10. Intellectual property: property rights and the public interest

Access to proprietary technology

James McLean

Intellectual property is recognized internationally as a property right (see the Preamble to the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property ('TRIPS Agreement')). It is a property right of a particular kind. Like property in land, it can have a term and be divided up into rights of occupation or use; and, also like property in land, its existence is not universally welcomed:

The first person who, having marked out a plot of land, thought to say: 'This belongs to me' and found people daft enough to believe him, was the true originator of the concept of property¹

J.J. Rousseau, *Discours sur l'origine de l'inégalité* (1755)

The reason why legal systems provide intellectual property regimes has been articulated by the European Commission as being 'to release the potential of European inventors and creators and empower them to turn ideas into high quality jobs and economic growth'.²

Some intellectual property rights come into existence entirely by the act of creation of a work (including copyright, unregistered design right, database right). Others are constituted by an entry in a public register (patents, registered design rights, plant variety rights). Still others, whether created by use or by registration, are enhanced by use and best defended by registration (trade marks). Secret technical information is an asset whose existence depends entirely upon the existence, scope and legal efficacy of measures and obligations designed to prevent disclosure of the secret. It is (by definition) unpublished. The secret, as such, is not an intellectual property right. That is why breach of a legal duty of secrecy, while it may be actionable as a breach of a voluntary or involuntary duty of confidentiality, is not an 'infringement'. Conversely,

the fact that the secret is a secret means that, if an obligation to disclose it (in order to enable others to use it) were imposed by law, there would be obvious limits to the means of enforcement considered acceptable in a democratic society under the rule of law.

The right to own property is embodied in various texts as a human right:

Universal Declaration of Human Rights of the United Nations

Article 17

- (1) Everyone has the right to own property alone as well as in association with others;
- (2) No one shall be arbitrarily deprived of his property.

European Convention on Human Rights, First Protocol

Article 1, Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Charter of Fundamental Rights of the European Union

Article 17, Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 51, Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Article 52, Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations

may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. ...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

In the law of the European Convention on Human Rights (ECHR), it is well established that appropriate rights are available not only to natural persons but also to non-governmental juristic persons and may accordingly be the subject of Article 34 applications by such.³ Consequently, any proposals concerning access to intellectual property require to be compliant with the ECHR and (insofar as initiated by institutions of the European Union) the EU Charter of Fundamental Rights. That is to say: the proposals must be for either a control/regulation of use in the general interest or an expropriation/deprivation for fair compensation.

At the same time it must be recognized that intellectual property rights have always been subject to inroads and exceptions.⁴

10.1 COMPETITION

The competition law of the European Union under Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibiting the abuse of a dominant position is (like national competition laws embodying corresponding principles) a law which might, under certain circumstances, control the use of intellectual property in the general interest. The issue of whether and in what circumstances refusal by a proprietor to make intellectual property available might amount to abuse of dominance has been the subject of much EU case law.⁵

The principle that appears to emerge from the case law is that it may be an abuse of a dominant position on a market to utilize an intellectual property right to stifle the emergence of new products on that market or on a neighbouring (actual or potential) market, but it is probably not an abuse to seek to obtain the highest price the market will bear for the use or the fruits of the intellectual property in question. This appreciation is consistent also with the provisions of (current but under review) Procurement Directive 2004/18/EC, Article 31(1), setting out the rare ‘Cases justifying use of negotiated procedure without prior publication of a contract notice’ (effectively, circumstances in which the Directive procedures can be substantially ignored). One such case is ‘(b) when, for

technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator’.

This refers, in particular, to circumstances where the only technical solution to a requirement is under the control of the proprietor of a valid intellectual property right. The Directive embodies a presumption that such exclusivity cannot be overcome.

