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29 The role of the CJEU in European patent law from a procedural perspective

Introductions

The Court of Justice of the European Union (CJEU or the Court)¹ has been created as a supranational court to guarantee the harmonised application of EU law in all EU Member States.² Its role is tremendous in all areas of law where the EU has established its exclusive or shared competence including in the field of intellectual property law which, according to the Court, falls into the category of shared competence when it comes to the establishment of IP rights within the Union.³ Hence, based on the EU's legislative acts which either create EU level IP rights⁴ or harmonise the national laws⁵ in the field of in-

1 For the purposes of this chapter, the term CJEU or the Court is adopted to refer to the Court of Justice and not to the entire institution that also includes the General Court.

2 Vincent Cassiers and Alain Strowel, 'Intellectual Property Law Made by the Court of Justice of the European Union' in Christophe Geiger, Craig Allen Nard and Xavier Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar 2018) 176; Joseph Kenneth Yarsky, 'Hastening Harmonization in European Union Patent Law Through a Preliminary Reference Power' (2017) 167, INT'l & Comp. L. Rev. 167, 187.

3 See, Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*, EU:C:2013:240, paras 24–25. The Court stated that the issues falling within the sphere of Article 118, TFEU are shared competences for the purposes of Article 4(2), TFEU and of Article 20(1), TEU, as it does not fall within the TFEU's Chapter, "Rules on Competition" which in turn, is the EU's exclusive competence based on the Article 3(1)(b), TFEU. However, as for the EU's external competence, the Court has held in Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, that all TRIPS provisions fall within the common commercial policy category and thus EU's exclusive competence based on the Article 3, TFEU. See in this regard, Anna Wilińska-Zelek, Milosz Malaga, 'EU Competence and Intellectual Property Rights. Internally Shared, Externally Exclusive?!' (2017) 1 Środkowoeuropejskie Studia Polityczne 27.

4 For example, trade mark and community design rights created by the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, p. 1–99 (EUTM Regulation) and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

5 For example, in the copyright field, the EU has adopted several directives, e.g. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (Text with EEA Relevance) OJ L 130, 17.5.2019, p. 92–125. In the trade mark field, there is Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks OJ L 40, 11.2.1989, p. 1–7 (EU Trade mark Directive).

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tellectual property, the questions may fall within the CJEU's jurisdiction. Apart from the substantive legal instruments, the acts related to exercising such IP rights, such as the EU Enforcement Directive 2004/48/EC,⁶ also bring issues related to IP rights under the scrutiny of the CJEU, particularly from a procedural point of view. As a supranational court, the Court's competence does not entail direct involvement in private legal disputes of any kind, it is reserved for cases where the correct interpretation or application of EU law needs to be guaranteed in an EU's supranational legal order, as it co-exists with national legal orders. Given these characteristics of the Court, first, it is worth outlining the available EU legal instruments in the field of patent law in the EU that trigger the CJEU's competence in this area as well as the legal avenues considered by the EU Treaty leading to the CJEU's binding case law. In this regard, the chapter presents the types of cases that have resulted from these avenues with a particular focus on the interpretation of the Enforcement Directive by the Court. Hence, after this introductory section, the chapter identifies the EU's stance in patent law and the available case law of the CJEU, then, the main objectives and the nature of the Enforcement Directive are highlighted followed by the detailed analysis of four judgments of the Court of Justice handed down concerning the procedural guarantees as foreseen by that Directive in relation to the enforcement of patent rights. In particular, two cases concern the provisional measures (Article 9(1) and 9(7)), one case concerns the reimbursement of legal costs (Article 14) and the last case is on the provisional measure (Article 9) in the context of the interpretation of competition law (Article 102, TFEU). Finally, the chapter provides reflections on how the new Unified Patent Court (UPC) can function in the light of the EU's procedural safeguards and the respective case law of the Court of Justice. Concluding remarks are provided in the conclusion of the chapter.

29.1 EU Legislation in patent law and the CJEU's current role in the patent field

In contrast to the other IP rights EU's legislation on patent law is relatively limited.⁷ Despite the Article 118 of the Treaty on the Functioning of the European Union (TFEU) that lays the ground for the creation of intellectual property rights in the EU, including patent rights, up to now an EU patent right has not been adopted. Alongside the national

⁶ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45 (Enforcement Directive, Directive 2004/48/EC or the Directive).

⁷ See in this regard, Elisabeta Zirnstein, 'Harmonization and Unification of Intellectual Property in the EU' (2005) Published Scientific Conference Contribution, University of Primorska, 293, 298–298; Tamar Khuchua, 'Different Rules of the Game – Impact of National Court Systems on Patent Litigation in the EU and the Need for New Perspectives' (2019) 10(2) JIPITEC, 257, 267.

patents, the only regional patent right that operates based on the intergovernmental agreement – the European Patent Convention (EPC)⁸ – is the so called “classical” European patent which may also be attributed a unitary effect in the EU upon the patent application at the European Patent Office (EPO), based on the EU Regulation 1257/2012⁹ after its entry into force. Therefore, a directly applicable EU legal instrument which would give rise to the CJEU’s rulings on EU patent rights is not yet in place.

However, since the scope of protection of biotechnological inventions varies in different national legal systems, the EU Directive on biotechnological inventions was adopted¹⁰ in 1998 to harmonise the national laws in this regard. Despite its harmonising nature, the Directive has led to ambiguities for national courts on numerous occasions, particularly concerning the patentability of human embryonic stem cells that led to the CJEU’s interference on this issue in the cases *Brüstle*¹¹ and *International Stem Cell*¹² where the CJEU has provided a balanced approach, taking into account differences in legal and cultural frameworks between the EU Member States and thus providing a broad definition of a human embryo.¹³ Other legislative instruments adopted on the EU level that have also led to the CJEU’s judgments are the Regulations on Supplementary Protection Certificates for pharmaceutical and for plant products.¹⁴ These Regulations have also been brought to the attention of the Court that has decided on the substantive issues, such as when an active ingredient can be considered as protected by a basic patent in force and therefore, the protection extended by a supplementary protection certificate.¹⁵ As for the procedural aspects of patent law, the most relevant EU legislation in this regard is the EU Enforcement Directive 2004. This Directive has incorporated most of the TRIPS Agreement provisions from its 3rd Chapter¹⁶ and has set minimum stan-

⁸ European Patent Convention of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000 (European Patent Convention).

