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**HARMONIZING PATENT LAW: THE UNTAMABLE UNION PATENT**

## Harmonizing Patent Law: The Untamable Union Patent

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### **Abstract**

*To the difference of trademarks and designs, protection of patents in Europe essentially rests on national law only. The “European patent” as granted by the European Patent Organization through the European Patent Office, while internationally uniform as to the conditions of the grant, represents but a “bundle” of as many independent national patents as have been asked for by the applicant. As a consequence, the terms of the exclusive right, which they confer upon their owner, are determined by the various national laws. It is to remedy this territorially fragmented and more or less diverse protection that, since about half a century, the European Union attempts to establish an autonomous system of unitary patent protection of its own design, but has failed to achieve it whichever way it chose. The stumbling blocks have been not so much the proper determination of the substance of protection, since only little efforts of modernization have been undertaken. Rather, they were the choice of the language regime for the patents granted, and the establishment of a common patent litigation system. Both obstacles have a history of their own. While the latter is still evolving, the former actually has blocked the introduction of an EU-wide unitary European Union (ex Community) patent. Instead, a “European patent with unitary effect” is about to come, which will cover only the territories of those EU Member States, which will participate in “enhanced cooperation” within the Union, most likely a majority of 25 States. Switching from the entire Union to enhanced cooperation was, indeed, the not unwelcome opportunity not only to overcome the language hurdle, but also to modify the very structure of patent protection, and to try to move from a Union type of patent to an international one.*

*The paper is concerned with, first, why the language regime could become or could be made a reason to move from a Union project to one of enhanced cooperation among “the willing”; second,*

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*with whether enhanced cooperation is a proper approach at all under Union law; third, with the problematic structure and nature of the “European patent with unitary effect”; and fourth, with the no less problematic co-existence of an up-graded European patent as it will result from the eventual adoption of an “Agreement on a Unified Patent Court” to be concluded among EU Member States only. The conclusion is that instead of obtaining a workable system of patent protection in Europe, we will have to face a multi-layer monster system of patents of all kinds, national, full and half European, Unionist, territorially fragmented or unitary, balanced or unbalanced in their substance.*

***Key words***

*Industrial property, patents, Community patent, enhanced cooperation, European Union law, European Union patent, European patent with unitary effect, unified patent court.*

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## I. Introduction

When the organizers of this conference and editors of the essays in honor of Frank Gotzen invited me to contribute by a paper on harmonization of patent law, they knew why they named the Union patent “untamable”. Just a few months earlier, on the 8<sup>th</sup> of March, the Court of Justice of the European Union had held the “envisaged agreement creating a unified patent litigation system (currently called “European and Community Patents Court”) ... (to be) incompatible with the provisions of the EU Treaty and the FEU Treaty”<sup>1</sup>. On the 10<sup>th</sup> of the same month the Council of the European Union authorized “enhanced cooperation on creation of unitary patent protection”<sup>2</sup> between 25 EU Member States against the votes of Italy and Spain. The Court’s opinion stopped long lasting efforts to establish a common, specialized and largely centralized international patent judiciary, the European and European Union Patents Court (EEUPC), for both the unitary Community (now European Union) patent and the bundle of national patents granted at internationally uniform conditions by the European Patent Organization for its Contracting States (the “European patent”)<sup>3</sup>. The authorization for enhanced cooperation as granted by the Council in reaction to the seemingly unsolvable language issue<sup>4</sup> aims at replacing the concept of a unitary, Union-wide territorial exclusivity of protection by one having its

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<sup>1</sup> ECJ, opinion 1/09 of 8 March 2011 (Rep. 2011 I ...). The draft submitted to the Court was the “Draft Agreement on the European and Community Patents Court and Draft Statute – Revised Presidency text” of 23 March 2009, Council Doc. 7928/09 (<http://register.consilium.europa.eu/pdf/en/09/st07/st07928.en09.pdf>), hereinafter Draft EEUPC Agreement. For an analysis of Opinion 1/09 see *Baratta*, National Courts as “Guardians” and “Ordinary Courts” of EU Law: Opinion 1/09 of the ECJ, 38(4) Leg.Iss.Eur.Integr. 299(2011).

<sup>2</sup> *Council*, Decision of 10 March 2011, OJEU 2011 L 76, 53. See also Press release 7506/11 of 10 March 2011, referring to documents 5538/11 of 11 February 2011 (draft decision) and 6524/11 of 2 March 2011 (text of decision as subsequently adopted); see also *European Parliament*, Press release of 15 February 2011: “EU-Patent: Parliament votes for the application of “Enhanced Cooperation” (with draft Recommendation, Committee on Legal Affairs, Rapporteur *Kl.-H. Lehne*, Doc. 2010/0384 (NLE)); *Commission*, Press release IP/10/1714 of 14 December 2010, “Patents: Commission opens the way for some Member States to move forward on a unitary patent” (with *Commission*, Proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection of 14 December 2010, COM (2010) 790 final).

<sup>3</sup> At present 38 States, for which the patent is granted upon designation (see Art. 2 et seq. European Patent Convention, EPC), designation of all Contracting States being presumed according to Art. 79 para. 1 EPC, and the designation fee under Art. 79 para. 2 being an overall fee since 2009, see *Teschemacher*, in *Singer, Stauder*, *Europäisches Patentübereinkommen*, 5<sup>th</sup> ed. Cologne 2010, Art. 79, annot. 15 et seq. However, with maintenance fees being national, specific designation or withdrawal of designation (Art 79 para. 3) still is widespread practice.

<sup>4</sup> The discord on the language regime is officially recognized as being the reason for having recourse to enhanced cooperation, see *Council*, Press release 7506/11, loc. cit.; recital 5 of the authorisation decision, Council Doc. 6524/11, loc. cit.

territorial scope of protection reduced to the territories of the “willing” Member States participating in enhanced cooperation<sup>5</sup>. This “patent with unitary effect” (unitary patent) represents a bastard type of a “Union” patent, since it claims EU-origin, but disclaims EU-character<sup>6</sup>.

The two failing projects really stand for old problems. The project of creating a unitary Community patent covering the entire Internal Market (then the “Common Market”) dates back to the very early years of the European Economic Community (now the European Union)<sup>7</sup>. It was to be established by EEC Member States by way of an international convention together with a system for the grant of national patents at internationally uniform conditions by a centralized procedure, the latter to be open for non EEC-Member States as well. For various political and practical reasons, the system for the central grant of European patents was negotiated first and set up as the independent international “European Patent Organization” by all EEC Member States and an almost equal number of non Member States in 1973<sup>8</sup>. It has been a huge success, albeit not one without its own problems<sup>9</sup>. By contrast, the problems of creating a Community patent

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<sup>5</sup> The authorization for enhanced cooperation has been granted for 25 Member States, with Italy and Spain not participating. However, according to recital 15 of the decision (supra n. 1, Council Doc. 6524/11), any Member State may “withdraw as long as no substantive act related to the enhanced cooperation has been adopted”. This exit clause means that the territorial coverage of the “unitary patent” may turn out to be even narrower.

<sup>6</sup> See *Commission*, Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, COM (2011)215 final, and infra sub II.B.1.).

<sup>7</sup> For the historical development (since 1962!) and more details see *Ullrich*, Patent Protection in Europe: Integrating Europe in the Community or the Community into Europe, 8 Eur. L.J. 433, 437 et seq. (2002); *id.*, National, European and Community Patent Protection: Time for Reconsideration, in *Ohly, Klippel*, Geistiges Eigentum und Gemeinfreiheit, Tübingen 2007, 61, 65 et seq., with references

<sup>8</sup> Convention on the Grant of European Patents (European Patent Convention, EPC) of 5 October 1973, BGBl. 1976II826, last revised by the Act for the Revision of the European Patent Convention of 29 November 2000, BGBl 2007 II 1083. The Convention, also called “Munich Convention”, because negotiated in Munich, entered into force in 1976, and the European Patent Organisation (EPO) with its European Patent Office (EPO) became operative in 1978. It had been signed by all the (then) 9 EEC Member States and 7 non-Member States (mainly the remaining EFTA-States and Switzerland), see *Haertel* in *Beier, Haertel, Schrickler*(eds.), Europäisches Patentübereinkommen, Münchener Gemeinschaftskommentar, 1.Lfg., Cologne 1984, “Geschichtliche Entwicklung”, annot. 62,note 102 .

<sup>9</sup> See *Battistelli*, How can Europe be a key player at the global level in the patent field, and which role should the EPO play, University College London Lecture of 8 November 2010, available at [www.epo.org/news-issues/press/speeches/20101108\\_de.html](http://www.epo.org/news-issues/press/speeches/20101108_de.html); *Ullrich* in *Ohly, Klippel*, loc. cit. at p. 76 et seq., 85 et seq.. Part of the EPO’s problems affect the modern patent system in general, see *Hilty*, Patent Quality in Europe, in *Drexel* et al. (eds.), Technology and Competition – Technologie et concurrence (Mélanges *Ullrich*), Brussels 2009, 91; *European Patent Office*, Scenarios for the Future, Munich 2007, 15 et passim.

were such as to inhibit two successive draft conventions from ever going to ratification in all EEC Member States<sup>10</sup>. These problems resulted less from a lack of concern for the substantive rules of protection, even though there were deficits<sup>11</sup>, than precisely from disagreement among Member States about the language regime for the Community patent<sup>12</sup>, and from, first, the absence, then the heavy design of a dispute settlement system.

When, after a time-out of several years, the European Commission took over the project from Member States, she had no real difficulties in submitting a Proposal for a Community Patent Regulation in 2000<sup>13</sup>, which modernized – without greater ambition – the substantive law of protection, i.e. the rules on infringement and on its exceptions<sup>14</sup>. The proposal also introduced provisions on remedies<sup>15</sup>, and centralized the grant of compulsory licenses at Community level<sup>16</sup>. In all these respects of substantive law, including

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<sup>10</sup> See Convention on the European Patent for the Common Market (Community Patent Convention) of 15 December 1975, OJEC 1976L17, 1; Agreement on Community Patents – Concluded at Luxemburg on 15 December 1989, OJEC 1989L401, 1 (incorporating a revised Community Patent Convention, and a Protocol on the settlement of litigation concerning the infringement and the validity of Community Patents (Protocol on Litigation); for the history of failure see *Ullrich in Ohly, Klippel*, loc. cit. at p. 65 et seq.

