению числа таких исследований.*

ОБСУЖДЕНИЯ И ВЫВОДЫ. *Европейский союз накопил существенный опыт в процессе создания механизмов разрешения споров по европейским патентам. Уникальность Единого патентного суда представляет особый интерес, когда речь идет об изучении перспектив создания судебных или квазисудебных механизмов разрешения патентных споров в рамках Евразийской патентной конвенции. Однако тенденции развития Евразийской патентной организации и возможная централизация региональной системы охраны объектов*

промышленной собственности может означать, что евразийский аналог Единого патентного суда может получить иную институциональную форму.

КЛЮЧЕВЫЕ СЛОВА: *Единый патентный суд, Европейский патентный суд, европейский патент, единый патент, евразийский патент, Евразийский суд по интеллектуальным правам, Евразийский патентный суд, патентные споры в Европе*

ДЛЯ ЦИТИРОВАНИЯ: Касьянов Р.А., Язбердиев И.М. 2024. К пятидесятилетию Европейской патентной конвенции (1973–2023 гг.). – *Московский журнал международного права.* № 1. С. 44–56. DOI: https://doi.org/10.24833/0869-0049-2024-1-44-56

Авторы заявляют об отсутствии конфликта интересов.

INTERNATIONAL ECONOMIC LAW

DOI: https://doi.org/10.24833/0869-0049-2024-1-44-56

Research article
UDC: 341.3
Received 9 February 2024
Approved 18 March 2024

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TO THE 50TH ANNIVERSARY OF THE EUROPEAN PATENT CONVENTION (1973-2023)

INTRODUCTION. *This paper reflects historical overview of long-standing emergence of mechanisms of judicial protections of patent rights conferred by European patens which begun even in 1950-s and ended with start of operations of the Unified Patent Court in 2023. The paper demonstrates that the establishment of the similar mechanism within the Eurasian Patent Organization or Eurasian Economic Union may require different approaches because of possible centralization of industrial property protection under Eurasian Patent Organization.*

METHODS AND MATERIALS. *The research materials for this paper are scientific works of foreign and Russian scientists and officials of the European Patent Office and the Eurasian Patent Office, legal acts of international and regional levels and drafts thereof. Methodological basis of this research are general and special scientific methods.*

RESEARCH RESULTS. *This paper suggests periodization in emergence and evolution of dispute resolution mechanisms for European patents, reveals rationales for establishment of the unified patent judiciary in Europe and outlines directions for further research of prospects of creation of the similar mechanism in the Eurasian region. Some findings made in this article may facilitate the growth of such researches.*

DISCUSSION AND CONCLUSIONS. *European Union (EU) accumulated broad experience in establishment of the dispute resolution mechanisms for European patents. Due to uniqueness the Unified Patent Court is of great interest when researching prospect of improvements of the patent judiciary and quasi-judicial mechanisms under the Eurasian Patent Convention. However, trends of developments of the Eurasian Patent Organization and possible centralization of the regional protection of industrial property may testify that a Eurasian analogue of the Unified Patent Court would have a different institutional form.*

KEYWORDS: *Unified Patent Court, European Patent Court, European patent, unitary patent, Eurasian Patent, Eurasian Intellectual Property Rights Court, Eurasian Patent Court, patent litigation in Europe*

FOR CITATION: Kasyanov R.A., Yazberdiev I.M. To the 50th Anniversary of the European Patent Convention (1973–2023). – *Moscow Journal of International Law.* 2024. No. 1. P. 44–56. DOI: https://doi.org/10.24833/0869-0049-2024-1-44-56

The authors declare the absence of conflict of interest.

1. Introduction

In 2023, the key international treaty under which patent law is unified in Europe, the European Patent Convention (EPC), celebrated its fiftieth anniversary. Furthermore, the much-anticipated Unified Patent Court (UPC) became operational on June 1, 2023. The development of a common patent court system for the EPC countries and the EU member states has been the subject of long-standing expert and academic debate. The European experience is relevant for the EAEU and the countries of the Eurasian Patent Convention (EAPC), which, in turn, celebrates its thirtieth anniversary this year. Grigory Ivliev, the 4th President of the Eurasian Patent Office (EAPO), has consistently advocated the creation of a Eurasian Intellectual Property Rights Court (EAIPRC). In 2023, this issue was officially included in the agenda of the Eurasian Patent Organization (EAPOrg) and reflected in the EAPOrg Development Program until 2028[1].