10.2 COMPULSORY LICENSING

On the basis that the establishment of a legal basis for involuntary authorization of access to essential technology on fair and reasonable terms amounts juridically to the compulsory licensing of intellectual property, legislation would be needed:

- (1) to set out the circumstances in which national intellectual property rights might be compulsorily licensed;
- (2) to authorize (in the case of national legislation) a national public authority or (in the case of EU legislation) to require Member States to authorize their respective national authorities, to grant compulsory licences of national intellectual property rights, subject to review on legal grounds by an appropriate court;
- (3) to set out the circumstances in which and the bodies by which pan-EU (pursuant to Article 118 TFEU) intellectual property rights might be compulsorily licensed;
- (4) to authorize and require Member States to authorize their respective national authorities, to grant, for the national territory, compulsory licences of pan-EU (pursuant to Article 118 TFEU) intellectual property rights, subject to review on legal grounds by an appropriate court;
- (5) if objections, including those of the European Court of Justice (see below), can be overcome, to select and authorize an institution of the European Union itself to grant compulsory licences of pan-EU (pursuant to Article 118 TFEU) intellectual property rights, subject to review on legal grounds by the Court of Justice.

The international principles on compulsory licensing are set out in the TRIPS Agreement at Article 31. They include strict limitations, of which the following are particularly significant:

- (b) such use [under compulsory licence] may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from

the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly; ...

- (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use; ...
- (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;
- (i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;
- (j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;
- (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.

In the current stage of development of EU law, most relevant intellectual property rights are national, although supranational pan-EU rights do exist and more of them are contemplated.

The laws affecting most national intellectual property rights in states of the European Economic Area (consisting of Iceland, Norway and Liechtenstein and the European Union along with its Member States) have been harmonized. Compulsory licensing of an intellectual property right could distort competition in the European market. Two cases have established that it is a misuse of national compulsory licensing measures to apply them where demand for a product is being met in a Member State by importation from elsewhere in the European Union.⁶ The same would apply to importation from another contracting state in the European Economic Area (EEA). Article 11 of the European Economic Area Agreement is identical to what is now Article 34 TFEU (apart from use

of ‘contracting parties’ instead of ‘Member States’). Accordingly, alignment of the law of the EEA with the EU in Joined Cases C-235/89 and C-30/90 would, it is submitted, be achieved by application of the principle of ‘homogeneity’.⁷

In the United Kingdom, national laws exist relative to compulsory licensing of (national) patents.⁸ There is no general compulsory licensing power in the Registered Designs Act 1949 but there is power to use the designs for ‘the services of the Crown’. In relation to copyright, action to remedy situations found to be anti-competitive following a Competition Commission investigation may include modification of licence terms or the grant of compulsory licences, on terms and conditions that, failing agreement, will be settled by the Copyright Tribunal.⁹

In relation to EU design right (whether unregistered or registered), Regulation (EC) 6/2002 on Community designs (which sets out the law relative to such right) provides that ‘Any provision in the law of a Member State allowing use of national designs by or for the government may be applied to Community designs, but only to the extent that the use is necessary for essential defence or security needs.’¹⁰

Trade marks are not relevant intellectual property rights for present purposes. They protect only brands. Although marks may be licensed along with technology, their use is not indispensable for access to the technology embodied in or used to make the goods or render the services marketed under the brand.

A limited precedent for EU legislation for the compulsory licensing of intellectual property does exist; it is Regulation (EC) 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems. As it takes the form of a Regulation, this legislation is directly applicable as law in EU Member States. It was designed to comply with the Doha Declaration of the WTO on the TRIPS Agreement. This declared that compulsory licensing measures necessary to protect public health and, in particular, to promote access to medicines for all could be compatible with the TRIPS Agreement. The Regulation is a very special measure related closely to the context of the Declaration. It ‘establishes a procedure for the grant of compulsory licences in relation to patents and supplementary protection certificates concerning the manufacture and sale of pharmaceutical products, when such products are intended for export to eligible importing countries in need of such products in order to address public health problems’.¹¹ Because a licence under the Regulation can cover only goods ‘eligible for export to eligible importing countries’, its effect is limited to the market for the manufacture of the patented goods in the European Union and their export from the EU. The

concept of a compulsory licence of essential technology relative to renewable energy would differ in not necessarily being limited to goods nor confined to goods intended for export from the EU.