<sup>11</sup> Thus, even the 1989 Community Patent Convention (supra n. 10) limited prior user rights territorially (Art. 37) and failed to establish a proper regime of compulsory licenses (Art. 45 et seq., 83), see also the resolutions regarding both matters in Annex 1 of the Agreement.

<sup>12</sup> See the different language regimes in Art. 14, 33, 34 para. 2, 88 Community Patent Convention 1975 (translation only of claims, but reservation in Art 88) and Art. 14, 29, 30, 31 Community Patent Convention 1989 (full translation mandatory with translators privilege). Note that at the time the EEC had less Member States, and see infra sub II.A.1.

<sup>13</sup> *Commission*, Proposal for a Council Regulation on the Community patent of 1 August 2000, COM (2000) 412 final, OJEC 2000C337, 278; subsequently revised by *Council*, “Proposal for a Regulation on a Community patent – General approach” of 27 November 2009, Doc. 16113/09 (<http://register.consilium.europa.eu/pdf/en/09/st16/st16113.en09.pdf>). Unless otherwise indicated, the Council’s version of a “General Approach” will be relied upon in the following text.

<sup>14</sup> Art. 7 and 8 (direct and indirect infringement) Art. 11 (ex post grant protection of patent application), Art. 9 lit a-j (all generally recognized exceptions), Art. 10 (Union-wide exhaustion), Art. 12 (Union-wide prior user right) Proposal for a Community patent Regulation – General Approach

<sup>15</sup> Art. 43 et seq., Original Proposal for a Community Patent Regulation of 1 August 2000 (supra n. 13). Together with all procedural rules these provisions have been removed subsequently to Art. 34a et seq. of the Draft EEUPC Agreement, loc. cit. supra n. 1.

<sup>16</sup> See Proposal for a Community patent Regulation – General Approach, Art. 9a (national Government use), Art. 20 et seq. (centrally granted Union-wide compulsory licenses in cases of insufficient use in the EU, of refusals to grant licenses to patentees of major improvement inventions, of national emergencies or extremely important national public interest (then with territorial limitation), and for export in the case of countries with public health problems).

the EU wide unitary reach of the “Community” patent, the proposal met with general agreement at the Council. However, it did not offer a convincing solution either for the language issue<sup>17</sup> or for the problem of having the Community patent accompanied by a generally acceptable Community patent judiciary<sup>18</sup>.

Although, in political terms, the solution of the latter problem constituted and constitutes a condition sine qua non for the acceptance of a Community(Union) patent, it will not be dealt with here, as it raises too many, rather complex questions, which have already resulted in a number of detailed studies<sup>19</sup>. It is the criticism of this

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<sup>17</sup> Originally, the Proposal for a Community Patent Regulation only implicitly provided for a language regime in that it made the patent granted by the EPO for the EU territory directly effective in the language of the grant (Art 1 of the Proposal of 1 August 2000), meaning that the EPO-regime of Art 14 para. 6 EPO would apply (language of grant plus translation of claims in the other 2 official EPO languages). However, claims for damages (not claims for injunctive relief) were limited by translation requirements (Art 44 para. 3) and Art 58 provided for the voluntary submission of translation to the EPO (see *Commission*, Proposal for a Community Patent Regulation of 1 August 2000, loc. cit. sub 2.4.4; and for a critique *Ullrich* in 8 Eur. L.J. at 468 et seq. (2002)). The subsequent public debate of the language issue has resulted in that the new Art 118 TFEU separates the legislative procedure for the enactment of the regulation on EU intellectual property from that for the enactment of the applicable language regime, which is why a specific language regulation had to be proposed that then became the trigger for enhanced cooperation, see infra sub II.A.1.

<sup>18</sup> The Commission made a concrete proposal only in 2003, which was to confer jurisdiction on the European Court of Justice, see *Commission*, Doc. COM (2003) 828 final and COM (2003) 827 final respectively, both of 23 Dec. 2003 ([http://ec.europa.eu/internal\\_market/indrop/patent/index\\_en.htm](http://ec.europa.eu/internal_market/indrop/patent/index_en.htm)). Doc. COM (2003) 828, Art. 4 proposed to amend the Protocol on the Statute of the ECJ by an Annex II (= CPC Annex); other articles (Art. 3, 5, 6) to amend the Protocol itself. The proposals followed a “Common Political Approach” decided by the Council on 7 March 2003, reprinted in 34 IIC 278 (2003). For a spontaneous, critical reaction see *Pagenberg*, Community Patent – Features and Comments, 34 IIC 281 (2003). For preparatory work by the Commission envisaging a more decentralised system see *Commission*, Working Document on the planned Community Patent Jurisdiction of 30.08.2002, COM (2002) 480 final ([http://ec.europa.eu/internal\\_market/indrop/patent/index\\_en.htm](http://ec.europa.eu/internal_market/indrop/patent/index_en.htm)); *Nooteboom*, Die Arbeiten zur Schaffung einer Gemeinschaftsgerichtsbarkeit, Festschrift Tilmann, Cologne 2003, 567; *M. Schneider*, Die Patentgerichtsbarkeit in Europa – Status quo und Reform, Cologne 2005, 295 et seq..

<sup>19</sup> See inter alia *Luginbuehl*, European Patent Law, Cheltenham 2011, 185 et seq., 252 et seq.; *id.*, The Future of Centralised Patent Litigation in Europe: Between the EPLA and the EU Patent Judiciary, in *Leible, Ohly* (eds.), Intellectual Property and Private International Law, Tübingen 2009, 231, 237 et seq.; *id.*, a Stone’s Throw Away from a European Patent Litigation Agreement, E.I.P.R. 2003, 256; *Jaeger*, The EU patent: Cui bono et quo vadit, 47 CMLRev.63,74 et seq.; *Jaeger et al.*, Comments of the *Max Planck Institute for Intellectual Property, Competition and Tax Law* on the 2009 Commission Proposal for the Establishment of a Unified European Patent Judiciary, 40 IIC 817(2009); *Ullrich*, The Court of Justice of the European Union and the Future European and EU Patents Court: Hierarchy, Complementarity, Rivalry? in *Hansen, Schüssler-Langeheine* (eds.), Patent Practice in Japan and Europe (Liber amicorum G. Rahn), Alphen 2011, 81; *id.*, Die



concept, its abrupt changes and exposure to challenges by alternative models, which relegated the language issue for solution at a later stage. However, the basic concept of establishing a highly specialized, semi-centralized “patents only” judiciary, which will be organizationally separated and essentially independent from both the national and the European Union’s judicial system, as was to be the EEUPC and as is to be the Unified patent court, which is proposed now<sup>20</sup>, does have some commonality with the preferred solution for the language regime. Indeed, while seemingly presenting a narrow, albeit important issue, the choice of the language regime mirrors a perception, if not a conceptualization of patent protection for inventions as a closed, subject-matter specific techno-legal system, which also and more evidently underlies the creation for the new patent system of a judiciary “of its own”<sup>21</sup>. The focus of this paper will be on the former, yet the latter is likely to later on cross our way again as we proceed. This is so because, after having hammered out a decision on the language issue to their benefit (see *infra* II.A.1.), and after having succeeded in obtaining, by way of preferring an enhanced cooperation (see *infra* II.A.2.), a “unitary” patent tailored their demand (see *infra* II.B.1.), the dominant players of the patent law community now try to turn the EEUPC defeat into a victory by seeking to have the European Court of Justice tamed to their will within the system of the Unified Patent Court by the use of the whip of the European patent (see *infra* II.B.2.).

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Entwicklung eines Systems des gewerblichen Rechtsschutzes in der Europäischen Union: Die Rolle des Gerichtshofs, in *Eger*, (Hrsg.), Ökonomische Analyse des Europarechts – Die Rolle des Europäischen Gerichtshofs, Tübingen 2011, sub II.3. (im Erscheinen).

<sup>20</sup> See *Council*, Draft agreement on a Unified Patent Court and draft Statute- Revised Presidency text, Doc. 16741/11 of 11 November 2011; *Council*, Draft Agreement on the creation of a Unified Patent Court- Guidance for future work, Doc.17539/11 of 24 November 2011 (all available at <http://register.consilium.europa.eu/pdf/en/11/st11/st16741.en11.pdf>; and [/st17539.en11.pdf](http://register.consilium.europa.eu/pdf/en/11/st11/st17539.en11.pdf); for the state of play see *Jaeger*, All back to square one? – An assessment of the latest proposals for a patent and court for the internal market and possible alternatives, forthcoming 43 IIC...(2012).

<sup>21</sup> For critique advocating a minimum of integration of the specialized expert court into the general judicial system see *Ullrich*, A Unified Patent system for Europe: An Exercise in “Self-Integration”?, forthcoming.

## II. A “patent with unitary effect” within the territory of enhanced cooperation: Taming whom?

### A. The failure of the Community (European Union) patent

#### 1. The language regime: Making a problem look like a roadblock

##### a) The issue and how it developed

When the proposed Community or European Union Patent Regulation failed and had to give way to a European patent with unitary effect<sup>22</sup> within “Enhanced Cooperation”<sup>23</sup> the answer generally given to the question, why it failed, simply was that the European Union patent in its turn hit again on the obstacle of finding a consensually acceptable language regime. While this is not the place to discuss, let alone to propose a proper language regime for the European Union patent<sup>24</sup>, or for its successor, the European patent with unitary effect<sup>25</sup>, one wonders, why an obstacle, which is there since more than a generation’s time<sup>26</sup>, has not been removed since. Instead, it has been allowed to trigger enhanced cooperation with its reduction of a European Union patent to a European patent producing a unitary effect within part of the Internal Market only. Therefore, some remarks may be in point showing how the controversy over the

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<sup>22</sup> *Commission*, Proposal for Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection of 13 April 2011, COM (2011) 215 final, as revised by a „Presidency compromise text“ of 23 June 2011, see *Council*, Doc. 11328/11 (proposed text – General Approach – available at <http://register.consilium.europa.eu/pdf/en/11/st11/st11328.en11.pdf>) as agreed upon on 27 June 2011, see *Council*, Doc. 11831/11 (Presse 184, PR CO 45). For a comparative presentation regarding the text of the Commission’s Proposal and the changes, the Legal Committee of the Parliament intends to make see *Council*, Doc.17578/11 of 1 December (“Analysis of the final compromise text” of the informal “Trilogue” between the Council, the Parliament and the Commission. For the substance of the proposed UPP Regulation see *infra* B.1.

