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Subject:	Creating a Unified Patent Litigation System - Reflections on the Benelux Court of Justice

Delegations will find in Annex a note from the Dutch, Belgian and Luxembourg delegations on the above subject.

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Reflections on the Benelux Court of Justice

Paper by the Benelux countries

Following the Opinion 1/09¹ of the Court of Justice of the European Union (in the following referred to as “ECJ”) concerning the compatibility with European Union law of a draft agreement creating a unified patent litigation system in Europe, much attention has been drawn to the Benelux Court of Justice. The question arises whether the Benelux Court of Justice, which is common to the three Benelux countries, could serve as an example showing us the way towards a Unified Patent Court?

Historical survey and competences of the Benelux Court of Justice

Belgium, the Netherlands and Luxembourg (hereinafter also referred to as the “Benelux”) founded the Benelux Court of Justice in 1965 by means of a treaty² establishing a common court for the uniform interpretation of Benelux law. Although the Benelux Court of Justice has also jurisdiction on other aspects of Benelux law, the majority of cases, which it has decided, deal with Benelux trademark law. Under the current treaty, trademark cases (first instance and appeal) are dealt with by the national courts of the Benelux countries. The national courts of first instance have the possibility and the national appeals courts the obligation, to refer cases to the Benelux Court of Justice as the highest judge for interpretation of the law of the Benelux (see below). However, it is to mention that the current treaty is being renegotiated by the Benelux countries including a project to divert appeal cases in trademark law to the Benelux Court of Justice. It is obvious that such modifications would render similarities with the envisaged Unified Patent Court even more striking.

¹ ECJ Opinion 1/09 of 8 March 2011, ECR I-nyr.

² Treaty of 31 March 1965, modified by the protocols of 10 June 1981 and 23 November 1984, http://www.courbeneluxhof.be/pdf/traite_fr.pdf (only available in French and Dutch).

Main characteristics of the Benelux Court of Justice

The Treaty establishing a Benelux Court of Justice and the rules of procedure which are based on it constitute the court's sole legal sources. Furthermore, it should be noted that in the national law of the three member states, there are no further provisions relating to the Benelux Court of Justice.

From a procedural point of view in a given case, the Benelux Court of Justice intervenes in the course of proceedings before the national courts. The latter stay their proceedings until such time as the Benelux Court of Justice has ruled on the interpretation of Benelux law.

In the treaty it is explicitly stated that national courts shall be bound by the decisions of the Benelux Court of Justice. From this follows that the Benelux Court of Justice is regarded, in its field of competence, as the highest court in the Benelux.

The Benelux Court of Justice is functioning within the framework of the Benelux Economic Union. It is closely linked to (the General Secretariat of) the Benelux Economic Union. Costs incurred by the court are dealt within a separate item in the budget of the Benelux Economic Union. Furthermore, in practice, staff recruited for the court comes from the General Secretariat of the Benelux Economic Union. In regard to the exercise of their duties, they are hierarchically subordinated to the President of the court.

The Benelux Court is also closely linked to the legal order of the Benelux Member States. The judges and Advocates General are recruited from the Supreme courts of the Benelux countries (functions that they continue to assume during their office as judges of the Benelux Court of Justice) and appointed by the Council of Ministers of the Benelux.

Relation with the IP-system of the three Member States

The Benelux Office of Intellectual Property (part of the Benelux Organization of Intellectual Property) is the institution competent for granting trademarks and designs in the Benelux. The Benelux Organization of Intellectual Property is formally independent from the Benelux Economic Union, and has its own international legal personality.

Law applicable before the Benelux Court of Justice

National laws on trademarks and designs no longer exist in the Benelux countries. The applicable law before the Benelux Court of Justice is defined by the Benelux Treaty on Intellectual Property Rights (trademarks and designs), which is also currently being renegotiated. This treaty describes not only the grounds on which a trademark can be granted, and the procedures, but integrates also the relevant enforcement dispositions of directive 2004/48³. In fact, directive 2004/48, but also directive 2008/95⁴ have been implemented by the Benelux countries within the Benelux Treaty on Intellectual Property Rights. The implementation of those directives in the Benelux Treaty thus has to be seen as an implementation by the three Benelux Member States.

Thus, the applicable law before the Benelux Court of Justice is also to be regarded as legal rules common to the Member States which is also an element in reasoning of the ECJ in both the *Dior* case and the *Paul Miles* case (cf. *infra*).

The Benelux Court of Justice position within the legal order of the EU

The ECJ already decides upon the legal status of the Benelux Court of Justice within the legal framework of the EU. The *Dior* case, to which the ECJ made reference in its Opinion 1/09 as well as the recent *Paul Miles* case, can serve as legal sources for the position of the Benelux Court of Justice within the legal framework of the EU.

- **The *Dior* case (C-337/95) of 4 November 1997**

In the case *Dior*, the Dutch Supreme court made a reference for a preliminary ruling in a litigation on trademarks dealt before it concerning the interpretation on the one side of Benelux Law on trademarks and on the other side of a Council Directive related to trademarks.⁵

³ Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, in the version of the corrigendum (OJ 2004 L 195, p.16).