It is worth noting that at the moment there is no clear answer to the question of the necessity of establishing the EAIPRC within the framework of the EAPOrg. Some believe that it will have a positive impact on cross-border trade within the EAEU, while others find more disadvantages than advantages. However, one thing is certain – with the adoption of the EAPOrg Development Program, the intensity of discussions and debates on this issue is expected to increase. According to the task list of the EAPOrg Development Program, the model of the Eurasian patent judiciary is expected to be developed only by the fourth quarter of 2025, while the relevant discussions are scheduled for the third quarter of 2026. In this light, it is of particular interest to study the numerous European efforts to develop a patent judiciary and the recent experience of the EU in creating the UPC.

2. Development of the patent judiciary in the EU and EPC countries

2.1. Contribution of the Council of Europe: 1949 to 1963

The European patent finds its roots in 1949, when Mr. Henry Longchambon put forward a plan (the so-called Longchambon Plan)[2] to establish

[1] Programma Razvitija Evrazijskoj Patentnoj Organizacii na 2023–2028 gody, utverzhdena na sorok vtorom (trinadcatom vneocherednom) zasedanii Administrativnogo soveta Evrazijskoj patentnoj organizacii 18 maja 2023 g. [The Program of the Development of the Eurasian Patent Organization for 2023–2028, approved on forty second (thirteenth extraordinary) meeting of the Administrative Council of the Eurasian Patent Organization on May 18, 2023]. URL: https://new.eapo.org/wp-content/uploads/2023/06/pr_2023_2028.pdf (accessed date: 08.02.2024).

[2] Report "Creation of a European Patent Office". Doc 75, 06.09.1949. URL: https://assembly.coe.int/nw/xml/XRef/Xref-XML-2HTML-en.asp?fileid=34&lang=en (accessed date: 08.02.2024).

a European Patent Office (EPO) that would issue "European Certificates for Inventions". Patent experts who studied the Longchambon Plan concluded that such an initiative would require significant changes in national laws, which were very diverse in both substantive patent law and patent enforcement. This seemed impossible at the time without a central legislative body with the power to enact a supranational patent law. Thus, the creation of an EPO (as proposed in the Longchambon plan) was out of the question, but the study of possible ways to unify and harmonize national patent laws continued [Kranakis 2007:704-705].

In 1950, the Council's Committee of Experts on Patents (CEP) was formed. The first efforts of the CEP resulted in two conventions (signed in 1953 and 1954) establishing uniform requirements for patent applications and providing for the classification of patents. The CEP then considered two more options for unifying national patent law: the first was to mutually recognize and validate national patents granted in other jurisdictions using different criteria, and the second was to unify substantive patent law and create a Unified Patent Court with exclusive enforcement powers [Plomer 2015:517]. Both proposals were rejected as they would have been too expensive and difficult. Finally, the CEP focused on harmonizing standards of patentability and the result of this effort was the 1963 Strasbourg Patent Convention (SPC). The SPC set only criteria and standards for patentability of patent applications, leaving enforcement to national laws, but it is believed that the SPC contributed to the later practical implementation of the EPC [Plomer 2015:517].

2.2. The patent judiciary in the First Draft: 1958 to 1965

With the establishment of the European Economic Community (EEC), the institutional torch of patent unification passed to the EEC, which took the initiative to draft a European Patent Convention (First Draft), published in 1962. The First Draft provided for the establishment of a European Patent Court. Conceived as a court of last instance, the relationship of the European Patent Court with the Court of Justice of the European Communities (EEC Court of Justice) remained unclear: on the one hand, the European Patent Court was possibly intended to be integrated as a specialized chamber (division, tribunal) within the structure of the EEC Court of Justice [Froschmaier 1963:896], on the other hand, the competence of the EEC Court of Justice was to be limited only to the examination of the public law aspects of the operation of European patents [Plomer 2015:517]. It is noted that a separate judicial institution competent to hear the civil law aspects of European patent disputes was envisaged [Plomer 2015:517]. Apparently, such a proposal took place, as this initiative was in line with the trends of unification in the field of industrial property in general (i. e. trademark and industrial design laws, among others), the exclusive rights to which are required judicial protection as well.

The First Draft was developed by the EEC countries, which were motivated primarily by the objectives of the Common Market – "the elimination of all economic barriers to free trade... by the introduction of a patent which would be valid in all countries of the Common Market" [Nicolai 1971:135]. But the First Draft was not only designed to supplement the Treaty of Rome (1958) as far as industrial property law was concerned; it also aimed at ensuring uniform patent legislation for several European states that were members of the European Free Trade Association (EFTA) but not part of the EEC at that time [Nicolai 1971:135]. The delegations could not agree on the nature of the European patent: the EEC countries (Benelux, France, Germany, Italy and Germany, which were also known then as the "inner six" [Kur, Dreier 2013:43-44]) insisted on a unitary and indivisible "patent particularly adapted to the conditions of the Common Market" [Froschmaier 1963:892]. The EFTA countries, led by the United Kingdom (the so-called "outer seven" [Kur, Dreier 2013:43-44]), proposed the introduction of a bundle ofpatents, which, once granted, should be divided into national patents of the patentee's choice. In addition, there was reportedly disagreement even among the inner six countries about the membership of non-EEC countries and whether a European patent should be available to be obtained by the residents of non-signatory states [Pila 2013:924]. These issues were fundamental, but not the only ones that caused conceptual differences between the delegations [Thompson 1973:54]. Thus, the First Draft became bogged down in disagreements and was shelved despite the fact that it was close to completion from a technical point of view [Nicolai 1971:140].