<sup>23</sup> See *supra* n. 2 and *infra* 2.

<sup>24</sup> For a general discussion *Ullrich*, loc. cit. 8 Eur. L.J. 468 et seq. (2002); *id.*, loc. cit. in *Ohly, Klippel* at p. 100 et seq.

<sup>25</sup> This regime simply adopts the rules of Art.14 EPC on the – questionable (see *infra* B.1.b)) - ground, that the patent with unitary effect originally is a “European patent”, see *Commission*, Proposal of 15 April 2011 for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, COM (2011) 216 final; as revised by a “Presidency compromise text” of 23 June 2011, see *Council*, Doc. 11328/11 (proposed text General Approach) as agreed upon on 27 June 2011, see *Council*, Doc. 11831 (Presse 184, PR CO 45). See also *Council*, Doc. 16016/11, *supra* n. 22 and *European Parliament*, Committee on Legal Affairs, Draft Report *Baldassarre*, of 26.10.2011 on Amendments 20-47 regarding Enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, Doc. 2011/0094(CNS).

<sup>26</sup> See *supra* n. 12; for the following generally also *Ullrich*, loc. cit. 8 Eur. L.J. 468 et seq. (2002) with references; *id.*, loc. cit. in *Ohly, Klippel* at p. 100 et seq.

language regime and its current design fit into the overall evolution of the Union's patent system.

As commonly framed, the issue is whether, for the Community patent to be granted and become valid, its specification must be translated from the EPO-language, in which the application is processed, in full or only in part (meaning only the claims), in all or only into a limited number of the official languages of EU Member States. The issue arises because, on the one hand, the patent specification must meet the information function of the patent system<sup>27</sup> and because its claims set forth a directly enforceable rule of prohibition for all third parties to use the invention as claimed<sup>28</sup>. On the other hand, the translation produces considerable, possibly even inhibiting costs<sup>29</sup>.

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<sup>27</sup> See Art. 83, 97 para. 3, 98 EPC.

<sup>28</sup> See Art. 69 EPC. Violation of this prohibition (infringement) entails not only liability for damages (Art. 13 Enforcement Directive), but also duties to cease and desist, which are imposed by injunctions granted irrespective of any fault (see Art. 11 Enforcement Directive), and to tolerate destruction of infringing goods (Art 10 Enforcement Directive). In addition, national law typically provides for penal sanctions under criminal law (see § 142 PatG), which arguably presupposes that the prohibition rule be in the language of the State providing for such sanctions. In addition, Council Regulation 1383/2003 of 22 July 2003 (OJEU 2003 L 1967), the so-called Product Piracy and Counterfeiting Regulation, provides for border control of imports of allegedly infringing products by national customs authorities (whose personnel ought to be able to at least understand the claims!?).

<sup>29</sup> See *Commission*, Staff Working Document of 30 June 2010, SEC (2010) 796, Impact Assessment for the Proposal for a Council Regulation on the translation arrangements for the European Union patent, sub 4.; *id.*, Staff Working Paper of 13 April 2011, SEC (2011) 482; *id.*, Impact of Assessment, Proposal for a Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection, and Proposal for a Regulation implementing enhanced cooperation in the area of unitary patent protection with regard to the applicable translation arrangements, sub 4. Irrespective of whether one fully accepts the Impact Assessments and the conclusions drawn there from, it ought to be kept in mind that translation costs represent outlays, which typically must be made before the commercial value of the invention is known, and they relate not only to big, but also to the average, typically incremental inventions. However, translation costs are not the only consideration. Rather, the cost attractiveness of an EU patent must be calculated over its likely (or average) life time, meaning that relatively high "entry cost" may be offset in part by lower renewal fees, meaning by a single, hopefully moderate renewal fee. The latter may not be set by reference to the renewal fees asked for by 27 Member States, if the idea is not only to overcome territorial fragmentation, but to effectively cover the entire Union territory as composed by 27 national territories. Yet, for being purely fiscal reasons (distribution of renewal fee income between Member States!), the political benchmark for the level of renewal fees will be that of an average bundle of national EPO-granted patents, see *Council*, Conclusions "Enhanced Patent System in Europe" of 7 December 2009, Doc. 17229/09 at no. 38 (<http://register.consilium.europa.eu/pdf/en/09/st17229.en09.pdf>). At present, the European patent with unitary effect also hits on the problem of defining a proper level of renewal fees and a key for the distribution of income

Whereas the Community Patent Conventions of 1979 and 1985/89 followed an all languages rule<sup>30</sup>, the Commission from the very beginning proposed a truncated three languages regime: The Community patent was to become effective directly upon grant in one of the EPO's procedural languages and publication of the grant in that language together with a translation of the claims in both of the two other procedural languages<sup>31</sup>. This proposal for English, French and German as the Community patent languages immediately was objected to, mainly but not only, by Member States, which already had been discontent with the language regime of the Community Patent Conventions<sup>32</sup>. Yet, the Commission apparently never suggested the possibility of a substantial modification of its original concept<sup>33</sup> during the repeated efforts by the Council to find a compromise between those Member States, which had always favored a 3-languages regime, and the "objectors"<sup>34</sup>. The Commission even submitted the same concept, when, in 2010, it had to propose a language regime, which, as the newly introduced Art. 118 para. 2 TFEU expressly required, had to find unanimous consent by all

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among participating States, see Art. 15, 16 proposed Unitary patent Regulation, supra n. 22, and the compromise documents mentioned there.

<sup>30</sup> See supra n. 12. Whereas the 1979 Convention required only a translation of the claims in the official language of all Member States, the 1985/89 Convention asked for a translation of the specification in full, but its Art. 30 para. 6 allowed to fall back on a European patent. For details see *Stauder*, Substantive Law Aspects of the Community Patent - Translation Requirements, Switching, and the European or Community Patent Option, 22 IIC 979 (1991).

<sup>31</sup> See *Commission*, Proposal of 1. August 2000 for a Council Regulation on the Community patent, COM (2000) 412 final, Explanatory Memorandum sub 2.4.4. This language regime did follow from the system of the Regulation (Art. 1 para. 1, 2<sup>nd</sup> sent. combined with Art. 14 para. 6, 97, 98 EPC), and from the absence of any translation requirements. Art. 58 provided for the patentee's option to produce and file with the EPO voluntary translations into several or all of the official language of Member States, an option, which she/he might have wished to exercise in order to exclude the defence of innocent infringement as provided for by Art. 44 para. 3 with respect to liability for damages.

<sup>32</sup> See for the following summary of the search for compromise on the language regime *Council*, Proposal for a Council Regulation on the translation arrangements for the European Union patent – Political orientation, Doc. 15565/10 of 3 November 2010. As to the controversy surrounding the 1985/89 language regime see *Krieger, Brouer, Schennen*, Die dritte Luxemburger Konferenz über das Gemeinschaftspatent von 11. bis 15. Dezember 1989, GRUR Int 1990, 173, 176 et seq. It should be noted that concessions made to the patent bar of the then new entrant States (Art. 31 1985/89 Convention) have their counterpart in the benefits, which the British, French and German patent bar enjoy due to the EPO's language regime.

<sup>33</sup> See *Commission*, Communication of 2 April 2007, Enhancing the patent system in Europe, COM (2007) 165 final, sub 2.1.

<sup>34</sup> From what transpired unofficially from the compromise negotiations, the objecting Member States had no "common position": Spain objected on principled grounds (non-discrimination between Member States, languages and businesses), whilst Italy, in part supported by other Member States, held the compromise to be insufficient (legal effect of a translation into English during a transitional period; open-endedness of that period).

Member States<sup>35</sup>. As was to be expected, resistance by Member States, notably by Spain and Italy, resumed. The Council, however, though seriously seeking for improved compromise solutions, never considered changes other than modifications of a complementary nature<sup>36</sup>. The principle remained that of three languages – rather than only one<sup>37</sup>, or five<sup>38</sup>, or all – and the “red line” arguments primarily

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<sup>35</sup> See *Commission*, Proposal of 30 June 2010 for a Council Regulation (EU) on the translation arrangements for the European Union patent, COM (2010) 350 final, Art. 3, with Explanatory Memorandum, sub 1. As a matter of ensuring a fair trial, Art. 4 provided for additional translation (only) in case of a dispute. As compared to the total number of existing patents, litigation, however, is rare and concerns only commercially valuable patents. Most patents are either respected anyway or technically irrelevant for other market actors, either generally or because these are engaged in substitute innovation anyway.

<sup>36</sup> These efforts are summarized by *Council*, loc. cit., Doc. 15565/10, sub “State of Play”. The “Political Orientation” set forth in an Annex, *ibid.*, informs a “First” and “Second” set of elements for compromise proposed (on 10 October) or to be proposed (on 10 November) to the Council at a moment, where there was already a threat by some Member States to take resort to enhanced cooperation (*ibid.* sub 5 penultimate para.). These “elements” were so-called “accompanying measures” intended to make the unchanged language regime more acceptable. The “basic” accompanying measure was that for information purposes only (!) machine translations of the patent specification would have to be made from all three EPO languages into all EU languages. To make this accompanying measure work, the Union would support (in particular financially) the EPO in developing a system of machine translations. During a transitional period covering the time until such machine translations become available (there remained a controversy over the length of the period and its definite or reviewable character), the patent applicant had to submit – for information purpose only, but this non-binding character remained controversial – an English translation in case the patent was not be granted in English or, in case it was to be granted in English, a translation into another EU official language of his/her choice. Other accompanying measures related to, first, the possibility for applicants from Member States not having an EPO procedural language as their official language to file applications in their own (EU) language, to obtain a compensation for their translation costs and to re-use this application as a translation into another EU-language where the patent is granted in English. Second, as regards provisional protection during application time (i.e. ex post compensation), by way of a recital, the regime of Art. 67 EPC would have been confirmed to the effect, that such compensation would be available only for the time that the application had been translated into a national language. Third, in addition to these Byzantine “elements of compromise”, a rule protecting the bona fide user of a protected invention was envisaged, possibly similar to Art. 44 para. 3 of the Commission’s Community patent proposal of 2000 (see *supra* n. 234), but now with a systematically awkward focus on SMEs. Fourth, by way of a recital, assurance would be given that the language regime of the EU patent, cannot be considered as creating a precedent for a limited language regime in any future EU legal instrument” (no. 9 of the “sets of elements”). In essence, these elements of compromise have become the accompanying rules of the language regime of the unitary patent of Enhanced Cooperation, see Art. 3, Art. 4 para. 4, Art. 5 and 6 of the proposed Regulation implementing the unitary patent with regard to the translation arrangements, – General Approach, *supra* n. 25

<sup>37</sup> Namely English, the proposal was made by Spain, subject to a translation with limited legal effect only into one other EU-language.

