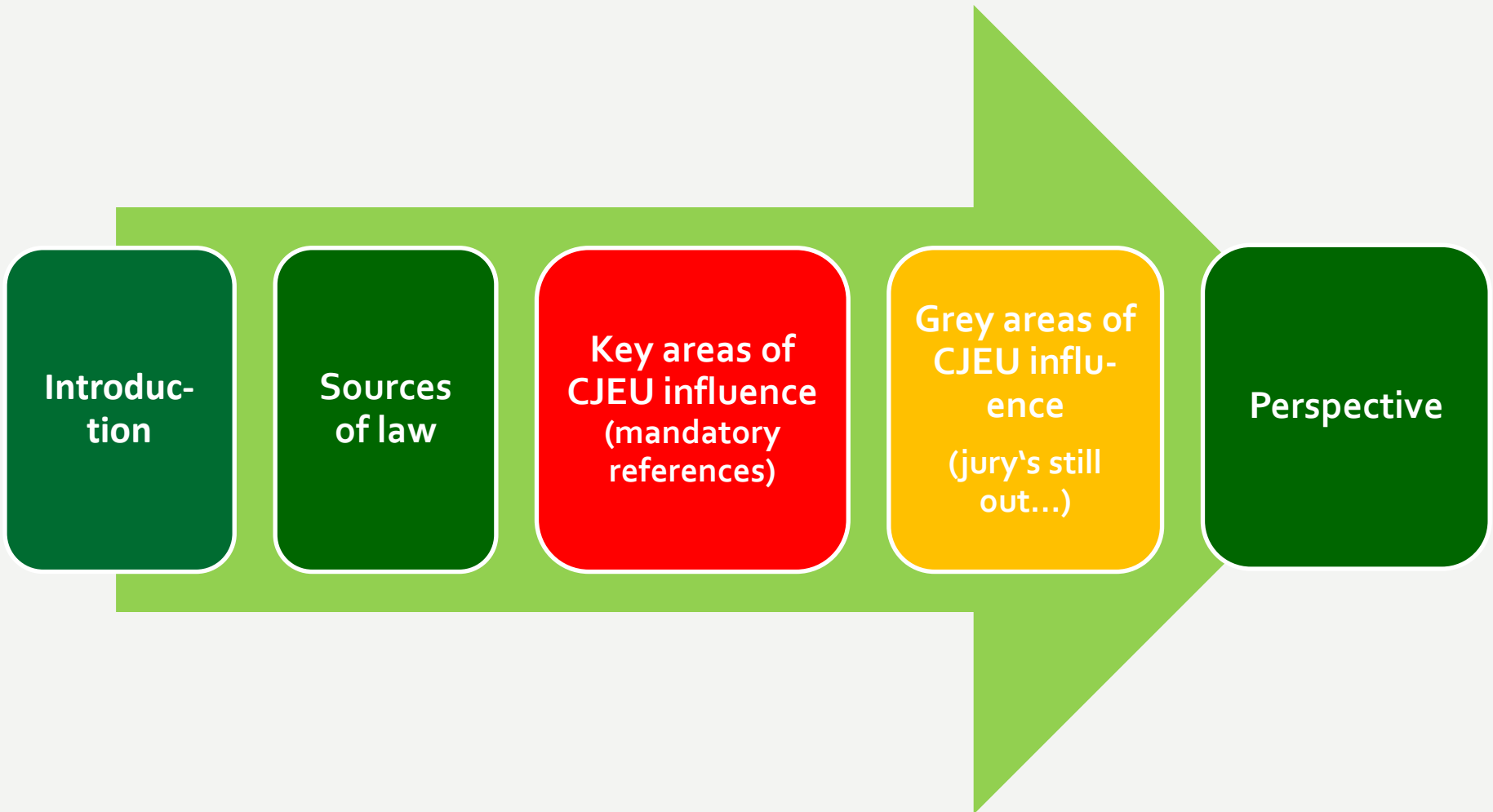


How will the UPC and the CJEU harmonize global patent law?

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- Structured institutional co-existence, „competition“ and co-operation of specialist and generalist courts
 - Main example: CAFC v. US. Supreme Court
 - Patentable subject matter, prior art, enablement etc.
 - But also broad experience in EU IP law
 - Copyright
 - Trade marks
 - Enforcement
 - Literature → Very much depends on the institutional setting
 - Dreyfuss (1989, 2013, 2018, 2023, see here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4365955), Leistner (2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350590 & 2023, to be published in Liber amicorum Hilty, 2023/24, see here <https://ssrn.com/abstract=4484038>)
 - Some vagueness & gaps concerning central factors in the UPCA → some risk of failure
- Goals of the institutional co-operation
 - Unity and predictability of patent law
 - „Speed“ and efficiency (e.g. copyright: CJEU Pelham („Metall auf Meeresspiegel“, C-476/17, 2019) since mid-90's)
 - Quality → balanced, in line with the overall innovation policies, proportional



Tension!



Neatly spoken, Prof.,
BUT
„Truth is concrete“.



- **Art. 24 (1) UPCA**

- (a) Union law, including Regulation (EU) No 1257/2012 and Regulation (EU) No 1260/2012 (1);
- (b) this Agreement;
- (c) the EPC;
- (d) other international agreements applicable to patents and binding on all the Contracting Member States; and
- (e) national law.