⁴ Directive 2008/95 of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (OJ 2008 L 299, p.25).

⁵ First Council Directive (89/104) of 21 December 1988 to approximate the laws of the Member States relating to trademarks (OJ 1989 L 40, p. 1).

The question arose whether the Dutch Supreme court or the Benelux Court of Justice has to be considered as the court or tribunal under article 177, third paragraph of the EC Treaty (article 267, third paragraph of the TFEU), whereupon the court or tribunal against whose decisions there is no judicial remedy under national law shall bring the matter before the ECJ.

The ECJ ruled that “*there is no good reason why such a court common to a number of Member States[i.e. the Benelux Court of Justice], should not be able to submit questions to the Court of Justice of the European Union, in the same way as courts or tribunals of any of those Member states.*”⁶ The ECJ found that “[...] *to allow a court, like the Benelux Court, faced with the task of interpreting Community rules in the performance of its function, to follow the procedure provided for by Article 177 of the Treaty would therefore serve the purpose of that provision, which is to ensure the uniform interpretation of Community law.*”⁷

Important in the ECJ ruling in the Dior case is “[...] *that the Benelux Court of Justice has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and that the procedure before it is a step in the proceedings before national courts leading to definitive interpretation of common Benelux legal rules.*”⁸

- **Opinion 1/09 of 11 March 2011**

in its Opinion 1/09, the ECJ emphasised “[...] *that the situation of the Patent Court envisaged by the draft agreement would differ from that of the Benelux Court of Justice, [...] since the Benelux Court is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union, its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union.*”⁹

⁶ Case C-337/95, *Parfums Christian Dior* [1997] ECR I-06013, para.21.

⁷ Case C-337/95, *Parfums Christian Dior* [1997] ECR I-06013, para.23.

⁸ Case C-337/95, *Parfums Christian Dior* [1997] ECR I-06013, para.22.

⁹ ECJ Opinion 1/09 of 8 March 2011, ECR I-nyr, para.82.

The European and Community Patent Court as it was presented to the ECJ (which was based on an agreement including also third party countries) would differ from these characteristics as it is “[...] *outside the institutional and judicial framework of the European Union. It is not part of the judicial system provided for in Article 19(1) TEU. The Patent Court is an organization with a distinct legal personality under international law.*”¹⁰ Furthermore, the first envisaged Patent Court would differ from the Benelux Court of Justice in that regard that the link between it and the judicial systems of the Member States would have been rather vague.

Since then the presidency proposed already several amendments in order to clarify the link between the judicial systems of the Member States and the envisaged Unified Patent Court by introducing elements on the liability of the Member States for damages due to infringement of the Union law, and by introducing a clear reference that the Unified Patent Court will be a “Court common to the Member States”.

- **The Paul Miles case (C-196/09) of 14 June 2011**

In the *Paul Miles* case, the ECJ had to decide whether the Complaints Board of the European Schools is to be regarded as a court similar to the Benelux Court of Justice, i.e. a court of a member state within the meaning of article 267 TFEU.

The ECJ denied this similarity by repeating that the Benelux Court of Justice has the task to ensure that “[...] *the legal rules common to the three Benelux States are applied uniformly and moreover, the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules, the Complaints Board does not have any such links with the judicial system of the Member States.*”¹¹

Furthermore the ECJ stressed that the Complaints Board is “[...] *a body of an international organization which, despite the functional links which it has with the Union, remains formally distinct from it and from those Member States.*”¹²

¹⁰ ECJ Opinion 1/09 of 8 March 2011, ECR I-nyr, para.71.

¹¹ Case C-196/09, *Paul Miles and Others v European Schools* [2011] ECR I-nyr, para.41.

¹² Case C-196/09, *Paul Miles and Others v European Schools* [2011] ECR I-nyr, para.42.

Consequences for the Unified Patent Court

Many of the common characteristics of the Benelux Court of Justice and of the Unified Patent Court will contribute to address the legal requirements set out by the ECJ in Opinion 1/09:

- Like the Benelux Court of Justice, the future Unified Patent Court shall be a court common to Member States solely (i.e. excluding third countries), operating entirely within the EU legal order.
- Both Courts have to be seen as the highest Court in the Member States in matters for which it has competence, and their decisions will lead to a definitive interpretation of the laws in matters for which it has competence, it being understood that both Courts are bound by the uniform interpretation of Union law given by the ECJ in references for a preliminary ruling.
- The national courts will not be able to act as a remedy if the said Courts were to wrongly interpret European Union law, except in cases of liability for damage caused by infringements of Union law.
- Hence, the Unified Patent Court shall request preliminary rulings, ensuring that EU law is interpreted uniformly by the ECJ and that, in all circumstances, it has the same effect in all Member States. In order to comply with article 267 TFEU, the Unified Patent Court shall thus intervene in the same way as any court or tribunal of the member states.
- The decisions of both Courts are subject to mechanisms capable of ensuring the full effectiveness of EU rules.

For all these reasons, the fact that the Benelux Court's decisions are (currently) a step in the proceedings before a national court is irrelevant and should not be an obstacle to establish the Common Patent Court as currently envisaged.