⁹ Regulation (EU) No 1257/2012 of the European Parliament and the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, p. 1–8. (1257/2012).

¹⁰ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions 1998, OJ L 213, 30.7.1998, p. 13– 21 (Biotechnology Directive).

¹¹ Case C-34/10, *Oliver Brüstle v Greenpeace e.V.* EU:C:2011:669.

¹² Case C-364/13, *International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks*, EU:C:2014:2451.

¹³ Regarding *Brüstle* case see Karen Walsh, ‘The Unitary Patent Package, the Court of Justice of the European Union, and Brexit: (Ir)reconcilable?’ (2019) *Intellectual Property Quarterly*, 1, 13.

¹⁴ Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products, OJ L 182, 2.7.1992, p. 1–5; Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products, OJ L 198, 8.8.1996, p. 30–35.

¹⁵ See for example, Case C-322/10 *Medeva v Comptroller General of Patents, Designs and Trade Marks* ECLI:EU:C:2011:773.

¹⁶ See in this regard, Rafał Sikorski, ‘Towards a More Orderly Application of Proportionality of Patent Injunctions in the European Union’ (2022) 53 *IIC*, 31, 32.

dards for IP protection through enforcement, mainly focusing on the fight against counterfeiting in the trade mark and copyright fields.¹⁷ Nevertheless, since its adoption, the CJEU has issued a few but noteworthy rulings in the patent field, particularly concerning the application of provisional measures by national courts in the light of the mentioned Directive coupled with the EU competition law provisions. It is precisely the procedural aspects seen through the prism of the CJEU that are central to this chapter, as these interpretations provide a solid foundation for the approximation of laws to ensure harmonised and competition law compliant patent enforcement in the EU.

29.2 Avenues leading to CJEU judgments on patent enforcement and available case law

Of the four most important avenues leading to CJEU jurisdiction within the EU, in particular 1. an action directed at an EU institution seeking the annulment of its act¹⁸ or an action for its failure to act¹⁹; 2. an action directed against a Member State due its breach of EU law²⁰; 3. an appeal action against the decisions of the General Court brought to the Court of Justice²¹; and 4. preliminary references submitted to the CJEU by national courts²², it is the fourth procedure that mostly trigger cases on the interpretation of substantive patent protection as well as the procedural aspects of patent enforcement at the CJEU. Preliminary rulings have long been deemed the most powerful tools for the CJEU to exert its harmonising impact in the EU.²³

Statistically, when searching for any kind of document issued by the Court of Justice in relation to the Directive 2004/48/EC without accounting for any specific time period, i.e. since the entry into force of the Directive until today (September 2022), and without any limitation of subject matter, out of all 197 search results²⁴ – judgments, judgment summaries, judgment information, abstracts, operative parts of the judgments, Advocate General opinions, applications as well as working documents labeled as “request for a preliminary ruling” found in the CJEU’s official Curia case law database, 42 judgements can be found (available in full or only with their operative parts, summaries, abstracts or

17 See, Florence Hartmann-Vereilles, ‘Achievements in Civil Intellectual Property Enforcement and Recent Initiatives Within the Digital Single Market Strategy on the Regulatory Environment for Platforms and Online Intermediaries’ (2017) 18 *Era Forum*, 1.

18 Article 263, TFEU.

19 Article 265, TFEU.

20 Article 263, TFEU.

21 Article 256, TFEU.

22 Article 267, TFEU.

23 See in this regard, Morten Broberg, Henrik Hanse and Niels Fenger, ‘A Structural Model for Explaining Member State Variations in Preliminary References to the ECJ’ (2020) 45(5) *E. L. Rev.* 599.

24 InfoCuria Case-law, <https://curia.europa.eu/jcms/jcms/j_6/en/> accessed 28 September 2022.

as an information).²⁵ Out of these 42 judgments 36 cases have derived from the preliminary requests of national courts, followed by three actions against Member States to fulfill their obligations, two appeals brought to the Court of Justice to set aside the judgments of the General Court and only one action for annulment of a decision of the EU institution (in this case the Council). Concerning the subject matter, majority of the cases were raised in relation to the approximation of laws (20) followed by freedom of establishment (6). As for the related IP issue in these proceedings, they vary, yet copyright is the most frequently invoked IP right related to the implementation of the Enforcement Directive, followed by trade marks. (See the Table 1 below).

Table 1: Share of subject matters and IP rights amongst judgments of the Court of Justice mentioning the Directive 2004/48/EC

#	Subject Matter	Total number of judgments	IP rights concerned
1	Approximation of laws	20	Copyright and related rights (8) Trade mark (5) Patent (3) Utility model (1) Other (3) ²⁶
2	Freedom of establishment	6	Copyright and related rights (4) Trade mark (1) Other (1) ²⁷
3	Freedom to provide services	1	Copyright (1)
4	Agriculture and fisheries	1	Community Plant Variety Rights (1)
5	Competition	2	Patents (2)
6	Intellectual, industrial and commercial property – trade mark	5	Trade mark (5) ²⁸
7	Intellectual, industrial and commercial property	1	Trade mark (1)
8	Free movement of goods	1	Copyright and related rights (1)

²⁵ For one case one corresponding judgement is counted (either available fully or only with its operative part as well as abstract, summary or information). In case all types of documents are available for one case, the judgment count is also only one).

²⁶ The rest of the three cases concerned the European Commission's action against Member States regarding the failure to transpose the Directive 2004/48/EC into national laws within the prescribed time-limit.

²⁷ One remaining case concerned the reimbursement of legal costs, however, as the entire judgment is not available on Curia case law database, it is not possible to identify the specific IP right concerned.

²⁸ In four cases, the issue of trade mark was raised in the context of the EUTM Regulation while the EU Trade mark Directive was discussed only in one case.

Table 1: (continued).