<sup>38</sup> Which is the language regime of the procedure before the Office of Harmonization for the Internal Market (Trademarks and Designs), Art. 119 para. 2

were costs, but also legal uncertainty resulting from (too) many legally binding translations<sup>39</sup>.

b) Inevitable imbalances?

The controversy and the compromises sought to overcome it are relevant here because of their narrow focus on the most immediate problems of translations, which are costs and a risk of inaccuracy. Thus, systematic imbalances got out of sight. While it is true, that translation costs may become an excessive burden, they will do so only as regards the grant of the patent, but need not do so as regards the application and its processing<sup>40</sup>, and they do not seem to have slowed down the steady increase of patent applications and of grants in the EU<sup>41</sup>. The reduction of translation costs, while advocated for in the interest of small and medium sized enterprises, but not sufficiently targeted on them<sup>42</sup>, will benefit mainly the relatively small number of major applicants running an important patenting activity<sup>43</sup>. This imbalance on the level of firms will be exacerbated by an imbalance on the level of Member States, since it is precisely the States having one of the EPO procedural languages as their official language that are also having the highest rate of patent applications, of designations

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Community Trade Mark Regulation (English, French, German, Italian, Spanish); as to publication in all EU languages see Art. 120.

<sup>39</sup> See *Council*, loc. cit. Doc.15565/10, sub I.4.5. The “red line” to maintain the unitary character of the EU patent is rather gray. There has been a doubt about the unitary character of the 1979 and 1985/89 Conventions’ all language regime. By contrast, leaving out some Member States on grounds of translation requirements was already envisaged in the 1985/89 Convention (switch back to EPC-patent, see supra n. 30), and it now is the result of “switching” to Enhanced Cooperation, the latter, however excluding the “unwilling” Member States altogether, whereas the former only excluded the unwilling patent applicant.

<sup>40</sup> Except in case provisional protection is sought in accordance with Art 67 EPC (see supra n. 36). Note that less than a half of the applications mature into a grant, partly because they do not qualify, partly because they are withdrawn for one reason or another, see EPO, Annual Statistics 2010, Granted Patents ([http://www.epo.org/about-us/office/statistics/granted-patents\\_en.html](http://www.epo.org/about-us/office/statistics/granted-patents_en.html)).

<sup>41</sup> See for 2001-2005, *EPO*, Annual Report 2005, Cover inside; for 2006-2010 *EPO*, Annual Statistics, European patent applications total ([www.epo.org/about-us/office/statistics/fileups\\_en.html](http://www.epo.org/about-us/office/statistics/fileups_en.html)); for 2001-2010 per country of domicile and total, *EPO* Annual Statistics, *ibid*.

<sup>42</sup> For one thing, the problem for SMEs is not general technical information, but easy access to legally reliable information. For another, the envisaged cost reduction scheme for applicants filing their application in their “domestic” language in accordance with Art. 14 para. 2 EPC, as provided for by Rule 6 para. 3 of the EPC Implementing Regulation and referred to by the Council compromise (supra n. 36) applies to all applicants rather than specifically to SME’s or to enterprises in need of a reduction of fees.

<sup>43</sup> See *EPO*, Annual Statistics 2010, Leading Applicants ([www.epo.org/about-us/office/statistics/top\\_en.html](http://www.epo.org/about-us/office/statistics/top_en.html)) showing 13 multinational corporations with more than 1000 applications per year, and even up to more than 2000, or, if broken down by technical field, with several hundreds of applications.

and/or of consulting and litigation business<sup>44</sup>. These activities are likely to be channeled ever more to them while the costs in other countries will increase as for them a limited language regime means extra costs of translation into or – invisible – costs of working in a foreign language<sup>45</sup>. There are simply more – visible and invisible – costs and benefits to be put on the micro- and the macro economic

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<sup>44</sup> For the countries of origin (domicile of applicant) of applications from 2001-2010 see EPO, Annual Statistics 2010, loc. cit; *Commission*, Impact Assessment, Translation arrangements unitary patent, loc. cit. Annex II, III; for the designation rates 1995-2003, *Commission*, Impact Assessment, translation arrangement European Union patents, loc. cit., Figure 4; EPO, Annual Report 2003, Fig. 10. The patent bar's business is located accordingly (plus: effect of EPO location in Germany; part of foreign English language application being channelled through the U.K.); as to the litigation business see infra sub b) (ii). Given that constantly over the years, about half of the applications originate from outside the EU (USA ~25%, Japan ~15%-18%), the "European" half stemming largely from Germany (~18%) with France (~6%-7%), the Netherlands (~6%), the U.K. (3%-4%), Italy (3%-3,5%), Spain (1%-1,5%) being distanced by a large margin, and that designation rates are highly concentrated on only 3 major Member States (D, F, UK all over 90%, indicating, among other factors, the language advantage: no translation costs) with, however, other Member States still having high rates (It: 78%, ES: 67%, NL: 66%, BE: 62%, PT: 60%), it seems fair to say, that as regards considerations merely of the operation of the patent system, the stalemate in the controversy over the language regime is as much due to the blocking attitude of the "haves" of once acquired advantages as it is to the insistence on their claims of the "have nots". The very arguments of the Commission in its impact Assessment regarding the translation arrangements for the European Union patent (ibid. at p. 12 et seq.) point to that Spain or Italy (and other countries) are not designated precisely because of (and therefore disadvantaged by) translation costs, and that the UK clearly is favoured by the language regime, as it has little patent propensity, but a high designation rate. The claim of English as a preferred language is due to the 50% of patent applications originating from outside the EU/EPO-territory, confirming only its lingua franca position. By comparison, the position of German is weak, but defensible, the position of French rooted only in history. This, among other things, explains why the objections were always against German and French, not against English (which had been proposed as single language, with some delegation being open to such an approach, see *Council*, loc. cit. Doc.15565/11, sub No 3). Note that almost all "international" patent applicants are likely to apply also in the USA, possibly also in Japan, China etc., so need an English version of their invention anyway (see *Commission*, Impact Assessment, Translation arrangements unitary patent, ibid. Annex III.). This is why English is also the "default" language for translation. To the difference of Spanish, unless maintained within the EPC/EU-system, French and German may hardly raise a claim to international importance in the patent field.

<sup>45</sup> To put it bluntly, given the data indicated supra n. 44, the proposed language regime facilitates expansion of patent protection for applicants from Member States with high patent propensity, and will tend to hamper the development of higher patenting rates originating from Member States with low patent propensity. In both respects, it has to be taken account of that a limited language regime does not only concern the costs of the translation, (or the savings of such costs), but also the costs of the in house- and out-house preparation of the application and of representation before the office. More ambivalent are the effects on effective observance of patents of other market actors, since national operators will be put at a disadvantage while international operators will benefit from a limited language regime.

balance sheet than the obvious savings of the costs of patent translations<sup>46</sup>.

Likewise, the focus on legal certainty with its preference for only one authentic language of the patent<sup>47</sup> produces imbalances on both the level of the firm and the level of the economy. The reason is not so much that the patent system's information function might not be adequately satisfied. Rather, the reason is that the rule of one legal language only is not really compensated for by either a qualified negligence requirement regarding liability for damages in cases of infringement<sup>48</sup> or by translation requirements resulting from the language regime of infringement litigation<sup>49</sup>. On the level of the economy, the authenticity of only a foreign language means a lack of legal transparency, which favors the patentee not only by giving him legal certainty, but also by creating a broader zone of respect as other market actors will shun operating at the risk of an infringement, which they cannot predict with sufficient precision. Such shift of legal uncertainty from the patentee to the market place may stifle competition by – more or less close – substitution.

Clearly, an all language regime with more than 20<sup>50</sup> quasi-authentic versions of the patent specification or of the claims will not produce a manageable, let alone a reliable form of patent protection in

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<sup>46</sup> See already earlier *Ullrich*, loc. cit., 8 Eur. L.J. at p. 471 (2002); *id.*, loc. cit. in *Ohly, Klippel* at p. 101

<sup>47</sup> Pursuant to Art. 3 para. 2 proposed Regulation on the translation arrangements for the EU patent, the EPC procedural language, as determined by Art. 14 para. 3 EPC, would have been the only authentic language (as it is the language, in which the claims have been drafted and then accepted upon examination by the EPO). Art. 3 proposed Regulation on the translation arrangements for the unitary patent does not provide for such explicit confirmation of this well-established rule (see *Singer, Stauder*, loc. cit., Art. 14, annot. 48), which essentially follows also from Art. 70 EPC, and from the limitation of other translations to an information purpose only (*ibid.*, Art. 6 para. 2, last sent.). The legal quality of translations to be submitted in legal disputes is left open by both Art. 4 of the proposed Regulation on the translation arrangements for the EU patent and Art. 4 of the proposed Regulation on the translation arrangements for the unitary patent. As this translation, which should not be carried out by automated means (recital 8 of the last mentioned Proposal), serves to ensure a fair trial and is to be submitted by the patentee, a rule of interpretation *contra proferentem* might be appropriate.

<sup>48</sup> For one thing, there are other, more severe sanctions than damage claims (see *supra* n. 28), in particular the grant of injunctive relief. For another, it remains to be seen whether courts will really accept an “innocent infringement” defence or rather dismiss it as soon as there is some translation, however imprecise, the reason arguably being that such translation should have motivated the alleged infringer to seek advice as to the meaning of the authentic text.

<sup>49</sup> As to its indeterminate quality see *supra* n. 47. The point is, that in infringement litigation, what matters is the exact meaning of the claims, an issue, which is so difficult to deal with that specialized expert courts are called for.