2.3. The concept of the "two conventions": 1967 to 1989

European cooperation on the path of patent unification was resumed in the late 1960s. In order to strike a balance between the different views on the nature of the European patent, a two-convention approach was proposed. The first (the so-called

"international convention") was supposed to be open to states outside the EEC and to deal only with the procedure for granting a patent. This is how the EPC came into being (signed in 1973 and entered into force in 1975). The EPC provides for a centralized procedure for the grant of a European patent, which once granted is treated as a set of national patents subject to national laws. The EPC was not developed as part of EEC/EU law and therefore it still formally exists outside the EU legal order.

The second convention was intended to be concluded only between EEC countries and within that territory a European patent granted by the EPO would enjoy uniform protection. To this end, the EPC establishes that a special agreement may be concluded establishing that a European patent will have a uniform effect for a group of EPC member states (Article 142 EPC). With reference to this provision, the EEC countries signed the Convention for the European patent for the common market in 1975 (CPC 1975)[3], which was supplemented in 1989 by the Agreement relating to the Community Patent (CPC 1989)[4] (both concluded in Luxembourg and better known as the Community Patent Convention, or CPC). The CPC provided for the uniform character of the European patent, which was granted in accordance with the procedure established by the EPC and was called the Community patent.

In the CPC 1975, national infringement courts as courts of first instance were required to treat a Community patent as such and therefore had no power to decide whether it was valid or not. Claims for invalidation were to be heard before the Enlarged Board of Appeal, a division of the EPO, under the judicial control of the Court of Justice of the EEC. The CPC 1989 proposed to eliminate this separation. The drafters of the updated CPC believed that it would be best to transfer jurisdiction over Community patent infringement suits to national courts of first instance, which could simultaneously examine the validity of the patent in suit and, if necessary, amend or invalidate it. A Common Court of Appeal was envisaged to ensure uniform application of the law on infringement and validity of Community patents. The EEC countries followed the approach taken in the EPC, leaving the determination of the criteria for patent infringement to national law. The CPC 1989 was supplemented by protocols that provided for detailed regulation of litigation and procedures before the Common Court of Appeal.

The CPC was never ratified and therefore did not enter into force. Despite this, the "two conventions" concept has proved to be perhaps the most promising way of achieving political agreement in the process of unifying patent law in Europe. The "two conventions" concept is reflected in Title X of the EPC, which was later supplemented by rules providing for the possibility of special agreements in the field of establishing a European Patent Convention or a quasi-judicial institution with the power to interpret the EPC. The most obvious need for such a judicial mechanism was observed within the framework of the EU as an integration association. However, the prospect of a unitary European patent and a unitary patent system together with a Unified (Common) Patent Court has long been questionable. EU Member States have for almost 40 years used the so-called "classical" European patent, which is an instrument of international law and not of EU law.

2.4. Criticism of the patent judiciary under the EPC

The EPC provides for the establishment of a legislative system for the granting of European patents, which, in brief, once granted, are transformed into a set (bundle) of national patents subject to national law, unless otherwise defined in the EPC (Articles 1–3 EPC). Thus, the determination of the rights conferred by a European patent under the EPC was placed within the competence of national legislations (Art. 64(1) EPC). Although the drafters of the EPC considered the possibility of harmonizing the rights conferred by a European patent, they decided not to do so because of the complexity of the issue [Pila 2013:927-928]. Accordingly, infringement of a European patent must be litigated before national courts and must be governed by national law (Art. 64(3) EPC).

The EPC provides uniform grounds for invalidating a European patent (Art. 138 EPC), but invalidation actions must be considered by national courts, whose decisions can only affect the relevant

[3] 76/76/EEC: Convention for the European patent for the common market (done at Luxembourg on 15 December 1975). OJL1726.01.1976.P.1-28.CELEX41975A3490.URL:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41975A3490 (accessed date: 08.02.2024).