Directive 98/44/EC on the legal protection of biotechnological inventions contains provisions for compulsory cross-licensing between holders of patents for such inventions and breeders holding plant variety rights. However, these provisions exist to deal with potential overlaps between different types of intellectual property rights. Any significance they might have in relation to biofuels would be likely to be only in that context. They do not provide any precedent that might be useful in relation to renewable energy generally.

The draft of the Proposal for a Council Regulation on the Community Patent,¹² (a proposal for a pan-EU patent as envisaged in Article 118 TFEU), contained the following provision relative to compulsory licensing: 'The Community Patent Court may grant a compulsory licence for lack or insufficiency of exploitation of a Community patent to ...'.¹³

On 8 March 2011, the Court of Justice delivered its Opinion 1/09 'relative to a Proposal for the Creation of a unified patent litigation system'. The Opinion included the following:

the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.

The Court's Opinion effectively rules out the creation of an EU tribunal to grant compulsory licences of intellectual property, whether of national or EU creation. Nonetheless, it should be kept in mind that the licensing procedure under Regulation (EC) 816/2006 (above) gave authority to national public authorities to grant the requisite licences without engaging any EU institution in the grant process.

The remedy of forcing access to particular intellectual property is a process of compulsory deprivation of certain rights relative to that intellectual property. That is not to say that competition considerations are absent. It may well be that particular compulsory licensing provisions

exist in order to correct perceived market failures. But if legal intervention is contemplated in order to address not suppression of innovation but a gap between the price and terms and conditions demanded and the price and terms and conditions considered 'reasonable', then that intervention is not so much regulatory as legislative. It alters the legal regime applicable to the intellectual property rights of the proprietor by obviating the need for the proprietor's consent to a licence. It is a restriction of proprietary interest.

At the beginning of a compulsory licensing process, the proprietor is the sole proprietor, enjoying, as such proprietor, the exclusive right to exploit the intellectual property. At the end of the process the proprietor's property rights have been eroded by the involuntary grant of licences, albeit subject to the 'fair compensation' (likely to be a royalty) required by human rights law. Paragraph (k) of Article 31 of the TRIPS Agreement (above) distinguishes between the two situations. Enforcement of laws against anti-competitive behaviour is not an expropriation. It is not a 'fair compensation' situation. But to take measures that alter the incidence of law on the proprietary rights of the proprietor is a different matter. Note the compulsory licensing provisions of the earlier Paris Convention for the Protection of Industrial Property (Stockholm revised version), Article 5:

(2) Each country of the Union [established by the Convention] shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

In the draft Proposal for a Community Patent (above), the ground for compulsory licensing would have been 'lack or insufficiency of exploitation'.¹⁴ The issue of compulsory licensing arises when the proprietor has not acted unlawfully (as by breaching competition law by abusing a dominant position) but nonetheless there is, in the words of the Community Patent Proposal, 'an insufficiency of exploitation'. The consequence of such insufficiency's not being attributable to unlawful conduct is that any attempt to address it should involve the payment of 'fair compensation' to those whose proprietary rights are being eroded.

10.3 STATE OWNERSHIP

Although compulsory licensing erodes the proprietary interest of an owner of intellectual property, it is less invasive than outright nationalization, the

taking of property into public ownership in exchange for payment of 'fair compensation' to its owner. Public ownership has returned in recent times but more as a response to financial emergency than as a policy for more settled times. Historically, the law of the European Union's predecessors was neutral on the issue of state ownership of the means of production. The TFEU still provides that 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership',¹⁵ a formulation relative to public ownership and traceable back to the EC Treaty¹⁶ and prior to that, expressed slightly differently, to the Treaty of Paris.¹⁷ But the TFEU also provides for 'a highly competitive social market economy'.¹⁸ The requirement of equal treatment, in all its manifestations including but not confined to the law of state aid, means that a state-owned undertaking cannot (except conceivably in very particular circumstances unrelated to the issues being examined) be given new privileged access to a strategic position in the economy of an EU or EEA state.¹⁹ Similarly, the freedoms embodied in the TFEU and the EEA Agreement preclude any steps that might have the effect of penalizing an undertaking from another Member State/contracting party state for having successfully scaled the commanding heights of an economy in a host state, following the exercise of its right of establishment there.²⁰