<sup>50</sup> At present, there are 23 so-called Treaty languages (Art. 55 para. 1 TEU) for 27 Member States, since some Member States have “national” languages in common.



the Union. However, this has never been a serious option for the enlarged Union nor is it where the problem is. Rather, the problem is that the language issue has been approached from too narrow a perspective with a view only to maintain existing structures and to benefit from them rather than to also review them in the interest of all market actors and all Member States. As evidenced by reliance being placed merely on “accompanying measures” and concern being focused only on the costs of translations for a patent applicant<sup>51</sup>, there was both a failure to examine more deeply into the consequences of a limited language regime for the overall operation of the patent system in the EU and an early loss of flexibility for considering essentially different alternatives, quite apart from the lack of sensitivity for the broader implications of a 3-languages regime<sup>52</sup>. Even though, admittedly, the establishment of a European Union patent is not a good reason or opportunity to raise the Union’s language problem in general<sup>53</sup>, it needs to be acknowledged that the introduction of a heavily armed exclusive right, whose subject matter and boundaries are expressed and defined in a foreign language, introduces a constitutive element into the regulatory framework not only of the Internal Market, but of national markets. As such, the language affects national sovereignty, and it concerns national economic and industrial policy, given that the grant of such exclusive rights introduces an incentive mechanism for innovation. Because this is so, and because Member States do have different interests and susceptibilities in these regards, the “accompanying measures” fail to fully address the problem. Instead of seeking to answer the language question as such, for instance by providing for an open language regime allowing

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<sup>51</sup> In addition, even this focus on translation costs was too narrow, since it excluded compensation by adequate levels of renewal fees (see supra n. 29, and note, that under Art. 15 para. 2 lit.c) of the proposed unitary patent Regulation these fees will again be set on the level of fees for the EPC-bundle of patents!). On the other hand, the focus is too broad, i.e. not well adjusted, since it is directed at costs for all enterprises, while the Commission’s (pretended ?) concern is with access barriers for SME (see *Commission, Impact Assessment Unitary Patent*, loc. cit. sub 4.4, asserting an inhibitive effect only for SMEs, but expressly not for large firms). The obvious remedy to such effects are fee levels targeted on firm size (as a proxy for the access barrier) or on actual need, rather than an “over the board” approach.

<sup>52</sup> The assurance given that the language regime of the European Union or of the unitary patent does not constitute a precedent (see supra n. 36) came too late, and it does not seem to be politically reliable. Concerns about the de facto 3-working language regime of the Commissions are well known since long (see *Hayder, Das Sprachenregime der Europäischen Union*, ZEuS 2011 (2) 343, 359 et seq. (361), and apparently have motivated Spain’s fundamental position on the language issue (see supra n. 34). It seems that a compromise idea of admitting Spanish (and Italian?) as a working language has not been pursued further as it met with resistance by the EPO.

<sup>53</sup> See as to this general problem only *Hayder*, loc. cit. ZEuS 2011 (2) 343 et passim; *Hilpold, Die Sprachenreglung der Union zwischen Grundfreiheiten und Kulturpolitik*, EuR 2011, 500, and the various contributions in *Hanf, Malacek* (eds.), *Langues et construction européenne*, Brussels 2010; *Ullrich*, in 8 Eur. L.J. at p. 468 et seq. (2002) with references.

objecting Member States to determine themselves which translation requirements, if any, are in their best interest<sup>54</sup>, the various proposals treat the language regime as representing merely a technical sub-issue of the availability of (EU-wide) unitary patent protection. Then, however, they allow it to degenerate into a total roadblock for the entire project, and – willingly or unwillingly – to trigger an enhanced cooperation<sup>55</sup> for a system of patent protection “with unitary effect”, which is truncated in its very substance.

## *2. Enhanced cooperation: Making a blocked road look like no problem*

### a) The price for integration, to share or to shift?

Although, as mentioned, the language issue loomed large since long, when it entered the actual debate, it has been cut off relatively rapidly by threats of and then the decision to go into enhanced cooperation<sup>56</sup>.

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<sup>54</sup> The voluntary conclusion and ratification by major EPC Contracting States of the London Agreement on the application of Article 65 of the European Patent Convention of 2000, OJEPO 2001, 549 (ratified by 11 EU Member States, see “Status of accession and ratification”, [www.epo.org/law-practice/legal-texts/london-agreement/status-of-accession](http://www.epo.org/law-practice/legal-texts/london-agreement/status-of-accession)) including the option offered to States to designate one EPO-procedural language as the official language (Art. 1 para. 2) has shown that States will opt for a common regime, if that is in their best patent policy interest. Instead of a 3-languages “compromise”, which really is only one between the major players, different models could have been considered for negotiation in view of a final, definite model, among others a sort of a reversed London model, which, by way of an exception of the (one single or three) language(s) regime, would allow Member States to adhere to a translation regime, into which or out of which patent applicants may opt with respect to coverage of a national territory. It would have had the advantage that, like under the 1985/89 switching regime (see supra n. 30) only individual patentees would have fallen out of the system rather than entire Member States as under Enhanced Cooperation (and they might possibly do so only with respect to one territory, as once foreseen by a former British proposal for the 1985/89 Community Patent Convention, which was rejected at the time purely as a matter of principle, see *Krieger, Brouer, Schennen*, loc. cit. GRUR Int 1990 at p. 176).

<sup>55</sup> Among the 25 participating States are those which have one of the procedural languages of the EPO as one of their official languages (French: BE, F, Lux; English: IRE, Malta, UK; German: D, A) or do not have much of a difficulty with these languages (DK, NL, SE) and the Northern (Fi) and Eastern European Member States. There is quite some, but no complete overlap with the 11 EPC Contracting States, Member States of the EU, which have ratified the London Agreement, see supra n. 54.

<sup>56</sup> The Commission submitted its proposal for a Regulation for the translation arrangements for the EU patent on 30 June 2010 (supra n. 35), so shortly before summer recess. In its summary of the State of play of 3 November 2010 the Council noted sub 5 that several Member States are ready to consider the possibility of enhanced cooperation (supra n. 36). The official requests by 9 Member States (DK, EN, Fi, F, D, Lit, Ln, NL, SI) was made on 7 December 2010 ([www.diplomatie.goov.fr/fr/IMG/pdf/Request\\_letter\\_enh\\_coop\\_definitive.pdf](http://www.diplomatie.goov.fr/fr/IMG/pdf/Request_letter_enh_coop_definitive.pdf)) and

Whether this switching from search for unanimity of decision as required by Art. 118 para. 2 TFEU to a majority vote<sup>57</sup> pursuant to Art. 329 para 1, subpara. 2 TFEU has been legally admissible under Art. 20 para. 3 TEU and Art. 326 para. 2 TFEU is a question, which the Court of Justice will have to answer as Italy and Spain have brought complaints<sup>58</sup> against the Council's decision to authorize enhanced cooperation<sup>59</sup>. It is hard to predict how the Court will approach this politically sensitive case<sup>60</sup>, and the more so as, except as regards formal rules, the politico-institutionalist literature mostly complains about the absence of precedents<sup>61</sup>, but abstains from giving much guidance of its own. Thus, the threshold issue of whether the transition to enhanced cooperation actually was the means of last resort to achieve the objectives sought after by the cooperation, seems to depend only on a determination of a definite deadlock of deliberation/negotiations within the decision-making (or legislative) process<sup>62</sup>. Since, however, enhanced cooperation has been

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separately by the UK on 8 December. Also on 7 December 2010 both the Prime Ministers of Italy and Spain submitted a letter to the President of the European Council, the President of the Commission and the Belgian Prime Minister confirming their interest in the European Union Patent, their willingness to further negotiate the language regime with a view to achieve consensus, and underlining the short period of official negotiations as well as the problems of enhanced cooperation and the risk it would pose for the Union (on file with the author). The Council took its decision on 10 March 2011, with the Parliament's consent of 15 February 2011, see supra n. 2. As all other Member States except Italy and Spain joined in the request for Enhanced Cooperation, the majority was "unanimous".

<sup>57</sup> See Editorial Comments, Enhanced cooperation: A Union à taille réduite or à porte tournante? 48 CML Rev. 317, 318 (2011); *Zeitzmann*, Das Verfahren der Verstärkten Zusammenarbeit und dessen erstmalige Anwendung – Ein Ehescheidungs- und Trennungsrecht für Europa, ZEuS 2011, 87, 96.

<sup>58</sup> Cases C-274/11, Spain/Council (OJEU 2011 C 219, 12) and C-295/11, Italy/Council (OJEU 2011 C 232,21)

<sup>59</sup> See supra n. 2

<sup>60</sup> Literature is unreflecting (see *Jacqué*, Coopération renforcée, Rev. trim. dr. eur. 2011, 819; *Hummer*, Der Bann ist gebrochen: Die ersten Ermächtigungen zur "verstärkten Zusammenarbeit" in der EU, EuZ 2011 (4) 78), notes the case only for illustrative purposes (see references supra n. 260) or is highly critical, see *Lamping*, Enhanced Cooperation: A Proper Approach to Market Integration in the Field of Unitary Patent Protection? 42 IIC 879 (2011), who also deals with the question, whether Art. 118 para. 2 TFEU must be read as a rule specifically protecting Member State's language interests, and, therefore, cannot be escaped by way of Enhanced Cooperation even if, as a general matter, enhanced cooperation may not be blocked by a unanimity rule, but precisely is intended to overcome "blocking" votes. Since the Treaty generally is silent on the language issue, enshrining a particular veto rule in Art. 118 para. 2 TFEU must, indeed, mean that in the particular context of European Union intellectual property protection it wishes to see a Member State's interests in its own language to be specifically respected.