[4] 89/695/EEC: Agreement relating to Community patents (done at Luxembourg 15 December 2989) OJ L 401, 30.12.1989. P. 1-27. CELEX: A41989A0695. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A41989A0695%2801%29 (accessed date: 08.02.2024).

"national part" of the European patent. In other words, 38 actions for the invalidation of a European patent granted in respect of all EPC member states would have to be brought in each country in order to invalidate the patent in its entirety (decentralized invalidation procedure). Decisions of the EPO taken in the course and outcome of the examination of European patent applications are subject to quasi-judicial control within the EPO through opposition and appeal procedures conducted by Opposition Divisions, Boards of Appeal and the Enlarged Board of Appeal (centralized invalidation procedure). The decision is then self-enforceable in all countries in respect of which a European patent has been granted. Time limit for filing an opposition against grant decision is nine months. Deadline for appealing is two months of notification of decision plus four months for filing statement setting out the grounds of appeal. The patent judiciary under the EPC is often criticized for its fragmentation. In order to invalidate a European patent by judicial review, it is necessary to bring the relevant action in each EPC country in respect of which such a European patent has been granted. Even though the European patent in all these countries is granted in respect of the same invention, the court of one state is not bound by the judgment of another state. In terms of infringement of a European patent, an action may be found to be infringement in one jurisdiction, whereas it may not be found to be infringement in another. Consequently, it is not uncommon for courts to issue contradictory decisions in relation to the same European patent. With a lack of sufficient unification measures and divergent national court decisions interaction of national law and community law might have been determined by the case law of the Court of Justice of the EU [Abdullin 2012:99].

The fragmented nature of the judiciary's adjudication of European patent disputes is due to various interrelated factors. Some of them will be highlighted and discussed: structural heterogeneity of judiciaries, different approaches to claim interpretation and jurisdictional issues.

Structural heterogeneity of national patent judiciaries. This problem is reflected in the national judiciaries of leading European countries in terms of the number of European patents granted. For example, in Germany, infringement cases are heard by twelve regional courts (Landregichte), which consider the patent as it is (i. e. without having jurisdiction to decide on its validity or lack thereof). The Federal Patent Court (Bundespatentgericht), which is a separate judicial institution, hears patent invalidation suits. In France, there is only one judicial body (Tribunal de Grande Instance), which has jurisdiction to hear both infringement and invalidation actions. In the UK, patent disputes are heard by either the Intellectual Property Enterprise Court or the Patent Court, depending on the value of the claim and the complexity of the case [Cremers, Ernicke, Gaessler, Harhoff, Helmers, McDonagh, Schliessler, van Zeebroeck 2017:1-44]. And in total, 38 countries are parties to the EPC. Obviously, associated with this are the high financial costs of long-standing litigation involving experts in the relevant area of law and technology in multiple jurisdictions.

Jurisdictional issues. In the EPC countries, the jurisdictional aspects of resolving most types of disputes, including patent disputes, are determined by the so-called Brussels I Regulation[5], which is adopted within the EU, and the Lugano Convention[6], to which both the EU itself and a number of non-EU European Patent Convention countries are parties. In accordance with both legal acts, the dispute is generally examined at the place of location of the defendant, although other criteria are provided, for example, at the place of infringement of the European patent, at the location of the branch or representative office of the defendant, at the location of one of the co-defendants, at the place of examination of the main claim - in case of counterclaim.

In other words, the Brussels I Regulation and the Lugano Convention provide the legal basis for so-called forum shopping. In this regard, both legal acts define the so-called lis pendens rules, which imply the suspension by the courts of different countries of the accepted proceedings of a case brought on the same grounds and between the same parties, except for the court that first accepted the claim for consideration. All of this, taken together, makes it possible to apply such a legal trick, which is known as torpedo action. The procedure is as follows.

The patent or procedural laws of a number of European countries provide for such a remedy as a

[5] Regulation (EU) No. 1215/2012 of the European parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast). OJ L 351, 20.12.2012. P. 1-32.

[6] Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. OJ L 339. 21.12.2007. P. 281-319.

"declaration of non-infringement". In The Tarty and The Maciej Rataj case, the ECJ held that an action for declaration of non-infringement has the same legal basis as an action for infringement[7]. Accordingly, in those situations where an infringement claim is brought before the court of one state after the court of another State has already accepted a claim for a declaration of non-infringement, the principle of lis pendens comes into play. The legal trick "Italian torpedo" is based on the above-mentioned case law of the Court of Justice of the EU. In Folien Fisher v. Ritrama[8], the ECJ allowed a claim for declaration of non-infringement of a European patent to be brought before the court both at the location of the holder of the European patent, acting in this case as a defendant, and at the court at the place of infringement. The essence of "torpedo action" is to hinder a potential patent dispute by filing a suit for a declaration of non-infringement in a court with long time limits for review [Vede 2020:25].