#	Subject Matter	Total number of judgments	IP rights concerned
9	Area of freedom, security and justice – judicial cooperation in civil matters	3	Community design (1) Trade mark (1) Patent (1)
10	Principles, objectives and tasks of the Treaties	1	Neighboring rights (1)
11	Provisions governing the institutions	1	Copyright and related rights (1)

Out of these 42 judgments concerning specific IP rights, six are related to patents. In particular, one concerns jurisdiction and recognition of judgments in the area of freedom, security and justice and judicial cooperation in civil matters; in three cases the proceedings are on the approximation of laws, out of which, one case deals with the costs and two cases with interim and provisional measures. Finally, in the two remaining cases the patent issue is related to competition, one involving the relationship between seeking an injunction and the dominant position, and another involving agreements, decisions and concerned practices between patent holders and manufacturers of generic products. All six cases have emerged within the preliminary reference mechanism.

Despite the small number of patent related CJEU cases involving procedural aspects, these rulings are worth studying as they provide guidance not only for the national courts but also for the potential litigants. These cases are directly linked to the attainment of the Treaty objectives regarding effective IP protection, the protection of fundamental rights, including in court proceedings, and fair competition practices. As the procedural aspects deriving from the Directive 2004 are the focus of this chapter, the four patent cases directly related to the provisions of this Directive will be analysed in detail, thus leaving aside one case on the Brussels I Regulation 44/2001²⁹ in the context of cross-border IP litigation³⁰ and the other case on the ‘by object’ or ‘by effect’ restriction of competition through patent settlements between an originator and a generic manufacturer.³¹

²⁹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

³⁰ The Case C-406/09 *Realchemie Nederland*, ECLI:EU:C:2011:668 concerned the recognition of an order imposing a fine within the meaning of the Brussels I Regulation. The small portion of the case touched upon the question whether the costs related to an exequatur procedure fell within the Article 14 of the Directive 2004/48/EC to which the answer of the Court was affirmative.

³¹ Case C-307/18 *Generics (UK) and Others*, ECLI:EU:C:2020:52. See in this regard, Sophie Lawrence, Edwin Bond, Francion Brooks, Matthew Hunt, Helena Connors and Isobel Thomas, ‘Patent Settlement Reach the CJEU; Pay-TV Licensing Commitments Annulled; Commission Analysed Patent Licensing Programmes: A Survey of Developments at the Intersection between Competition Law and IP Law in the Past Year’ (2021) 12(4) *Journal of Competition Law and Practice* 338.

29.3 Guaranteeing an EU-law compliant patent enforcement procedure within national courts based on the Enforcement Directive

The Enforcement Directive is the central instrument for harmonising private enforcement of IP rights, including the patent enforcement procedure in the EU. EU legislative interference in the sphere of private enforcement is rather exceptional, which is why this Directive has been considered to be an ambitious initiative that touches upon procedural issues.³² In particular, due to the disparities in the procedural guarantees available for the IP enforcement, such as the application of provisional measures to preserve evidence, damages to be granted, or remedies available to the rightsholder,³³ that in turn may lead to the lack of confidence on the part of IP rights holders, lack of investment in innovation and thus a weakening of substantive IP rights,³⁴ the Directive was adopted on the basis of Article 114 TFEU with the aim to provide “effective means of enforcing intellectual property rights” in the internal market.³⁵ These means are understood as different “measures, procedures and remedies”.³⁶ At the same time, the technology driven increase in rich patent portfolios in pharmaceutical, electronic or communication sectors as well as the accumulation of patents amongst patent assertion entities have triggered abuse and aggressive litigation strategies.³⁷ Therefore, the Directive operates in a challenging global context where IP enforcement mechanisms can be used to abuse the system under the pretext of IP protection. For this reason, Article 3(2) of the Directive underlines that “those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.” This Article echoes Article 41 of the TRIPS Agreement and is also rooted in Articles 34 and 36 TFEU that seek to strike a fair balance between the free movement of goods and services on the one hand, and IP rights protection, on the other.³⁸ Observing fundamental rights as recognised by the Charter of Fundamental Rights of the European Union (the Charter) is also highlighted by the Directive.³⁹ Hence, in addition to the effec-

32 Folket G. Wilman, ‘A Decade of Private Enforcement of Intellectual Property Rights under IPR Enforcement Directive 2004/48: Where do We Stand (and Where might We Go)?’ (2017) 42(4) E. L. Rev. 509, 512.

33 Recital 7, Enforcement Directive.

34 *ibid* Recital 9.

35 *ibid* Recital 3.

36 *ibid* Article 1.

37 See in this regard, Sikorski (n 16) 33; Concerning abuse of patent rights see, Amandine Léonard, ‘Abuse of Rights’ in Belgian and French Patent Law – A Case Law Analysis’ (2016) 7 JIPITEC, 30; Regarding the Patent Assertion Entities’ strategies see, Shawn P. Miller, ‘Who is Suing Us? Decoding Patent Plaintiffs since 2000 with the Stanford NPE Litigation Dataset’ (2018) 21 Stan. Tech.L. Rev. 235.

38 Regarding Article 34 and 36 TFEU, see, Cassiers and Strowel (n 2) 178–179.

39 Recital 32, Enforcement Directive.

tive IP enforcement, the second main message of the Directive is to balance the interests of parties by adopting the proportionality principle, which also leads to the consideration of public interest.⁴⁰ For attaining these objectives, the Directive contains provisions on evidence,⁴¹ right of information,⁴² provisional and pecuniary measures,⁴³ corrective measures,⁴⁴ injunctions,⁴⁵ alternative measures,⁴⁶ damages⁴⁷ and legal costs.⁴⁸ However, the interpretation of these norms largely depends on the courts of the Member States, resulting in either pursuing a strong enforcement policy or rather a weaker one in favor of alleged infringers.⁴⁹ For instance, judicial authorities may order “the information on the origin and distribution networks of the goods and services” if the claimant’s order is “justified and proportionate”⁵⁰ – the vagueness of these notions is undoubtful.⁵¹ The calculation of damages can also vary from court to court, depending on what kind of enforcement is pursued,⁵² to name just a few examples. Due to existing disparities and uncertainties, the European Commission, after its report on the Directive issued in 2010,⁵³ has also published the guidance in the form of the Communication Paper.⁵⁴

Hence, striking a fair balance is not an easy task for the national courts in IP enforcement proceedings. This may explain the overall number of preliminary references submitted to the CJEU for the interpretation of different elements of the Directive, which is quite high considering the fact that the Directive is a relatively recent piece of legislation in the EU.⁵⁵

40 Wilman (n 32) 515.

41 Articles 6 and 7, Enforcement Directive.

42 *ibid* Article 8.