<sup>61</sup> There have always been forms of cooperation between Member States within the context of the EU, but within its constitutional framework the only example is in quite another field, namely in divorce law, see *Zeitzmann*, loc. cit. ZEuS 2011, 87

<sup>62</sup> This seems to be the position of the Council in its decision of 10 March 2011, loc. cit. OJEU 2011 L 76, 3 at no. 4, and of a literature looking only at the specific legislative project, see v. *Buttlar*, Rechtsprobleme der "verstärkten

institutionalized as an integration mechanism of and within the Union, and as the “last-resort” requirement characterizes it as an exceptional way out of an impasse<sup>63</sup>, one wonders why that requirement should not imply also a substantive assessment of the relationship between the grounds of a (really?) definite discord and the objectives of the cooperation<sup>64</sup>. Such a reading of the “last-resort” requirement would

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Zusammenarbeit” nach dem Vertrag von Nizza, ZEuS 2011, 649, 665 et seq.; *Hatje* in *Schwarze*, EU Kommentar, 2<sup>nd</sup>. Ed. Baden-Baden 2009, Art 43a EUV, annot. 19. Given the voting rules and possibly the voting power of the proponents of an enhanced cooperation, such form-based approach may provide quite some power of exclusion. This is why some voices in literature argue that instead of a unilateral ascertainment of “nothing goes”, there ought to be consensus within the Council that agreement may not be reached (agree not to agree), and that, only thereupon, a decision authorising enhanced cooperation may be taken by majority vote, see *Lamping*, loc. cit. 42 IIC at p. 892 et seq. (2011) with references. Such a requirement, which has its historical precedents (the famous Augsburg “itio in partes” of 1555), would only confirm the basic solidarity between Member States as mirrored by Art. 327 TFEU (see *Blanke* in *Grabitz, Hilf, Nettesheim*, loc. cit. Art. 20 EUV, annot. 47 – and also annot. 34)

<sup>63</sup> See *Zeitmann*, loc. cit. ZEuS at p. 96; *Hatje* in *Schwarze*, EU Kommentar, loc. cit. Art. 43a, annot. 1. The basis for a substantive understanding of the „last resort” requirement is the very wording of Art. 20 para. 2 TEU, the fundamental character of the principle of unity of Union law and of the balanced structure of the decision-making process of the Union, as well as the duties of loyalty binding the Union and its Member States (Art. 4 para. 3 TEU). Inherent limits of judicial control (see *Ruffert* in *Calliess, Ruffert*, loc. cit. Art. 20, annot. 19) may follow from the nature of the objectives of a project, for which authorization is requested, and from their relationship with the Union’s objectives of integration (see *infra* n. 267), but do not exclude a substantial test as such. By its very nature the test is flexible enough to leave as much room for political discretion and manoeuvre as is warranted for a given project of enhanced cooperation (e.g. it may vary according to whether enhanced cooperation is used to get out of a deadlock in a legislative process or to enter a new policy field). After all, enhanced cooperation constitutes an integration mechanism within the framework of EU legal order (contra *Antenbrink, Kochenov*, *Towards a More Flexible Approach to Enhanced Cooperation*, in *Ott, Vos* (eds.), *Fifty Years of European Integration*, The Hague 2009, 181, 198, who generally wish to loosen control in order to see more of closer cooperation).

<sup>64</sup> Thus, in its complaint, Spain claims (possibly somewhat in contradiction to its previous support of the proposed EU patent regulation) that the objectives of establishing an EU patent could have been achieved just as well on the basis of Art. 142 EPC, an approach, which the Community now has chosen within enhanced cooperation by its proposed European patent with unitary effect (see *supra* n. 22, and *infra* B.1). The problem is that Art. 20 para. 2 TEU defines the “last resort”-requirement in relation to the objectives of enhanced cooperation, thus allowing the proponents of the cooperation to set the goals as they wish, provided these concur with those of the Union (Art. 20 para. 1, sub para 1 TEU). That approach fits well the original concept of enhanced cooperation as a way to further develop and implement as of yet open fields of policy (see *Blanke* in *Grabitz, Hilf, Nettesheim*, loc. cit. Art. 20 EUV, annot. 56 et seq.). It does not, however, fit as well projects of enhanced cooperation, originating from legislative proposals made by the Commission with a view to attain objectives fixed by her, and which ultimately failed before the Council. In such cases, enhanced cooperation tends to become an emergency exit only from an overly ambitious or simply from an ill-conceived legislative project. In addition, the risk then is that the general objectives of the proposal will be confused with those of its specific design and components. The fact

be particularly apposite, where the objection by a Member State or by some Member States concerns only a sub-issue of a project, whose objective is shared by all, and where that specific objection is based on grounds, whose legitimacy is derived from general values of the Union<sup>65</sup>.

It is, however, not only its cultural or political implications, which make it difficult to adequately deal with the language issue under the rules of enhanced cooperation. The original idea of enhanced cooperation is to allow a group of Member States to develop

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that the Commission and the Council fully endorsed and still endorse within enhanced cooperation the principle of optionality between the EU patent and the EPC bundle of national patents with its more complex language regime as well as their switching to an EPC bundle patent with unitary effect, which only is intended to open the door of Art. 142 EPC (see *infra* B.2.) is evidence of that the objective of enhanced cooperation is not so much the establishment of a comprehensive form of protection by European Union patents (even though this is what was originally intended), but a specific language regime with its cost efficiencies for applicants. While with respect to patent availability such consideration certainly is pertinent, such narrowing of the perspective raises the question whether it is in conformity with the overall goals of the Union (Art. 20 para. 1, sub para. 2 TEU; see as regards maintenance of cultural diversity Art. 3 para. 3, last para. TEU, and *Lamping*, loc. cit. 42 IIC at p.914 (2011); as regards legally open access to the benefits of the Internal Market see *infra* text at n.74 et seq.). More particularly, the question is whether and when such use of enhanced cooperation comes to undercut both the structure of the EU-decision making process with its purposive constraints and the legitimate function of enhanced cooperation within that framework (see *Blanke in Grabitz, Hilf, Nettesheim*, loc. cit., Art. 20 EUV, annot. 39). After all, there are many legislative proposals whose legitimate and politically important objectives are actually shared by all, and which have one or the other element, which a group of Member States will rightfully consider to be essential, which others might accept or “swallow”, and which still others will definitely object to (see e.g. the spare part issue of the Community Design Regulation, *Kur*, Limiting IP Protection for competition policy reasons – a case study based on the EU spare parts-design discussion, in *Drexel* (ed.), *Research Handbook on Intellectual Property and Competition Law*, Cheltenham 2008, 313 with references, for other examples see *infra* text at n. 100 et seq.). Are these proper cases for enhanced cooperation, or rather cases for inescapable compromise, as are cases of legislative proposals having multiple objectives, which cannot be met all to the satisfaction of all. In short, enhanced cooperation has too much of a potential for easy use, which needs to be kept within limits that prevent not only abuse, but also misuse. The pre-requisites set by Art. 20 TEU and Art. 326 et seq. TFEU need to be construed and applied accordingly. The problems of judicial review of some of the “softer” criteria may be overcome by “soft” solutions, such as imposing on parties a duty to reconsider their positions and to renegotiate the (entire) project until they really agree on disagreement.

<sup>65</sup> See as regards the respect asked for by Art. 3 para. 3, last subpara. TEU *Lamping*, loc. cit. 42 IIC at p. 894 (2011). It has, indeed, to be taken account of that, precisely because the language regime of a patent system is so important for its well-functioning and its general acceptance, it has to be a patent system for the “multi-national”/“multi-language” EU. Therefore, a balance might have to be stricken between the rationales of Art. 118 para. 1 and of Art. 118 para. 2 TFEU, see also *supra* text at n. 57 (with n. 60), and as to Art.118 para.1 TFEU *infra* text at n. 90 et seq..

by way of closer cooperation a specific field of policy, which is not yet sufficiently integrated, and into which other Member States refuse to follow. Where such initiative is aimed at furthering the Union's objective, the Union will lend its institutional support, while the constraints cast upon such enhanced cooperation by Art. 20 para. 1 subpara. 2 TEU and Art. 326 et seq. TFEU precisely purport at making sure, that such "particularism" will, indeed, further the objectives of the Union, protect its interests and reinforce its integration process without impairing its *acquis* or going at the expense of the recognized interests of the abstaining Member States, including their interest in further integration<sup>66</sup>. Thus, enhanced cooperation is a mode of integration intended to allow some Member States to go forward with their integration initiative while respecting the reluctance or inability of others to follow, and to do so without frustrating existing integration or its general evolution. Its objective is to overcome refusals of further integration in that it offers a way out of stagnation. The claim for a broader language regime, however, is not of a negative character expressing a disinterest in further integration, and it certainly is not so when raised upon full and demonstrated agreement with and active contribution to the advancement of integration in the envisaged field, i.e. of EU-wide patent protection. Rather, by its very nature, it is a claim for full inclusion and participation, and for equal sharing in the benefits of more advanced integration<sup>67</sup>. Its dismissal by a majority amounts to an

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<sup>66</sup> For the historical origin and the various concepts of differentiated integration/closer cooperation see *Blanke* in *Grabitz, Hilf, Nettesheim*, loc. cit. Art. 20 EUV, annot. 1 et seq.; as to the objectives and structure of enhanced cooperation, *ibid.* annot. 25 et seq.; *Dougan*, *The Unfinished Business of Enhanced Cooperation: Some Institutional Issues and Their Constitutional Implications*, in *Ott, Vos* (eds.), *Fifty Years of European Integration*, The Hague 2009, 157, 159 et seq.; v. *Buttlar* ZEuS 2001, at 650 et seq.; *De Areilza*, *The Reform of Enhanced Cooperation Rules: Towards less Flexibility?* In *De Witte, Hanf, Vos* (eds.), *The Many Faces of Differentiation in EU Law*, Antwerpen 2001, 27, 29 et seq.

<sup>67</sup> This is not only that France or Germany are not willing to give up their language nor is the language regime simply a matter of ease of legal communication (as in the case of the language regime of the Community trademark, see ECJ of 9 September 2003, case C-361/01 P, *KiK/OHIM*, Rep. 2003I8283, at nos. 81 et seq.) or of application costs (which it certainly also is). Rather, the legal exclusivity as such is defined by language as to its content and scope, so as to what is the privilege of the owner, the prohibition addressed to and the room left for other market actors, and the benefit of the public in terms of reliable information (e.g. as to how to work the inventions (Art. 83 EPC) or experiment with it, to use it for testing purposes etc. (see Art. 9 Proposed Community patent Regulation, Art. 8 Proposed unitary patent Regulation)). As such, the language regime produces direct and indirect costs over the lifetime of a patent for those, who are not at full ease with its language, and it favours those who are familiar with it. In short, it distributes advantages and disadvantages, or, to put it into the terms of patent practice, it enables the linguistic beneficiaries of the language regime to cover the entire EU-market including the language territories of the non-beneficiaries by an exclusivity at no extra-cost, extra effort of care and risk avoidance, while the non-beneficiaries seeking EU-wide

act of exclusion, and the more so as it asks for a sacrifice by some, which other members of the majority are not willing to make themselves.