Different approaches to claim interpretation. According to Article 69(1) EPC, the scope of legal protection granted by a European patent is determined by the claims of the invention and the descriptions and drawings are used to interpret them. The inclusion of this rule in the text of the EPC was due to the fact that only by understanding the principles on which the claims will be interpreted, the applicant will be able to properly formulate the relevant suggestions (patent claims) [Pila 2015:927]. However, a European patent, once granted, is subject to national law as if it were a national patent (with some exceptions provided for by the EPC).

By the time the EPC was adopted in European countries, two different approaches to the interpretation of claims for the purpose of determining the scope (limits) of legal protection granted by a patent had developed – the so-called "peripheral" and "central" methods. In practical terms, the use of one or the other approach means determining a narrower scope of protection due to the use of strict (literal) meaning of the claims or, on the contrary, a broader scope of protection because, first of all, the central idea of the patented technical solution is revealed[9]. In order to ensure a uniform interpretation of the claims of an invention protected by a European patent by the national courts of different European countries, Article 69(1) of the EPC was adopted and supplemented by the Protocol on Interpretation[10]. This document left States wide latitude in applying different standards to the interpretation of claims, provided that they did not exceed the established limits. The disagreement over the rules of claims interpretation is illustrated by the approach of European courts to the so-called "doctrine of equivalence", which, having been widely applied in the practice of German courts, was not recognized by British judges until recently [England 2016:689-690].

A landmark case is "Improver", in which English and German courts reached conflicting conclusions regarding the use of the same protected invention in counterfeit products [Khuchua 2019:261-263]. This case, however, is not the only case in which courts in different EPC countries have reached conflicting decisions regarding the same European patent [Khuchua 2019:261-263]. Therefore, at the Munich Diplomatic Conference of 2000 the Protocol on Interpretation was supplemented by a second paragraph that essentially enshrined the application of the doctrine of equivalents in European patent litigation. The amended Protocol of Interpretation did not enter into force until the end of 2007, due to the extensive changes to the EPC adopted at that conference. By 2007, however, efforts to develop proposals for a unified judiciary patent system on the part of the EU institutions had intensified. We now turn back a few years again and look at this track in more detail.

2.5. Further proposals: 1999 to 2009

In 2003, the EPO Working Group on Litigation established in 1999 proposed a draft Agreement on the Establishment of a European Patent Litigation System, better known as the European Patent Litigation Agreement (EPLA)[11]. The EPLA envisaged the establishment of a European Patent Judiciary as a new international organization open for

[7] CJEU: case C-406/92. ECR I-5460, 1994.

[8] CJEU: case C-133/11. ECLI:EU:C:2012:664.

[9] Patent Litigation Manual and Terminology. Block 1. Procedures to obtain a patent and legal framework. – *European Patent Academy.* 2015. P. 95-135. URL: https://e-courses.epo.org/pluginfile.php/1365/course/section/353/Patent%20litigation%20Manual%20and%20terminology%20-%20Block%201.pdf (accessed date: 08.02.2024).

[10] Protocol on the interpretation of the Article 69 EPC. – OJ EPO. 2001. Special edition No. 4. P. 17. URL: https://www.epo.org/xx/legal/official-journal/2001/etc/se4/2001-se4.pdf (accessed date: 08.02.2024).

[11] Draft Agreement on the Establishment of a European patent litigation system. Working Party on Litigation. 16.02.2004. URL: https://www.biicl.org/files/2465_european_patent_litigation_agreement.pdf (accessed date: 08.02.2024).

accession by any EPC member states. The bodies of the European Patent Judiciary were to be the European Patent Court and the Administrative Committee. In turn, the European Patent Court was to consist of the Court of First Instance, the Court of Appeal and the Registrar. In 2004, the European Commission proposed the creation of a Community Patent Court with a structure similar to that of the European Patent Court within the European Patent Judiciary [Fallah, Koller, Stadler 2021:662]. Both proposals generated a great deal of interest among judges specialized in patent law, who advocated closer cooperation in this field[12].

A public consultation followed in 2006. The European Parliament believed that the EPLA required substantial improvements and asked its own legal service to prepare an interim opinion on the EU-related prospects for the possible conclusion of the EPLA by EU member states, in light of the consistency between the EPLA and the acquis communautaire, and to clarify legislative powers in this area. In 2007, the European Parliament's legal service issued a negative opinion on the EPLA because it concluded that the matters governed by the EPLA fall within the exclusive competence of the Community and therefore the member states are not entitled to conclude such an international agreement on their own [Wszolek 2021:1145-1146].