43 *ibid* Article 9.

44 *ibid* Article 10.

45 *ibid* Article 11.

46 *ibid* Article 12.

47 *ibid* Article 13.

48 *ibid* Article 14.

49 See in this regard, Marcus Norrgård, ‘The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property’ (2005) 6 *Era Forum* 503, 506–507.

50 Article 8, Enforcement Directive, see in this regard, *ibid*, 509.

51 See, Norrgård (n 49) 509.

52 *ibid*.

53 See, Christophe Geiger, Jacques Raynard and Caroline Roda, ‘What Developments for the European Framework on Enforcement of Intellectual Property Rights? A Comment on the Evaluation Report Dated December 22, 2010’ (2011) 33(9) *EIPLR* 543.

54 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Guidance on Certain Aspects of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights, Brussels, 29.11.2017, COM (2017) 708 final.

55 Even though the Enforcement Directive was adopted in 2004, and the deadline for national transposition was set for 2006, most of the Member States were late with the implementation, the last Member State being Luxembourg, transposing the Directive in 2009. See in this regard, Commission Staff Working

In the trade mark and copyright context, the CJEU clarified most of the provisions of the Directive, which have been discussed in detail elsewhere.⁵⁶ However, procedural guarantees for the patent enforcement have remained in shadow in the scholarly literature, with some exceptions,⁵⁷ calling for the analysis of these few identified cases – two pertaining to interim and provisional measures, one to legal costs and one to competition (abuse of a dominant position). The analysis is particularly relevant in the context of the upcoming UPC which will also be required to observe the CJEU's case law whenever relevant.⁵⁸

29.3.1 CJEU rulings on interim and provisional measures in patent enforcement

In order to prevent any “imminent infringement”, Article 9(1) of the Directive provides the possibility of requesting an interlocutory injunction against an alleged infringer. It is in this context that the Court of Justice, in case *Phoenix Contact*, has been asked for a preliminary ruling by the regional court in Munich in the dispute between the two technology companies concerning the European patent held by Phoenix Contact.⁵⁹ Particularly, the referring court was interested in whether the practice of the higher regional courts in Germany, which refused to grant interim reliefs when the patent in question had not yet survived the opposition procedure before the EPO or the invalidity proceedings before the Federal Patent Court of Germany (*Bundespatentgericht*), was compatible with Article 9(1) of the EU Directive.⁶⁰

The Court stressed that the objectives of the Directive should be recalled and that each case should be treated individually by national courts when they decide upon the provisional measures.⁶¹ The purpose of the provisional measure stipulated in Article 9

Document Analysis of the Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights in the Member States, Brussels, 22.12.2010, SEC (2007) 1589 final, Annex 1.

⁵⁶ In the context of trade mark disputes, see for example cases, C-427/15, *New Wave SZ*, EU:C:2017:18, C-580/13, *Coty Germany*, EU:C:2015:485; In the context of copyright see for example cases, C-275/06, *Promusicae*, ECLI:EU:C:2008:54; C-314/12, *UPC Telekabel Wien*, ECLI:EU:C:2014:192. See, Wilman (n 32) 509.

⁵⁷ Pedro Henrique D. Batista and Gustavo Cesar Mazutti, ‘Comment on “Huawei Technologies” (C-170/13): Standard Essential Patents and Competition Law – Howe Far does the CJEU Decision Go?’ (2016) 47 IIC 244.

⁵⁸ According to the Article 21, UPC Agreement, the UPC, “[a]s a court common to the Contracting Member States and as part of their judicial system [...] shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court”.

⁵⁹ Case C-44/21, *Phoenix Contact*, ECLI:EU:C:2022:309.

⁶⁰ *ibid* para 27.

⁶¹ *ibid* para 31.

(1) of the Directive is, according to the Court, precisely to stop the infringement immediately before the final decision on infringement is taken, in order to avoid any irreparable harm caused to the IP rights holder.⁶² This goes to the heart of the Directive that set as its objective an effective IP enforcement.⁶³ The Court argued that as the patent in question was confirmed to be valid, the case law of national courts predominantly rendered the procedural guarantees to protect IP right ineffective.⁶⁴ To mitigate the risk that the defendant might suffer from an interim relief, the Court, by referring to Article 3(2) of the Directive, emphasised the necessity to balance the interests of parties in order to avoid an abusive conduct by a patent holder.⁶⁵ Thus, the Court recalled all possibilities provided by the Directive (Articles 9(5) (6) and (7)) that ensure that the rights of the defendant are preserved and that the abuse of provisional measures is avoided, for instance by granting a compensation to the defendant.⁶⁶ Interestingly, German national law did not contain any rule whereby the issuance of an interim injunction is subject to the condition that the patent in question must have been held valid by a court decision,⁶⁷ but it was only the national courts that followed this line of reasoning. Therefore, the Court of Justice called for precluding such case law which was clearly contrary to the objectives of Article 9(1) of the Directive.⁶⁸

With this decision, the Court of Justice averts the burden imposed on patent holders in German proceedings. In many parts of the judgment it can be noted that the Court frequently highlights that IP rights must be protected effectively, for instance when the Court states that the Directive is only a minimum standard and that the national legislation, and ultimately the courts, can only provide a higher level of protection⁶⁹ and not a lower one. The pro-IP protection character of the judgment is also noticeable when the Court mentions the presumption of validity of patents granted at the EPO.⁷⁰ With this judgment, the German courts are now obliged to disregard the additional criterion for applying provisional measures that will perhaps make the German courts even more attractive for patent holders.⁷¹ As this case is very recent, dating to 28 April 2022, it remains to be seen how the case law in Germany will further develop, and if the Court of Justice will receive similar questions in the future.