The constraints surrounding the authorization of enhanced cooperation do not really meet such a conflict. They only serve to protect the status quo of Member States, which are unwilling to take another step of integration beyond the *acquis*, but do not channel or control, weigh or balance the claim of priority of the interests of Member States willing to participate in the envisaged additional integration effort. Worse, the exclusionary effect of building an enhanced cooperation group for a unitary patent at a restrictive language regime is reinforced by Art. 328 TFEU, which purports to guarantee “open access” to the enhanced cooperation, but requires the candidate to accept all the acts adopted by the Member States participating in enhanced cooperation (including “their” language regime !). Given that the integration purpose of enhanced cooperation ultimately is the attainment of a completely EU-wide unitary patent protection<sup>68</sup>, this rule means that Italy and Spain are excluded from the development of a patent policy, which is to become a EU patent policy. They are so excluded on language grounds and irrespective of that they share the policy objective of enhanced cooperation in the field of unitary patent protection, and that they do consent to the configuration, which all EU Member States have given to such a patent system<sup>69</sup>. Moreover, as they will not be able to influence its further development, the risk is real that the divide within the EU will deepen<sup>70</sup>.

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patent protection covering also the language territories of the beneficiaries do have to bear such burden.

<sup>68</sup> This is the origin and the *telos* of enhanced cooperation, irrespective of that the *acquis* of enhanced cooperation is not tantamount of the *acquis* of the Union (Art. 20 para. 4, last sent. TEU), see also *Zeitmann*, loc. cit. ZEuS 2011 at p. 90.

<sup>69</sup> See supra I. text at n. 13 et seq.; see also references supra n. 7

<sup>70</sup> See Art. 20 para.3 TEU, and note that non-participating Member States joining the enhanced cooperation group later on will have to accept its *acquis*, Art. 328 para. 1, 2<sup>nd</sup> sent. TFEU. In fact, the proposal for a unitary patent made by the Commission and approved in principle by the Council (see supra n. 22) already substantially deviates from the generally accepted Proposal for a Community patent (see infra subB.1.), and does so in respects, which most likely are important to Italy and Spain (the issue of compulsory licenses). Curiously enough, literature on enhanced cooperation gives little thought only to what non-participating Member States will do while excluded. Will they simply stand still and remain or become controlled in their status quo by the Union? Or will they rather continue to develop their own national policies, possibly even coordinate them with an adverse effect on re-integration of the – subsequently emerging - two or three groups into the Union? In patent law, non-participating Member are perfectly free to develop their own patent systems as they wish, and thus to establish their own *acquis*, see for the resulting problems infra n. 99 et seq.

In sum, the rules on enhanced cooperation protect the unwilling against direct impairment of their *acquis*, but they are silent as regards the question of determining just how much of a concession a proactive and – quite naturally – equally self-interested group of Member States may in its turn ask from the other Member States for its adherence to further integration. After all, integration results not simply from the pursuit of a common goal, but is a process of mutual policy concessions made in view of the common objective. Thus, although these rules are intended to facilitate further integration, by allowing the terms of a compromise (such as the price the “unwilling” have to pay for their inclusion) to be dictated by a “willing” majority, they also allow to block broader integration. By the same token, they fail to address the core of the issue raised by Italy’s and Spain’s claim to a multi-language regime: What price may they be asked to pay for remaining definitely included in a common policy, which from its very inception was and ever since is also theirs<sup>71</sup>.

b) Enhanced intellectual property cooperation within the Internal Market?

(i) Indeed, when examining the enhanced cooperation for a unitary patent, both its benefits for integration and its impact on the Internal Market, on trade and on competition between Member States need to be assessed in their own terms. These positive and possibly negative effects may not, however, simply be balanced against each other nor do they provide a measure for the interest in participation in the enhanced cooperation, i.e. a measure for the gains lost due to exclusion. The positive effects for the enhanced cooperation group are, of course, not as much in controversy as are the likely negative effects for non-participating Member States and for the Union as such. The concern is that enhanced cooperation for a unitary patent will

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<sup>71</sup> See references *supra* n. 7. Put differently, the rules on enhanced cooperation are modelled according to the hypothesis of Member States simply blocking/negating further integration. Therefore, they are ill suited to deal with the more typical “real” situations, where all Member States are willing to pursue further integration, but only on their own, differing terms and conditions. More particularly, they provide for no answer to the crucial question, which is to what extent a “willing” majority ought to take account of and concede to the interests of an equally “willing” minority pursuing a different concept of how to implement further integration. The problem, with which the Court will be confronted then is whether it should let pass the enhanced cooperation project precisely because the question is not dealt with by the rules on enhanced cooperation, so a matter of politics rather than one of law, or whether, on the contrary, it must stop the enhanced cooperation project, because the question really is one of maintaining the constitutional cohesion of the Union, which is founded on that precisely these types of “real” situations are to be consensually settled by compromise (see only Art. 4, para. 2 and 3 TEU). The respect of this cohesion may have different weight according to whether enhanced cooperation is envisaged for new or for core areas of integration of the Union, see *infra* b).



impair<sup>72</sup> the Internal Market, as well as economic, social and territorial cohesion<sup>73</sup>, constitute a barrier to or amount to a discrimination in trade between States and distort competition (Art. 326 para. 2 TFEU)<sup>74</sup>. The very reasons that make the European Union prefer an EU-wide unitary patent prefer over a “fragmentation” resulting from national patent protection, whether granted nationally or as a bundle by the EPO, are evidence of these negative effects. Since under enhanced cooperation the unitary patent will only shift the national borders, the Union will be split into three territorial segments, one “Northern”, and two “Southern”. Thus, the well-known effects of territorial segmentation will remain, if not be aggravated by the enlargement of the “Northern” territories into one.

These effects are not negated by the circumstance, so much stressed by the Commission and the Council<sup>75</sup>, that enterprises from Spain or Italy will be able to apply for and obtain unitary patent protection in the territory of enhanced cooperation, and that enterprises from that territory may likewise obtain patent protection in Italy or Spain via the national or the EPO-route. The argument does not only pass over the differences of costs<sup>76</sup>, and fails to acknowledge,

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<sup>72</sup> Note that the French and German wording of Art. 326 para. 2 TFEU (“porter atteinte ... au marché intérieur”; “den Binnenmarkt ... beeinträchtigen”) is more properly translated into English by “not impair the Internal Market” than by “not undermine the Internal Market”.

<sup>73</sup> This refers to Title XVIII. TFEU; it will not be considered here.

<sup>74</sup> Council Decision authorising Enhanced Cooperation, supra n. 2, OJEU 2011L76, recitals 13 et seq., does not in any way substantiate its considerations relating to Art. 326 TFEU; the Proposal by the Commission, loc. cit. supra n. 2, sub 45. is more detailed, but simply assimilates the positive effects of integration within the enhanced cooperation to the absence of negative effects for the Union.

<sup>75</sup> Council Decision, supra n. 2, OJEU 2011L76, 53, recital 14; *Commission*, Proposal Enhanced Cooperation, supra n. 2, sub 4.5.2, 4.6.

<sup>76</sup> If considered in terms of national territories, then the costs for nationals from enhanced cooperation countries will increase, if they wish to obtain patent protection also in Italy and Spain, the costs for Italians and Spaniards seeking patent protection also in the enhanced cooperation area will decrease by reference to the existing system of national patent protection. However, firms typically seek patent protection for geographic markets, not for State territories. This they do on the basis of national treatment (infra n. 77), and, therefore, the cost factor of strategy patenting must be assessed in terms of overall costs for markets. For instance, it makes little sense to say that the costs of obtaining a patent in the USA or in Japan are much lower than in the EU, when in the EU and in the USA respectively half of the patent applications originate from abroad (see *Commission*, Impact Assessment Unitary Patent, loc. cit., sub 4.5.2. and Fig. 4.1, Annex III), since the overall costs are the same for all firms active on the international market (but they may be too high, which is quite another matter). Likewise, in the EU, enhanced cooperation will not result in cost discrimination for firms acting on the EU market (the entire Internal Market), whether nationals from enhanced cooperation countries or from Italy or Spain. The problem rather is that, on the one hand, additional costs for patenting in Italy or Spain may result in patent applicants refraining from seeking such broader coverage (see following text), and, on the other, that by reference to a true European

that under the existing, fragmented system of patent protection equal accessibility to patent protection has never and could never have been the problem anyway<sup>77</sup>. Rather, it misses the true question, which is to define the negative effects with which Art. 326 para. 2 TFEU is concerned. If, as regards the Internal Market, Art. 326 para. 2 TFEU would only mean that no new obstacles may be established by way of enhanced cooperation, but that the obstacles, which are already tolerated under the rules on the free movement of goods and services, may just as well be tolerated when resulting from enhanced cooperation<sup>78</sup>, then enhanced cooperation for a unitary patent would possibly be compatible with the status quo-defense set up by Art. 326 para. 2 TFEU. However, Art. 326 para. 2 TFEU might more properly be understood as excluding the introduction of additional obstacles to free movement of goods and services, and/or to also shelter the genuine concept of an Internal Market as it develops into a space without internal borders by virtue not only of the free movement rules of primary law, but also by virtue of secondary law of harmonization, which precisely is predicated on the realization of the Internal Market (Art. 114 TFEU)<sup>79</sup>. Such an understanding of Art. 326 para. 2 TFEU would be justified by that enhanced cooperation as a way of advanced integration in specific areas may not frustrate the acquis or further efforts of integration in general. As a result, irrespective of whether it is intended to address new or existing policy areas, enhanced cooperation would be limited to measures, which do not alter the

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Union patent, a limited language regime increases the costs for some while decreasing the costs for others.

<sup>77</sup> This follows from the national treatment principle as established by Art. 2 Paris Convention for the Protection of Industrial Property of 1883, Art. 3 TRIPs Agreement of 1994, and, last but not least, Art. 18 TFEU. As self-evident as the Council's and the Commission's justifications of enhanced cooperation are, their implementation by the proposed unitary patent Regulation is not without problems. As regards the status of a unitary patent as an object of property, Art. 10 of the Proposal subjects it to national law, the applicable law being that of Germany in case the patentee has no residence, principal place of business or simply a place of business in another participating State. This means that, as regards assignments, licensing, bankruptcy etc., Italians and Spanish patentees will be treated like EU-non nationals (also as regards compulsory licensing, see *infra* B.1.). Thus, the logic of the principle of territoriality is maintained within enhanced cooperation; Art. 15 et seq. of the proposed Regulation for a European Union Patent, however, provided for European Union rules on these matters, thus ensuring a level playing field for all patentees, see also *infra* B.1. with n. 114.