In 2009, the European Commission presented its own draft agreement on the establishment of the European and Community Patents Court (ECPC)[13]. The draft agreement was broadly similar to the EPLA and it was intended that accession to it would be open to non-EU states as well. However, in 2011, the draft agreement was rejected by the Opinion No. 1/09 of the Court of Justice of the EU (Opinion No. 1/09) as incompatible with the EU founding treaties[14]. In its Opinion, the CJEU emphasized that the proposed exclusive jurisdiction of the ECPC would deprive national courts "of their task as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned"[15].

2.6. Unified patent package: from 2010 to 2012

Pursuant to the Treaty of Lisbon, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, establish measures for the establishment of European intellectual property rights to ensure uniform protection of intellectual property rights throughout the Union and to establish centralized EU-wide mechanisms for authorization, coordination, supervision; The Council, acting in accordance with a special legislative procedure and unanimously after consultation with the European Parliament, shall, by means of regulations, establish the linguistic conditions for European intellectual property rights (Article 118 TFEU).

The inability to reach a political compromise over disagreement on translation rules due to numerous protests along with other reasons has led to the use of mechanisms to implement enhanced cooperation measures with a view to the European Commission's efforts to introduce an EU patent granting uniform protection[16]. In 2012, on the basis of Article 118 TFEU, EU countries agreed on a legislative initiative consisting of two regulations and an international treaty. Regulation (EU) No 1257/2012 introduced "uniform patent protection" in the EU Member States participating in enhanced cooperation[17]. In this sense, a European patent granted by the EPO should have unitary effect and be called a European patent with unitary effect (EPUE or unitary patent). Once a European patent has been granted, its owner may request the EPO to enter the unitary effect in a special register. The second EU legal act adopted under enhanced cooperation, Regulation (EU) No 1260/2012, defined the rules for the translation of such patents[18].

[12] Resolution passed by the named judges specializing in patent law at the judge's forum held in San Servolo, Venice. October 14–16, 2005.

[13] Draft agreement on the European and Community Patents Court and Draft Statute 7928/09 (PI 23). URL: http://register.consilium.europa.eu/pdf/en/09/st07/st07928.en09.pdf (accessed date: 07.02.2024).

[14] CJEU: Opinion 1/09 of 8 March 2011, ECR 2011, I-01137.

[15] CJEU: Opinion 1/09, para. 80.

[16] 2011/16/EU: Council Decision of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection. OJ L 76, 31.12.2012. P. 53-55.

[17] 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.

[18] Regulation (EU) No. 1260/2012 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 with regard to the applicable translation arrangements.

2.7. Agreement on the Unified Patent Court: 2013 to 2023

According to Regulation (EU) No 1257/2012, a unitary patent gives its owner the right to prohibit any third party from performing acts in respect of which the patent provides protection, but the scope of this right and its limitations are to be determined by the Agreement on the Unified Patent Court (which is better known as the UPCA). The above regulations therefore emphasize that ratification of the UPCA by the requisite number of its contracting states is of paramount importance. The UPCA is named as a third element of the unitary patent package [Visser 2019].

The geographical scope of a single European patent may not correspond to all EU countries involved in advanced cooperation, despite the indivisible nature of such a patent. The granting of an EPUE depends on the application of UPCA in the relevant territory. The unitary nature of the validity of the EPUE will not be available in those countries which, although participating in advanced cooperation, are still not non-adhering or have not ratified UPCA.

Under UPCA, this international treaty is subject to ratification by thirteen contracting states, including France, Germany and Italy. It was originally intended that, instead of Italy, the UK's instrument of ratification would be mandatory for UPCA to enter into force. Although the UK successfully ratified the UPCA and this country seemed to have a string desire to be a part of the newly established court[19], Brexit forced the country to withdraw its instrument of ratification because membership of the Unified Patent Court (UPC) requires compliance with EU law, at least as far as European patents are concerned, which was not in line with the objectives of Brexit[20].

In Germany, due to a constitutional complaint filed against the UPCA ratification act, the Federal Constitutional Court (FCC) asked the German President not to sign the law. In 2020, the complaint was upheld for violating procedural requirements. The FCC qualified the UPCA as an international agreement "supplementing or being otherwise closely tied to the European Union 's integration agenda" [Graf von Luckner 2022:168], i. e. those international agreement by which EU Member States take integration steps outside of EU law [Graf von Luckner 2022:169]. Then the ratification of the UPCA by the required two-thirds majority followed, followed by two more constitutional complaints, which, however, were declared inadmissible by the FCC in 2021, and on February 17, 2023, Germany finally deposited its instrument of ratification, becoming the 17th state party to the UPCA.