Given that compulsory licensing is available and that, because it does not involve outright transfer, the amount of 'fair compensation' payable is the value of not more than a non-exclusive limited licence of the total intellectual property right; given also that fair compensation would be the open market price on a willing-purchaser, willing-seller basis determined, in the absence of agreement, by an expert valuer, it is difficult to see what benefit the state could obtain from outright nationalization that it could not obtain at less cost from a compulsory licence. It should also be noted that the fact that an undertaking is wholly or partly owned by a Member State does not of itself entitle the state to accord to that undertaking any treatment more favourable²¹ or less favourable²² than accorded to wholly private undertakings.

10.4 COLLABORATION OF PRIVATE SECTOR UNDERTAKINGS FACILITATED AND ENCOURAGED BY A PUBLIC AUTHORITY AND WITH OR WITHOUT THE PARTICIPATION OF PUBLIC SECTOR UNDERTAKINGS

The starting point on collaboration in EU and other systems of competition law is, broadly, that the onus is on the collaborators to

demonstrate that the collaboration is objectively justified having regard to the resources, physical, intellectual and financial, that are needed to accomplish the particular goal. Any collaboration is likely to involve exchanges of information that, at least in theory, could lead to some sort of alignment of conduct in the marketplace. So anything of the kind would be closely scrutinized for potential anti-competitive effect by national competition authorities, as well as the European Commission and EFTA Surveillance Authority.

10.5 PROCUREMENT AND SUBSIDIES

An ‘economic activity’ is, according to the European Court of Justice: ‘the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity’.²³ That is to say: the issue of whether the provider of a particular service is or is not providing that service as an ‘economic activity’ is not determined by the intrinsic nature of the activity but by the context in which the provision is made. If the provider receives a payment, is that payment truly dues paid to a public authority exercising its authority (such as a land registry registering a title) or is it a consideration for a service (the same land registry providing sets of photocopies for its users’ convenience)? If it is a consideration, the activity is an ‘economic activity’ and the person engaged it is acting as an ‘undertaking’, whether it is a private undertaking or a public undertaking or even a public authority acting as a public undertaking²⁴ or a non-profit organization.²⁵

The significance is that competition law, in its widest sense including public procurement law and state aid law, applies to the behaviour of undertakings and to the way the public authority relates to them. Whenever funds or benefits move from any part of the public purse to an entity engaged in an economic activity, an ‘undertaking’ (public or private), then it is necessary to construct a juridical narrative. Questions arise:

- is there a public procurement of goods, services or works and, if so, is it compliant with any applicable EU or EEA rules;
- is there a grant of a public concession, *with* a requirement to build something and, if so, is the award process compliant with any applicable EU or EEA rules;
- is there the grant of a public concession, *without* a requirement to build anything and, if so, is the award process compliant with any applicable EU or EEA general principles;

- is there a public service compensation, a subsidy payable in exchange for the performance of public service obligations (rendering economic the provision of an otherwise uneconomic public service) and, if so, has the public service obligation been properly 'entrusted' to the provider by an official act covering exactly what is required;
- is there a state aid and, if so, has it been recognized to be such and located within an exemption or an existing scheme or individually notified and approved; if not, for what amount should provision be made for a potential recovery requirement?

An Institutionalised Public–Private Partnership (IPPP) is:

Understood by the [European] Commission as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions. The private input to the IPPP consists – apart from the contribution of capital or other assets – in the active participation in the operation of the contracts awarded to the public–private entity and/or the management of the public–private entity.