⁶² *ibid* para 32.

⁶³ *ibid*.

⁶⁴ *ibid* para 40.

⁶⁵ *ibid* para 42.

⁶⁶ *ibid* paras 45–47.

⁶⁷ *ibid* para 51.

⁶⁸ *ibid* para 52–54.

⁶⁹ *ibid* para 38.

⁷⁰ *ibid* para 41.

⁷¹ Sandra Mueller, 'Through the Fire? Not Anymore – European Court of Justice strengthens Rights of Patent Owners in Germany', 17 May 2022, <<https://www.iptechblog.com/2022/05/through-the-fire-not-any-more-european-court-of-justice-strengthens-rights-of-patent-owners-in-germany/>> accessed 2 September 2022.

Another case in relation to preliminary measures provided in Article 9 of the Directive which is also relatively new – dating to 12 September 2019 – is *Bayer Pharma*.⁷² This time the issue in question was Article 7(9) of the Directive which is a counterbalancing provision and provides that in case no infringement or threat of infringement has been found, the courts can, upon the request of the defendant, order the applicant to pay appropriate compensation for the injury caused by the provisional measures.

The case concerned a pharmaceutical product of Bayer for which the patent application was still pending at the Hungarian patent office when the two competitors started marketing their generic products in Hungary.⁷³ Once the patent was granted, the patent owner requested a preliminary injunction to stop the marketing of the alleged infringers' products and in addition, to provide the guarantees.⁷⁴ The provisional measures had been granted, but were then revoked due to some procedural defects.⁷⁵ Moreover, the patent was later found to be invalid⁷⁶ and thus, the infringement proceedings were also stopped.⁷⁷ The two defendants subsequently asked for a compensation for their losses caused by the provisional measures.⁷⁸ In these circumstances, the Hungarian national court, the Budapest High Court, discontinued the proceedings and asked the Court of Justice how the "appropriate compensation" provided in Article 9(7) of the Directive should be interpreted and whether national legislation under which a party shall not be compensated for the loss if he has not taken any action to avoid the said loss, shall not apply.⁷⁹ In other words, the question was whether the defendant's action or inaction in experiencing the loss, in this case the marketing of the products despite the pending patent application, played a role in deciding the issue of compensation.⁸⁰

According to the Court, as the Article 9(7) of the Directive does not make any reference to national law, it must be given an autonomous and uniform interpretation,⁸¹ since otherwise the objective of the Directive to ensure an equivalent, homogenous and high level of protection would be compromised.⁸² In this regard, the national authorities

⁷² Case C-688/17, *Bayer Pharma*, ECLI:EU:C:2019:722.

⁷³ *ibid* para 16.

⁷⁴ *ibid* para 21.

⁷⁵ *ibid* para 23.

⁷⁶ *ibid* para 26.

⁷⁷ *ibid* para 28.

⁷⁸ *ibid* para 31.

⁷⁹ *ibid* para 34.

⁸⁰ Eszter Szakás, 'Launch at Risk' – Article 9(7) of the Enforcement Directive interpreted by the CJEU in C-688/17 (Bayer), concluding that when a patent is subsequently revoked it does not automatically follow that the preliminary injunction was unfounded', Kluwer Patent Blog, 23 September 2019, <<http://patentblog.kluweriplaw.com/2019/09/23/launch-at-risk-article-9-7-of-the-enforcement-directive-interpreted-by-the-cjeu-in-c-688-17-bayer-concluding-that-when-a-patent-is-subsequently-revoked-it-does-not-aut/>> accessed 2 September 2022.

⁸¹ Case C-688/17, *Bayer Pharma*, ECLI:EU:C:2019:722, para 41.

⁸² *ibid* para 44.

must provide their national courts with the power to grant such “appropriate compensation”⁸³; it is therefore up to the national courts to find out what the “appropriate” compensation would be in the specific circumstances of the case.⁸⁴ The Court submitted that the mere fulfilment of the criteria of Article 9(7), particularly the lifting of provisional measures or the cessation of infringement or threat of infringement, does not automatically oblige the national courts to grant a compensation.⁸⁵ In the given context, as the defendants were marketing their products while the patent application was pending, the applications for the provisional measures could not be considered as “unjustified,” even if they were later set aside.⁸⁶ Otherwise it would be discouraging for the IP rightsholders to apply for such provisional measures available under Article 9 of the Directive.⁸⁷ Most importantly, the national courts should determine whether the possibility of receiving a compensation foreseen by Article 9(7) is not abused.⁸⁸ Therefore, the Court of Justice found that the national law prohibiting the grant of compensation for the party that had not acted to avoid the loss, was not incompliant with Article 9(7) and with the concept of “appropriate compensation”, as long as it allowed the national courts to observe all the objective circumstances to determine whether the tool of compensation had been abused or not.⁸⁹

Hence, automatic compensations imposed on patent holders are not welcomed by the CJEU and a cautious approach is instructed before concluding whether the defendant has suffered from preliminary injunctions. Based on these two cases, it can be argued that the possibilities to put a heavy burden on the patent holders when it comes to the application of preliminary measures are minimised by the Court. In one case, national case law that hinders the way to preliminary measures employed by patent holder is overturned, and in another, automatic compensation to be provided by the patent holder is restrained. The latter case is particularly relevant for the system where an “injunction gap” may occur due to the bifurcated judicial system to which Hungary and Germany belong. The Unified Patent Court has also adopted this system, therefore, the CJEU’s balanced approach exhibited in *Bayer Pharma* will be most probably followed by the UPC as it will be under the obligation to observe EU law, in this case the Enforcement Directive, when dealing with cross-cutting substantive patent issues.

⁸³ *ibid* para 50.

⁸⁴ *ibid* para 51.

⁸⁵ *ibid* para 52.

⁸⁶ *ibid* paras 63–64.

⁸⁷ *ibid* para 65.