Although the UPCA is an instrument of international law which was developed outside of EU legal framework but is problematically interdependent with EU law [De Lange 2021:1078], it explicitly states that the UPC shall apply EU law in its entirety and respect its supremacy (Art. 20 UPCA). To this end, the UPC not only replaces national courts in the exercise of exclusive jurisdiction to hear disputes over both unitary and classical European patents but is also considered a part of their judiciary. Like any national court, the UPC must cooperate with the Court of Justice of the EU, i. e. request so-called adjudicated decisions from it, in order to ensure the correct application and uniform interpretation of EU law (Art. 21 UPCA). These provisions reflect the position of the Court of Justice of the EU as set out in Opinion No. 1/09 [Wszolek 2021:1147].

The UPC is a patent judiciary consisting of the Court of First Instance, the Court of Appeal and the Registry. The Court of First Instance consists of a central unit located in Paris, as well as local and regional units. The central division of the Unified Patent Court is located in Paris with sections in Milan and Munich. At the time of writing, thirteen local branches have been established. Estonia, Latvia, Lithuania, Sweden and Latvia have agreed to establish a North Baltic Regional Office of the UPC. The UPC is to be composed of both legally and technically qualified judges appointed by the Advisory Committee.

Although having started its work on June 1, 2023 by the end of last year the UPC had registered a total of 160 cases with 67 infringement suits and 24 invalidation actions and the first judgments were handed down in September 2023, there is still uncertainty about the legal fundamentals of the UPC [Baldan 2022:6].

[19] Patents if there's no Brexit deal. Guidance. 24.09.2018. Withdrawn on 26.09.2019. URL: https://www.gov.uk/government/publications/patents-if-theres-no-brexit-deal/patents-if-theres-no-brexit-deal (accessed date: 08.02.2024).

[20] UK withdraws ratification of the Unified Patent Court Agreement. – *Kluwer Patent Blog.* 2020. URL: https://patentblog.kluweriplaw.com/2020/07/20/uk-withdraws-ratification-of-the-unified-patent-court-agreement/ (accessed date: 08.02.2024).

3. Prospects for the development of a Patent judiciary under the Eurasian patent convention

The EAPC was signed in 1994 and entered into force in 1995. Under the EAPC the Eurasian Patent Organisation (EAPOrg) was established and its executive, the Eurasian Patent Office (EAPO), is responsible for granting Eurasian patents for inventions through a centralized procedure conducted entirely in Russian, available in the EAPC member states. The EAPOrg is an international organization operating outside the legal order of the Eurasian Economic Union (EAEU) and previous integration associations.

In 2019, the EAPC was supplemented by a Protocol for the Protection of Industrial Designs, for which Eurasian patents have been granted since 2021. In 2023, the EAPOrg Development Plan until 2028 was adopted, according to which it is expected to expand the range of intellectual property objects protected under the EAPOrg to trademarks and utility models. This circumstance may speak in favor of potential centralization of legal protection of intellectual (industrial) property objects within the EAPOrg, which will qualitatively distinguish the EAPOrg from the EPOrg. This will also be important when considering the prospects of development and improvement of the system of patent dispute resolution within the EAPO.

Under the EAPC the examination procedure of a Eurasian patent is completely centralized from filing to grant. Once granted the Eurasian patent is valid in each EAPC countries without any validation procedures, but it must be maintained by payment of annual fees in respect of each EAPOrg member states in which its validity is desired. The Eurasian patent may be revoked fully or partially or amended through the centralized post-grant opposition procedure and administrative revocation procedure. In the Eurasian patent has been revoked, it is considered to be invalid in all EAPC countries from the date of the patent grant decision (centralized invalidation procedure). It may be appealed to the EAPO President whose decision is final. Then the Eurasian patent may be invalidated only in national courts or other competent authorities, whose decisions may affect only the respective "national" part of the Eurasian patent (decentralized invalidation procedure).

The EAPC establishes that the owner of a Eurasian patent has the exclusive right to use, also to authorize or prohibit others from using the patented invention (Art. 9 EAPC), while the scope of the exclusive right to it is disclosed in the rules of the Patent Regulation (e. g. Rules 16–19). In other words, the exercise of rights under the Eurasian patent is based on a single legal regulation, which clearly speaks in favor of the more unitary nature of the Eurasian patent compared to the European patent [Eremenko 2011:13]. As regards the patent claim interpretation under the EAPC and the Patent Regulation middle way to be found between the two extreme approaches (broad and strict interpretation) that it describes [Grigoriev, Eremenko 2012:66]. Litigation over Eurasian patent takes on national basis: national courts of the EAPOrg member countries resolve disputes concerning infringement or validity of Eurasian patents on the ground of the EAPC and the Patent Regulation, but with the application of national rules of their procedural legislation. Thus, the Eurasian patent like the classical European patent has the "bundle" nature, but unlike the EPC (before the UPCA's entry into force) having more uniform post-grant regulation.