Irrespective of how the IPPP is set up, Community law on public contracts and concessions requires a contracting entity to follow a fair and transparent procedure, either when selecting the private partner, who supplies goods, works or services through his participation in the IPPP or when granting a public contract or a concession to the public–private entity. It is important to note that public authorities are not permitted 'to resort to devices designed to conceal the award of public contracts or concessions to semi-public companies'.²⁶

Once the private sector partner has been appointed, the IPPP can then proceed to function without separate further procurements for tasks within the overall partnership.²⁷ In circumstances where a provision necessary in the general interest is not being provided or proposed by any unsubsidized undertaking, the issue of a subsidy or other transfer of public resources may arise.

Subsidies by way of public service compensation have in the past been found most often in relation to transport. Similar subsidies may have a role in encouraging potential transmission system operators to make the necessary investment and commitment, especially, perhaps, in relation to high capacity long distance offshore capability. The use of public service obligations and concomitant public service compensation is expressly contemplated in Directive 2009/72/EC concerning common rules for the internal market in electricity.²⁸

Public service compensation paid in exchange for the acceptance and performance of public service obligations is in strict law distinct from

state aid.²⁹ However, the European Commission has sought to assert control by devising and using the expression ‘state aid in the form of public service compensation’. It would expect compliance with its Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest³⁰ and the Community Framework for State Aid in the form of public service compensation.³¹ A similar reference is to be found at paragraph 49 of the Preamble to Directive 2009/72/EC. Compliance with Directive 2006/111/EC on transparency of financial relations between Member States and public undertakings, as well as on financial transparency within certain undertakings (as implemented in the United Kingdom by the Financial Transparency (EU Directive) Regulations 2009, SI 2009/2331) would also be essential.

Any subsidies or incentives that could not be classified as public service compensation would be potential state aids and would need to be:

- notified to the European Commission for Decision and then shown to be neither liable to affect trade between Member States nor able to distort or threaten to distort competition; or
- fashioned to fit into a block exemption (and entered in the Member State’s annual return of exempt aids); or
- designed to attract a favourable decision under the Guidelines and notified to the European Commission for Decision.

The concept of state aid is not confined to grants of funds:

for a national measure to be classified as State aid, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition.³²

It may be said that state aid involves a transfer of state resources, ‘conferring an economic advantage that the recipient undertaking would not have received in the ordinary course of business’, that it is selective in that it will ‘affect the balance between certain enterprises and their competitors’, that it has ‘a potential effect on competition and trade between Member States’.³³

A measure that ‘provides in favour of certain undertakings in the Member State an exception to the application of the tax system’ is likely to be a state aid.³⁴

Specifically:

1. National measures which provide for a rebate of energy taxes on natural gas and electricity do not constitute State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) [and now Article 107 TFEU] where they apply to all undertakings in national territory, regardless of their activity.

[but]

2. National measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid within the meaning of Article 92 of the Treaty.³⁵

and:

the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article 87(1) EC (see, to that effect, *inter alia* Case C409/00 *Spain v Commission*, paragraph 54), as account may in any event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article 87(3) EC.³⁶

State aid must be notified and not implemented until approved. If it is not notified it is unlawful, not eligible for approval and liable to recovery from the beneficiary, except in exceptional circumstances,³⁷ under Regulation (EC) 659/99 (the limitation period for clawback is ten years, see Article 15, impact on company accounts).

Approval may be of particular aid or of a scheme of aid. 'Guidelines' are statements of the policy considerations that the European Commission will apply in deciding whether or not to approve a state aid. The Commission will make a Decision setting out its reasons for considering:

- (a) that the facts do or do not amount in law to a state aid;
- (b) why, if the facts do amount to a state aid, the aid should be approved or disapproved and, if approved, subject to what conditions.

The European Commission is authorized to make group exemptions ('block exemptions').³⁸ Each block exemption includes provisions requiring each Member State to have in place systems for the reporting to it and monitoring by it of aid considered to fall within that block exemption

and for the making of an annual return to the Commission of information about aid granted on the basis of being within its scope.