⁸⁸ *ibid* para 70.

⁸⁹ *ibid* para 71.

29.3.2 The issue of reimbursement of legal costs in patent proceedings clarified by the CJEU

Article 14 of the Enforcement Directive states that “Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.” However, it is not always clear what shall be included in the costs to be reimbursed by a losing party. This question gave rise to the case *United Video Properties*, which originated from the dispute in Belgium between United Video Properties and Telnet concerning the former’s patent.⁹⁰ In particular, United Video Properties brought a patent infringement action against Telnet and requested an injunction to cease the infringement and pay the costs.⁹¹ The Commercial Court in Antwerp dismissed the infringement action, declared the patent invalid and ordered the claimant to pay procedural costs amounting to EUR 11 000.⁹² The United Video Properties subsequently appealed the judgment at the Court of Appeal, however, it later discontinued its appeal.⁹³ Telnet, in addition to the granted damages, requested reimbursement of lawyer’s and patent specialist’s fees,⁹⁴ but Belgian legislation sets EUR 11 000 as a ceiling for the proceedings at each instance and, moreover, according to the case law of the Court of Cassation, any additional reimbursement can only be made if there is a fault on the applicant’s side when bringing an action resulting in these additional costs.⁹⁵ Telnet submitted that such legislation and case law were contrary to Article 14 of the Directive, which is why the Court of Appeal of Antwerp stopped its proceedings and asked the Court of Justice whether 1. a national legislation giving courts the flexibility to take into account the specificities of a case at hand and setting a ceiling on the costs associated with lawyer’s assistance and 2. national case law making the reimbursement of additional expert costs conditional on fault, were in compliance with Article 14 of the Directive.⁹⁶

Regarding the first question, the Court has traditionally employed a teleological reasoning, specifying that the question of costs must be read in the light of the objectives of the Directive and that the substantial part of the costs must be reimbursed in order to ensure the enforcement of intellectual property rights.⁹⁷ At the same time, the Court highlighted that the unsuccessful party can only bear “reasonable” and “proportionate” costs,⁹⁸ which is up to the national courts to determine. Therefore, the Court’s answer to

⁹⁰ Case C-57/15, *United Video Properties*, ECLI:EU:C:2016:611.

⁹¹ *ibid* para 14.

⁹² *ibid* para 15.

⁹³ *ibid* para 16.

⁹⁴ *ibid*.

⁹⁵ *ibid* para 17.

⁹⁶ *ibid* para 19.

⁹⁷ *ibid* para 22.

⁹⁸ *ibid* paras 26, 29.

the first question is that a national legislation allowing the courts to take into account the specific features of each individual case and a law setting the limit for reimbursement, can be justified as long as the set rates take into account the costs incurred for the given proceedings in the Member State concerned,⁹⁹ whereas a legislation setting “significantly below the average rate” would not be acceptable.¹⁰⁰

As for the second question, here the court adopted a literal approach and held that the “other costs” mentioned in Article 14 of the Directive are not specified anywhere, and therefore the technical expert’s fees are not excluded in principle.¹⁰¹ At the same time, the Court noted that a broad interpretation of Article 14 would blur the line between the costs associated with the court proceedings under Article 14 and the damages considered under Article 13 which articulates upon the infringer’s fault and reads as follows: “knowingly, or with reasonable grounds to know engaged in an infringing activity.” Consequently, the Court’s response to the second question is that the national rules subjecting the reimbursement of “other costs” to the fault of the unsuccessful party, is not acceptable as long as those other costs of a technical advisor are “directly and closely” linked to a judicial action.¹⁰² Although these terms are open to interpretation, the Court has at least defined which costs are not directly and closely linked to the court action, such as the general observation of the market,¹⁰³ or the “costs of identification and research.”¹⁰⁴

The question of costs of representation in patent proceedings has become especially relevant in the context of the Unified Patent Court where litigation will require particular preparation due to the new legal instruments and court proceedings. The short deadlines imposed on defendants are also considered to be particularly challenging and require the involvement of multiple lawyers in the preparation of the defence at the UPC.¹⁰⁵ Hence, the rule on incurring costs by an unsuccessful party, also considered by the UPC Agreement¹⁰⁶, will be alarming for the parties prior to deciding upon bringing an action to the new court. Nevertheless, with the aforementioned CJEU judgment, the risk of reimbursing of expensive representation costs is somewhat mitigated, as not every prior effort put in the preparation by a party will be counted as a cost “directly and closely” related to the litigation at the UPC.

⁹⁹ *ibid* para 25.

¹⁰⁰ *ibid* para 26.

¹⁰¹ *ibid* para 34.

¹⁰² *ibid* para 40.

¹⁰³ *ibid* para 39.

¹⁰⁴ *ibid* para 35.

¹⁰⁵ For instance, according to the Rule 23 of the Rules of Procedure of the UPC, the defendant will have only three months for the preparation of a Statement of defence.

¹⁰⁶ Article 69, Unified Patent Court Agreement 2013 (UPC Agreement).

29.3.3 CJEU providing guidance on procedural guarantees in patent enforcement in the light of EU competition law

The thin line between the protection of IP and the concerns of competition is a well-known issue that is appropriately covered in academic literature.¹⁰⁷ The case in point – *Huawei Technologies* – is a representation of how patent enforcement can potentially conflict with the principles of fair competition and the CJEU's guidance in this regard. The case originated from proceedings between Huawei Technologies and the German corporation ZTE concerning the alleged infringement of a standard essential patent granted by the EPO in the field of telecommunication as established by European Telecommunications Standards Institute (ETSI).¹⁰⁸ Given that the dominant position of Huawei Technologies was undisputed, the regional court of Düsseldorf asked the Court of Justice 1. whether it constituted an abuse of that dominant position if the applicant, that had committed to grant licences on FRAND terms, brought an action for an injunction against the alleged infringer, in cases where the infringer had shown its willingness to negotiate a licencing agreement or, would there be an abuse only if in addition to the willingness, an offer to conclude the licencing agreement had been submitted by the infringer and 2. how each of the scenarios should have been concretely exhibited in order to conclude whether there was an abuse or not.¹⁰⁹ The question was particularly relevant in the context of the pre-existing contrasting practices – on the one hand, of the German Federal Supreme Court in the *Orange Book* case, where the standard user's defences were limited by requiring him to submit an unconditional offer as well as the payment of a licencing fee, and, on the other hand, the Commission's approach, according to which the standard user's mere willingness to become a licensee would be sufficient to prohibit the SEP holder from seeking an injunction, without establishing the objective criteria for "willingness".¹¹⁰ In view of these two extreme references, in one case the intricate conditions required from the defendant (SEP user) and in another case with some leeway given to them, the German court sought clarification from the CJEU.