While earlier the creation of a specialized court within the EAPO was only occasionally discussed [Grigoriev 2007:10; Eremenko 2011:13], at present there is a growing interest in discussing the prospects of creating a single judicial body to hear disputes over Eurasian patents. Thus, in 2020, the former head of Rospatent, Mr. Grigory Ivliev, proposed to discuss approaches to the development of the dispute examination system within the Eurasian Patent Organization, taking into account the European experience, "including with regard to... invalidation of a Eurasian patent by creating an appropriate Eurasian jurisdiction" [Ivliev 2020:211]. Already being the 4th President of the EAPO, he began to actively speak in favor of the creation of an appropriate jurisdiction in view of the potential expansion of the number of intellectual property objects that can be granted legal protection under the EAPOrg [Ivliev 2024:23]. In 2023, the relevant area of EAPOrg activity was officially included in the EAPOrg Development Program until 2028. The draft Eurasian Intellectual Property Development Strategy 2035 (Draft Strategy – 2035) identifies the creation of the Eurasian Intellectual Property Rights Court (EAIPRC) as one of the tasks to achieve the set goals[21].

[21] Proekt Evrazijskoj strategii razvitija v sfere intellektual'noj sobstvennosti do 2035 goda (Strategija – 2035) [Draft of Eurasian strategy in the filed of intellectual property until 2035 (Strategy 2035)]. URL: https://www.eapo.org/wp-content/uploads/2023/12/nir-razrabotka-proekta-evrazijskoj-strategii-razvitiya-intellektualnoj-sobstvennosti-do-2035-goda.pdf (accessed date: 08.02.2024).

It is not by chance that the Draft Strategy – 2035 speaks about the prospects of creating EAIPRC, i. e. as a judicial body to resolve disputes on several intellectual property objects. First, the relatively small number of judicial disputes on Eurasian patents (and in some EAPOrg countries such disputes are not known at all) indicates the inexpediency and futility of creating a single specialized court whose jurisdiction could be limited only to patent disputes on inventions (similar to the UPC). Secondly, one should take into account the potential expansion of the EAPO's powers to grant legal protection to other industrial property objects, including trademarks and utility models. In the conditions of possible centralization of systems of legal protection of industrial property objects, the establishment of the EAIPRC will allow to ensure uniform practice of law enforcement.

It is noted that the number of disputes over the Eurasian patents are relatively low in comparison with European patents. In accordance with EAPOrg's annual reports a tendency of the recent years is a low number of appealed decisions of refusal to grant Eurasian patent and oppositions against grant of Eurasian patents (less than 1 % of the total number of patents granted per year)[22]. The Draft Strategy – 2035 reflects insignificant invalidation actions filed against the Eurasian patents both in national courts and through opposition procedure, but the most numbers of revocation actions were filed in Russia[23].

4. Conclusions

European countries have accumulated an impressive experience in the creation and development of dispute resolution mechanisms for European patents, which should be given special attention when assessing the prospects for the introduction of similar mechanisms in the framework of Eurasian integration processes (EAEU, EAPOrg, etc.). The periodization of the initiatives to establish the European Patent Court proposed in this study is aimed at highlighting its possible institutional models depending on its jurisdiction, composition and correlation with the EU Court of Justice.

For example, the institutional model of the Unified Patent Court can be labeled as "absolutely supranational", i. e. it does not envisage the division of jurisdiction between it and the national courts of its member states (leaving aside the seven-year transitional period envisaged by the UPCA). In turn, the CPC 1975 envisaged a "mixed" institutional model of judiciary, where national courts retained jurisdiction to hear disputes over infringement of Community patents, while disputes over invalidation were to be heard by the relevant divisions of the EPO under the judicial control of the Court of Justice of the EEC. The ECPC was another institutional model, which was intended to bring together, on the one hand, the countries belonging to the EU as a key regional integration association and, on the other hand, other European countries.

EAPOrg proposal for creation of a supranational judicial body with the competence to adjudicate disputes over Eurasian intellectual (industrial) property rights (something similar to the UPC) sounds attractive. It is justified by the possible expansion of the powers of the EAPO to trademarks and utility models. In other words, the EAPOrg tends to be a centralized system of protection of industrial property by expansion its power to grant Eurasian regional trademarks and utility models that inevitably leads to increase the number of contentious matters. Therefore, the EAPOrg Development Plan demonstrates the prospects of establishment of a supranational judicial body with a wider jurisdiction than the UPC.

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