State aid guidelines and exemption of particular potential relevance in relation to renewable energy include:

- Community guidelines on state aid for environmental protection ([2008] OJ C82/01);
- Community framework for state aid for research and development and innovation ([2006] OJ C323/01);
- Council Regulation (EC) 994/98 on the application of Articles 92 and 93 (later Articles 87 and 88, respectively) of the Treaty establishing the European Community (and now Articles 107 and 108 TFEU, respectively) to certain categories of horizontal state aid;
- Commission Regulation (EC) 800/2008 (General Block Exemption Regulation).

10.6 CONCLUSION

If access to particular intellectual property rights on fair and reasonable terms can be shown to be indispensable to the availability in a particular EEA state of energy from renewable sources; and if agreement cannot be reached; and if the situation is remediable only by the grant of a licence of such rights insofar as existing under the law of the same or another EEA state, then any EEA state where such indispensable rights are situated (including the state having a need for the renewable energy) may establish the necessary compulsory licensing regime, which must include a basis for payment of fair compensation. Legislation at EU level would be required in order to oblige (as distinct from permit) EU states to establish the necessary compulsory licensing regimes. A Decision of the EEA Joint Committee established under the EEA Agreement would be the legislative means of extending such an obligation to those EEA states that are not EU Member States.

In view of Opinion 1/09 of the European Court of Justice (above), it may be some time before an EU institution has the power to grant compulsory licences of intellectual property rights created at EU level, such as a European design right or, in future, a European patent. However, from requiring EU states to cause their national compulsory licensing authorities to grant compulsory licences of national patents it would be but a short step to require them to use their national compulsory licensing authorities to grant compulsory licences of a future EU

patent. As such licences (of an EU intellectual property right but granted by a national authority) would inevitably be limited to the territory of the national authority's state, a bundle of such licences would be needed in order to cover activities in a plurality of states. This would be similar to the bundle of compulsory national licences envisaged above for national intellectual property rights.

The duty to accord equal treatment to all undertakings (public or private) means that any special privileges have to be won in open and transparent competition on objective and transparent criteria, whether or not procurement laws are applicable in the particular circumstances.

NOTES

1. 'Le premier qui ayant enclos un terrain s'avisa de dire: Ceci est à moi, et trouva des gens assez simples pour le croire, fut le vrai fondateur de la société civile.'
2. *A Single Market for Intellectual Property Rights: Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe*, COM(2011)287 (2011) 22.
3. *State Holding Company Luganskvugilla v. Ukraine* (23938/05) [2009] ECHR 335 (27 January 2009) and earlier cases, including *Agrotexim and others v. Greece* (14807/89) [1995] ECHR 42 (24 October 1995).
4. See discussion of this at World Intellectual Property Organization (WIPO) Standing Committee on the Law of Patents, *Experts' Study on Exclusions from Patentable Subject Matter and Limitations to the Rights*, SCP/15/3, www.wipo.int/meetings/en/doc.details.jsp?doc_id=141352 from September 2010.
5. Including *Etablissements Consten SARL v. European Commission* (56/64 and 58/64) [1966] ECR 299; *Volvo v. Veng* (C-238/87) [1988] ECR 6211; *Radio Telefis Eireann v. European Commission* (C-241/91 P and C-242/91) [1995] ECR I-743 ('Magill'); *Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG* (C-7/97) [1998] ECR I-7791; *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* (C-418/01 P (R)) [2004] All ER (EC) 813, [2004] ECR I-5039; *Der Grüne Punkt – Duales System Deutschland GmbH v. European Commission* (C-385/07 P) [2009] ECR I-6155; *European Commission v. Alrosa Co. Ltd* (C-441/07 P) [2010] 5 CMLR 11; *AstraZeneca AB v. European Commission* (T-321/05 P) [2010] 5 CMLR 28.
6. *European Commission v. Italy* (C-235/89) and *European Commission v. United Kingdom* (C-30/90) [1992] ECR 777.
7. Agreement Creating European Economic Area, Art. 102 [1992] OJ L1/3; see also *European Commission v. Netherlands* (C-521/07) [2009] ECR I-04873, especially para. 32; *Ospelt and Schlössle Weissenberg Familienstiftung v. Voralberg* (452/01) [2003] ECR I-9743, especially para. 29; and EFTA Court cases *Erla Maria Sveinbjörnsdóttir v. Iceland* (E-9/97) [1999] 1 CMLR 884, especially paras 58–61 and *Ákærvaldið (Public Prosecutor) v. Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Mar Reynisson* (E-2/03) [2003] EFTA 185, especially para. 28.
8. Patents Act 1977, ss.48 and 48A, as well as (national) unregistered design right (Copyright Designs and Patents Act 1988, s.237).
9. Copyright Designs and Patents Act 1988, s.144(1A) and Enterprise Act 2002, Sch. 8.
10. Regulation (EC) 6/2002 on Community designs, Art. 12 [2002] OJ L3.