The CJEU's balanced response to the question of whether seeking an injunction, the rendering of accounts, the recall of products and damages constitutes an abuse of a dominant position within the meaning of Article 102 was a middle ground between the *Orange Book* case law and the Commission's approach. At the outset, the Court underlined that balance should be found between on the one hand, free competition and on the other

¹⁰⁷ See, for example, Joseph Strauss 'Patent Application: Obstacle for Innovation and Abuse of Dominant Position under Article 102' (2010) 1(3) *Journal of European Competition Law & Practice* 189; Hanns Ullrich, 'Mandatory Licensing under Patent Law and Competition Law: Different Concerns, Complementary Roles' in Reto Hilty and KC Liu (eds) *Compulsory Licensing MPI Studies on Intellectual Property and Competition Law*, vol 22 (Springer 2015).

¹⁰⁸ Case C-170/13, *Huawei Technologies*, ECLI:EU:C:2015:477, para 2.

¹⁰⁹ *ibid* para 39.

¹¹⁰ *ibid* paras 30–34.

hand, the protection of intellectual property rights and effective judicial protection.¹¹¹ Even though the right to bring an action for infringement cannot in itself be considered an abuse of a dominant position, in exceptional circumstances, it may however be qualified as abusive.¹¹² In particular, the CJEU observed that in this specific case, the question concerned not any patent but a standard-essential patent that is granted only on condition that the patent holder licences on FRAND terms,¹¹³ thus creating legitimate expectations for third parties that such licences will be granted.¹¹⁴ Refusal to do so can indeed be considered as an abusive conduct, yet the specific circumstances of the case must be observed in the light of the objectives of the Directive 2004/48 and the Article 17(2) concerning the IP protection as well as Article 47 of the Charter on the access to a tribunal.¹¹⁵

Consequently, the Court provided the objective elements that may contribute to defining a possible abuse. According to the CJEU, the SEP holder does not infringe Article 102 by bringing the prohibitory injunction if he has submitted a prior notice or has engaged in the consultation with the alleged infringer.¹¹⁶ Moreover, it is up to the SEP holder to specify the nature of the infringement as it is not always easy to be aware of the specific essential patent, since standards consist of many such patents.¹¹⁷ The SEP holder should then submit a written offer for a licencing agreement on FRAND terms, specifying the royalty fees¹¹⁸ to which the alleged infringer has not diligently responded.¹¹⁹ At the same time, the CJEU also set out the obligations that the alleged infringer must fulfill in order to be able to rely on the abuse of a dominant position by an SEP holder as a ground in its defence. These are: no delaying tactics in responding to the offer,¹²⁰ submission of a counteroffer also with FRAND terms in case of a disagreement with the initial offer,¹²¹ and providing the security for the past uses of the SEP from the moment the counteroffer is refused.¹²² The CJEU also held that legal proceedings seeking a render of accounts or an award of damages do not amount to an abuse of a dominant position as these requests relate to past actions and do not impact the competitors' ability to enter the market.¹²³ Moreover, although the issue was not raised when speaking of procedural guarantees, the Court held that the defendant's parallel action against the

111 *ibid* para 42.

112 *ibid* paras 46–47.

113 *ibid* paras 50–51.

114 *ibid* para 53.

115 *ibid* para 57.

116 *ibid* para 60.

117 *ibid* paras 61–62.

118 *ibid* para 63.

119 *ibid* para 71.

120 *ibid* para 65.

121 *ibid* para 66.

122 *ibid* para 67.

123 *ibid* paras 74–76.

validity or essentiality of a patent shall not be “criticised” as these are not checked by the standardisation body.¹²⁴

This judgment is an outstanding example among the Courts’ many rulings, where a clear and objective guidance is set out for the national courts and the SEP holders willing to enforce their patent rights without infringing the competition rules. As a result, the heavy burden of identifying the infringement and preparing the licencing agreement offer is lifted from the SEP users, who are in an inferior position compared to the SEP holder in terms of the knowledge about the value of a patent, while at the same time the Court maintained the possibility to fight against the infringement even by a dominant SEP holder, as long as the latter cautiously follows the steps explained in the judgment. Such a decision minimises the risks associated with the over and under enforcement of patents, also known as “hold-up” (instrumentalising the licence agreements for hindering access to market by competitors, e.g. by setting high royalty fees) and “hold-out” (setting low or no royalty fees by the SEP users, thereby jeopardizing IP rights enforcement).¹²⁵ These types of judgments serve as a reminder that even though patents are very technical in nature, they can “become a matter of general interest.”¹²⁶ The *Huawei* case is of particular importance when it comes to reconciling competition and patent law requirements, which will also be one of the main preoccupations of the UPC.

29.4 The future role of the CJEU in procedural aspects of patent enforcement at the UPC

The new and (still upcoming) Unified Patent Court will have exclusive jurisdiction over disputes concerning European patents with unitary character and, ultimately European patents.¹²⁷ Even though this court is based on an international agreement and not EU law, it will co-exist with the existing judicial order of the EU and, particularly, the established case law of the Court of Justice. The UPC Agreement explicitly refers to EU law as its source of applicable law in the Article 24(1). In addition, the very same preliminary reference mechanism is also considered for the UPC in Article 21 of the UPC Agreement. In particular, the UPC, as a court common to the Contracting Member States “shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU,” rendering the CJEU’s decisions binding on the

¹²⁴ *ibid* para 69.