- **Art. 267 TFEU**

- Preliminary reference procedure, where necessary to give judgment (and also beyond...)
- Voluntary for lower courts, mandatory for Member States' supreme courts → Voluntary for local/regional/central division, mandatory for Court of Appeal in Luxembourg



• Dispensability, leeway for Court of Appeal?

- CJEU CILFIT (1982) → CJEU Consorzio Italian Management v Catania Multiservizi (2021)
 - Irrelevance
 - **Acte éclairé** → has already been interpreted by the CJEU
 - **Acte clair** → so obvious as to leave no scope for any reasonable doubt

To be shown by the national court.

- Hardly conceivable, if deviating case law in at least one Member State's Supreme Court.
- Plus: What is acte clair, in the absence of such case law?

• Enforceability?

- More leeway as there is no legal remedy, if the Court of Appeal does not refer „borderline“ cases?
- Not so different in the general multi-level EU IP law system – CJEU's authority ultimately depends on „persuasive“ lines of case law, but also...
- German Constitutional Court Pelham („Metall auf Metall“) (2016), para. 112 et seq.
 - Plausible explanation, why irrelevant, clear or **leeway of discretion** in Union law
- System of mutual minimum ‚quality control‘



- **Biotech-Directive (1998)**
- **Enforcement Directive (2004)**
 - **Case law**
 - CJEU *Olawska Telewizja Kablowa v Folimowcow Polskich* (2017) – double damages possible in © law; CJEU (2021) *Bayer vs. Richter* – on damages for unjustified preliminary injunctions etc. →
 - → Injunctions, damages, preliminary measures, freezing injunctions, saisie/Anton Piller orders etc.
 - **But important: Mere minimum standard...or is it more conclusive?!**
 - Case law on the necessary uniform interpretation of unitary concepts of Union law
 - Main example: Current discussion on discretion in the granting of injunctive relief
- **Jurisdiction and applicable law (see also Art. 24 (2) UPCA)**
 - **Brussels I Regulation (2012)** → e.g.: How far reaching is the new torpedo protection?
 - **Rome I-Regulation (2007)**
 - E.g.: The important discussion **whether national courts shall apply national substantive law or the substantive UPCA provisions** (combined with their national procedural law only) might be determined by Art. 8 Rome I Regulation



- **Primary law – in particular fundamental freedoms**
 - **Specific subject matter of patent law** (and the other IP rights) as justification for protection (early exhaustion case law, in particular in pharma patents)
 - ...and also increasingly as a **guiding principle to interpret Secondary Union law (Directives)**
 - **CJEU: Premier League (2008), UsedSoft (2012)**
 - **Relevant for**
 - Exhaustion doctrine, but also potentially for indirect patent infringement etc.
- **Common principles of Union law**
 - Based on so-called **evaluative comparative law analysis** of Member States' laws
 - E.g. good faith, proportionality
 - **Relevant for**
 - All kinds of preliminary questions in Member States' general civil law (e.g. in the area of exhaustion, in regard to preliminary questions in licensing contracts etc.)
 - Via the 'link' of Art. 24 (1) (e) UPCA?



- **A „co-operative“ system of mutual co-operation and control**
- **Court of appeal should pro-actively refer particularly selected and argued cases in order to reasonably shape Union law**
 - And regional/local/central division should consider direct references where this seems particularly appropriate (the gist of Art. 267 TFEU is that this should not be considered ‚above the pay grade‘ of those UPC Justices)
- **CJEU should act close to the facts of the case and take those cases particularly seriously**
 - Smart assignment of the cases, max. involvement of the Grand chamber, inclusion of Advocate General without exception, preparation through comparative law reports (internal), thorough preparation of the references and introductory parts
 - Cf. generally Leistner/Roder ZfPW 2016, 129 ff.; Leistner in FS für Bornkamm, 2014, S. 859 ff.



- High **quality of law** should be the ultimate goal...
- ...while keeping in mind
 - **Unification** and
 - Consistency and predictability (**legal certainty**) as well as
 - **Efficiency**
- A well argued and explained, balanced and consistent UPC case law will be the best ‚vaccine‘ against an overly influence of the CJEU
- References should be particularly well prepared to guarantee
 - Sufficient **closeness to the facts**, a **comprehensive and easily understandable summary** of the arguments, and, ideally, a **reasonable solution proposal**
- Continuous exchange beyond the official channels and procedures will be needed



18:19 Mittwoch 24. Mai

Hémicycle

Court of Justice of the European...

2 min 5 min 2 min

5 min (400 m) Größtenteils flach
über Rue Galileo Galilei und Rue Johannes Kepler

Vorschau >>

Vorsicht: Fußgängerrouen stimmen eventuell nicht immer mit realen Bedingungen überein.

Hémicycle
1 Rue du Fort Thüngen, 1499 Neudorf-Weimershof Luxembourg, Luxemburg

Auf FK4 nach Nordosten Richtung Rue Galileo Galilei

40 Meter

Links abbiegen auf Rue Galileo Galilei

150 Meter

Leicht rechts abbiegen auf Rue Johannes Kepler Treppe nehmen

190 Meter

Europäische Investitionsbank (EIB)

Boulevard Konrad Adenauer

Rue Charles de Gaulle

Av. John F. Kennedy

5 min

European Convention Center...

Philharmonie Luxembourg

Viewpoint

European Convention Center

La Table du Belvédère

Rue du Fort Thüngen

Schuman-Gebäude

Moderne Rue Jean

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Thank you very much for your attention!