11. Regulation (EC) 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems, Art. 1 1st para. [2006] OJ L157.
12. Annex to EU Interinstitutional File 2000/0177 (CNS) Doc. 13706/09.
13. Draft Proposal for a Council Regulation on the Community Patent, Art. 21(1).
14. *Ibid.*
15. Treaty on the Functioning of the European Union, consolidated version [2010] OJ C115/01, Art. 345.
16. Treaty Establishing the European Economic Community 1957, Art. 222.
17. Treaty of Paris 1951, Art. 83.
18. TFEU, Art. 3(3).
19. TFEU, Art. 37; *Criminal Proceedings Against Franzen* (C-189/95) [1997] ECR I-5909 and *Rosengren v. Riksaklagaren* (C-170/04) [2007] ECR I-4071.
20. TFEU, Art. 49; EEA Agreement, Art. 31.
21. *Commission v. Portugal* (C-483/99) [2002] ECR I-04781 and *Commission v. Spain and United Kingdom* (C-463/00 and C-98/01) [2003] ECR I-04581 and other 'golden share' cases referred to therein.
22. *European Commission v. Italy* (174/04) [2005] ECR I-04933, Opinion of A-G Kokott, at para. 24.
23. *FENIN v. European Commission* (C-205/03 P) [2006] ECR I-06295 (appeal affirming T-319/99).
24. *Auroux v. Commune de Roanne* (C-220/05) [2007] ECR I-00385.
25. *Fédération Française des Sociétés d'Assurance v. Ministère de l'Agriculture et de la Pêche* (C-244/94) [1995] ECR I-04013.
26. Commission Interpretative Statement on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), COM(2007)6661, including quoted excerpt from *European Commission v. Ireland* (C-507/03) [2007] ECR I-9771.
27. *Acoset SpA v. Conferenza Sindaci* (C-196/08) [2009] ECR I-09913.
28. Especially Directive 2009/72/EC concerning common rules for the internal market in electricity, Art. 3 [2009] OJ L211.
29. *Altmark v. Altmark* (C-280/00) [2003] ECR I-07747.
30. Decision 2005/842/EC [2005] OJ L312.
31. 2005/C 297/04 [2005] OJ C297.
32. Most recently reiterated in *European Commission v. Deutsche Post* (C-399/08 P) [2010] ECR I-07831.
33. Excerpted from European Commission Vademecum on State Aid, available at http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf.
34. Commission Notice 98/C 384/03 on the application of the state aid rules to measures relating to direct business taxation.
35. *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten* (C-143/99) [2001] ECR I-08365.
36. *British Aggregates Association v. European Commission* (C487/06 P) [2008] ECR I-10515.
37. *European Commission v. Germany* (C-5/89) [1990] ECR I-03437.
38. Regulation (EC) 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid, Art. 1 [1998] OJ L142.