¹²⁵ See on this case, Batista and Mazutti (n 57) 348–349.

¹²⁶ Hanns Ullrich, ‘Patent Protection in Europe: Integrating Europe into the Community or the Community into Europe?’ (2002) 5 EUI Working Paper Law 1, 5.

¹²⁷ According to the Article 83, UPC Agreement, during the transitional period of seven years, the European patents can still be challenged before national courts.

UPC.¹²⁸ In terms of co-existence of two courts, the beforementioned article is the central provision. When it comes to the Regulation 1257/2012, it is assumed in the literature that the preliminary references will be submitted regarding its Article 5 that is on the unitary effect and the rights derived from it. Other substantive norms regarding which the preliminary references are likely to be raised relate to the Biotechnology Directive, one of the rare pieces of EU substantive patent legislation. However, the UPC, like any national court, will also apply the rules of procedure and thus, it may well be that the procedural aspects in the context of patent enforcement will be the subject of dialogue between the UPC and the Court of Justice.

Legally, the UPC contains those procedural guarantees provided in the EU Enforcement Directive. It is even argued that the entire UPC Agreement is “a collective transposition of the rules” of this Directive.¹²⁹ Indeed, in principle all provisions of the Directive are provided in Chapters 3 and 4 of the UPC Agreement, and some of the provisions are in parts even repeated literally, for example the issue of preserving evidence,¹³⁰ the provisional and protective measures,¹³¹ damages¹³² or legal costs.¹³³

As for the Rules of Procedure of the UPC, the *travaux préparatoires* illustrate that after the discussion on these rules between the Member States’ delegations, such as, legal aid, court fees, recoverable costs, etc., the European Commission was asked to examine their compatibility with the *acquis communautaire*.¹³⁴ In principle, the rules are detailed explanations of the provisions set out in the UPC Agreement, spread through the five main parts: on the Procedures before the Court of First Instance, on Evidence, on Provisional Measures, on Procedures before the Court of Appeal and General Provisions.¹³⁵

While formally speaking the UPC is ready to co-exist with the CJEU, the types of references and therefore, the interference of the CJEU in patent enforcement, as it has done in the illustrated national cases, will only be seen once the UPC enters into force. As of now, it can be argued that the judicial law-making of the CJEU is always characterised by a “balanced” approach and observation of the proportionality principle in the light of EU legal principles, including fundamental rights. If the UPC’s powers in relation to ordering the production of evidence, or inspection of premises will be called for the CJEU’s scrutiny through the preliminary reference mechanism, the CJEU will continue its line

¹²⁸ Article 21, UPC Agreement.

¹²⁹ Wilman (n 32) 518.

¹³⁰ Article 60, UPC Agreement and Article 7, Enforcement Directive.

¹³¹ Article 62, UPC Agreement and Article 9, Enforcement Directive.

¹³² Article 68, UPC Agreement and Article 13, Enforcement Directive.

¹³³ Article 69, UPC Agreement and Article 14, Enforcement Directive.

¹³⁴ EPO, ‘17th European Patent Judges’ Symposium, Tallin, 9–12 September 2014’ (2015) 5, Supplementary Publication – Official Journal of EPO, p. 27, <<https://www.epo.org/law-practice/legal-texts/official-journal/2015/etc/se5/2015-se5.pdf>> accessed 19 August 2020.

¹³⁵ Rules of Procedure of the Unified Patent Court, 2017.

of case law and ensure to guide the UPC in terms of application of procedural rules in the same way as the Court guides the national courts. The CJEU's balanced approach will be particularly essential as patent enforcement directly affects the protection of fundamental rights and has far-reaching societal implications in some fields, such as the medical sector.¹³⁶ However, as there is no appeal mechanism of the UPC's decisions at the Court of Justice, it will be up to the UPC itself or individuals – the parties in disputes before the UPC – to initiate the preliminary references to the CJEU.¹³⁷ To mitigate the concerns, it is important to note that the judges of the UPC will come from national courts that are used to dealing with the EU legislation and CJEU case law, the examples of which were discussed above. This experience will be a valuable attribute for serving as a judge at the UPC.

29.5 Conclusion

The importance attached to the effective enforcement of intellectual property rights in the EU is undeniable as evidenced by the adoption of the Directive 2004/48/EC. As it is an instrument setting minimum standards, its implementation varies amongst national legislations and courts. This may explain the overall number of preliminary references submitted to the CJEU seeking clarification of the provisions of the Directive. As far as the procedural guarantees and enforcement of patents are concerned, there are only a few CJEU rulings, but their analysis allows some conclusions to be drawn. Firstly, the Court is aware of the importance of the patent enforcement, which is often underlined by referring to the objectives of the Directive and the context in which it was adopted. Secondly, despite the need to ensure the protection of the rights of patent owners (as was seen in cases *Phoenix Contact and Bayer Pharma*), the Court reinforces the balanced approach towards patent holders' interests on the one hand, and their competitors and the general public, on the other. The procedural norms explained by the Court concerning the use of preliminary measures, the reimbursement of legal costs and the final injunctions demonstrate how cautious the Court is about a reasonable and proportionate approach, reminding us that these are not straightforward issues and that each case shall be treated individually within its legal and economic context (for example that the reimbursable costs must be calculated based on the national context as stated in *United Video Properties case*). Finally, these cases, particularly the *Huawei* case, demonstrate that the Court of Justice is in full capacity to provide a very detailed examination of patent issues, especially when they are discussed in the context of EU competition law. The Court's guidance is clear and applicable by national courts. Such ruling is particularly

¹³⁶ See in this regard, Aurora Plomer, 'The Unified Patent Court and the Transformation of the European Patent System' (2020) 51 IIC 791, 794.

¹³⁷ *ibid.*

essential in times when the specialised European Unified Patent Court is about to enter into force, as the authority of the Court of Justice must be maintained when it comes to the interpretation and the application of procedural guarantees deriving from EU law, including fundamental rights in patent enforcement. Only if the role of the Court of Justice as a guardian of EU law is ensured, the harmonious co-existence of the two courts and thus, balanced patent enforcement can be achieved.