<sup>78</sup> Such a reading of Art. 326 para. 2 TFEU would result in, so to speak, a "territorial" enlargement of the reservation of national sovereignty made by Art. 36 TFEU. The Court has always respected that reservation of sovereignty as regards the substance of national intellectual property protection (see for details *Ullrich in Immenga, Mestmäcker, Wettbewerbsrecht*, 5<sup>th</sup> ed. Munich 2012, EG/Teil 2, GRUR Teil A, sub III.3.4.). However, the rationale of such respect for national sovereignty does not fit well into the concept of enhanced cooperation as a sort of institutionalized territorial sub-integration.

<sup>79</sup> See for the distinction *Hatje in Schwarze* (ed.), EU Kommentar, loc. cit. Art. 43 EUV, annot. 24.

framework regulation of the Internal Market along a territorial split<sup>80</sup> or at least do not do so to an appreciable extent<sup>81</sup>.

(ii) In the latter respect, a particular problem arises from that enhanced cooperation for a unitary patent tends to deepen the divide between the participating and the non-participating Member States. This is a problem of both preserving the Internal Market from being undermined and of preventing distortions of competition<sup>82</sup>. It arises from that firms seeking patent protection may be satisfied with obtaining it for the larger territory of enhanced cooperation, and, for various reasons of their patenting strategy<sup>83</sup>, forego protection in the territories of the non-participating Member States<sup>84</sup>. They might then tend to either entirely neglect the latter territories<sup>85</sup> or to compete there

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<sup>80</sup> Such a reading of Art. 326 para. 2 TFEU would not impede using enhanced cooperation as a way to advance integration in as of yet not (sufficiently) integrated policy areas, as is its original purpose (see n. 66), but only block basing implementation of such policies on territorially effective measures. As regards the rules the Court of Justice has developed to specify the scope of application of Art. 34, 56 TFEU, see *Ullrich in Immenga, Mestmäcker*, loc. cit. GRUR Teil A, annot. 35 et seq.. More particularly, territorially effective policy measures may not be justified by elevating Art. 36 TFEU on the level of enhanced cooperation with a view to use it for distinguishing between admissible and non-admissible measures (see *Hatje*, Grenzen der Flexibilität einer erweiterten Europäischen Union, EuR 2005, 148, 158 with references). This would amount to add a new multi-State layer of differentiation to that provided for by Art. 114 para. 4 and 5 TFEU, and to undermine the limits set by these provisions. Enhanced cooperation, however politically designed, may not be used as a pretext to “deconstruct” the Treaties and ultimately to deconstruct their pre-federalist institutional and substantive balance.

<sup>81</sup> Note that ECJ of 21 September 1999, case C-44/98, BASF/DPMA, Rep. 1999I6269 is not in point, since it is not the language regime, but enhanced cooperation for the unitary patent, which is at stake. Moreover, the rationale underlying the Court’s ruling in that case would not cover the language issues arising with respect to the entire EU or the entire area of enhanced cooperation.

<sup>82</sup> As a matter of doctrine, these are separate issues, non-distortion of competition being the stricter test, but in practical terms both reservations against enhanced cooperation are linked together, see *Hatje in Schwarze* (ed.), EU Kommentar, loc. cit. Art. 43 EUV, annot. 26; *id.*, loc. cit. EuR 2005, 158 et seq.

<sup>83</sup> Many factors determine patenting strategies, such as costs of application and of maintenance, quality of patents granted (upon examination or simply upon registration) and reliability of enforcement, type and ease of likely infringement (e.g. location of competitors; attractiveness of national market for competitors), see generally *Weber, Hedemann, Cohausz*, Patentstrategien, Cologne 2007, passim; as to maintenance/renewal costs see *Commission*, Impact Assessment unitary patent, loc. cit., sub 4.2. and Annex V; see also *Ullrich*, Propriété intellectuelle, concurrence et régulation – Limites de protection et limites de contrôle, Rev. int. dr. ec. (RIDE) 2009,399, 423 et seq., with references.

<sup>84</sup> It is the very same effect, which the *Commission*, Impact Assessment Unitary Patent, loc. cit. sub 4. et passim, relies upon to explain the economic and legal shortcomings of fragmentation of protection and insufficient territorial coverage due to selective national validation of patents granted by the EPO.

<sup>85</sup> The market may be unrewarding for them, and/or it may be too small to be profitable for domestic firms to set up a separate business limited to the local/regional market.

on the strength of their large domestic patent protection, and, if likely to occur, attempt to control “parallel” trade<sup>86</sup>. More generally, given the explicit objective of the creation of a unitary patent, the unification of the protected territories of the Member States participating in enhanced cooperation must be presumed to result in higher innovation propensity in this territory as compared to the fragmented territories of non-participating Member States. Whilst this divide will only indirectly affect enterprises as these may seek and obtain patent protection everywhere and benefit from the free movement principles of the Union<sup>87</sup>, it will distort competition between Member States in terms of the territorially optimal allocation of innovation potential<sup>88</sup>. It

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<sup>86</sup> Parallel trade, however important in some markets, is a limited phenomenon as high transportation costs, low price differences, the coverage of the use of products by process or application patents or the specificities of admissible national market regulation may render it unprofitable or impossible. As regards non protected territories, parallel trade may take place as regards imports of patented products sold abroad by the domestic patentee (see ECJ of 5 December 1996, cases C-267/95 and C-268/95 *Merck/Primecrown*, Rep. 1996 I 6285 confirming ECJ of 14 July 1981, case 187/80, *Merck/Stephar*, Rep. 1981, 2063), but trademark protection and distribution agreements may effectively limit the potential for such parallel trade.

<sup>87</sup> See the rationale of ECJ of 14 July 1981, case 187/80, *Merck/Stephar*, Rep. 1981, 2063 at no. 11; of 20 January 1981, cases 55 and 57/80, *Musik Vertrieb Membran/GEMA*, Rep. 1981, 147 at no. 25.

<sup>88</sup> *Contra Commission*, Proposal for Enhanced Cooperation, loc. cit. 4.5.2. It is simply contradictory to assume, on the one hand, that overcoming fragmentation of national protection within the territory of the unitary patent will enhance innovation, and, on the other, that fragmentation of the Union into territories of enhanced cooperation and of two (or more) non participating Member States with the ensuing differences of the laws will have no effect on the terms of trade and of competition. Provided that patents do at all have an impact on innovative activity in terms of investments in research and development, in production and distribution, then local availability of the type, quality and costs of patents will matter. The size of the territories (meaning of the geographic market) covered by one uniform and unitary (national or international) patent matters, and so do the differences of the laws, which the Commission seems to ignore altogether. To illustrate the point: If patent protection differs as to the definition of infringing acts and of its exceptions (such as experimental use), as to the scope and ease of obtaining compulsory licenses, as to the practical availability of injunctive relief in cases of (alleged) infringement and/or as to the reliability of the judicial system regarding patent litigation, would not a firm, depending on its business interests and position as looked at from a perspective of patent law, make its decision where to locate its RandD-facilities and its production plant (rather than only where to distribute its products) dependent upon whether it needs more or less room for experimental use (e.g. in view of improvement), whether it might or might not be exposed to compulsory licensing, whether it may be able to sufficiently protect its RandD facilities and production plants against threats of injunctions by competitors or other market actors, and, more generally, whether judgements on the scope and validity of its patents and of those of other market actors are reliable enough, and the market covered by its patents large enough to there- upon build a production line, let alone an entire business? After all, the unitary patent is considered to be worthless if not combined with a reliable judicial system of patent litigation.

These location effects will be reinforced positively as innovative industries attract others (educated staff, sub-contractors, rival improvement or non-rival diversification industries), but they may also be reinforced negatively as early

will do so all the more as non-participating Member States have no effective influence on the patent policy of the Members of enhanced cooperation<sup>89</sup>, and thus not on the innovation incentives they set. Much of these effects of enhanced cooperation are inherent in its objective and operation, and particular so in the field of patent protection. They are kind of its promise. In the context of the Internal Market, however, which is based on a system of undistorted competition, they are its problem.

(iii) Fortunately enough, in the field of intellectual property, it is the TFEU itself, which provides for a solution. It is, indeed, precisely in view of a territorial fragmentation of protection and the resulting risks for the Internal Market with its rationale of undistorted competition that Art. 118 TFEU provides for a competence of the EU to grant its own unitary titles of protection as distinguished from Art. 114 TFEU, which enables it to merely harmonize territorially limited national rights of exclusivity. Yet, with regard to enhanced cooperation, Art. 118 TFEU mostly is examined only with a view to determine whether or not it provides for an exclusive competence of the Union. Given the clear attribution of exclusive and shared competences by Art. 3 and Art. 4 TFEU respectively, the outcome of such examination generally is negative. Since Art. 118 TFEU has its formal and systematic place within the rules relating to harmonization of laws in view of realizing the Internal Market, it is considered not to confer upon the Union an

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imitators, who are legitimate price competitors, might tend to have their production facilities in territories, where they are less vulnerable to patent based attacks. In sum, territorially defined disparities of the substance and of the operation of the patent system, if effective, do affect factor allocation between Member States and, in their turn, also the level and type of competitiveness of local/regional industry. These are not, of course, desirable effects in the European Union. The Commission certainly is aware of them, but, in the interest of enhanced cooperation, sets them aside. She only compares the situation with and without enhanced cooperation. This way, she does not only ignore the price, which non-participating Member States have to pay (Italy and Spain for adhering to their languages). Rather, she misses the test of Art. 326 para. 2 TFEU, which is not, whether enhanced cooperation has advantages over the status quo (that is the test of Art. 20 para. 1, subpara. 2 TEU), but whether it impairs the Internal Market, affects trade or distorts competition. The Commission's approach, as followed by the Council, undermines Art. 326 para. 2 TFEU. By definition, enhanced cooperation should always produce advantages of closer integration, which in one way or the other will benefit the entire Union (e.g. enhanced protection in the field of the environment, of increase of energy saving etc.), but that is not the issue.

<sup>89</sup> Patent policy reaches from practically important administrative matters such as, e.g., setting the level of maintenance (renewal) fees, conditions for the grant of assistance for translation costs, approval of the quality of machine translations to the (re-)design of the substance of patent protection, as done precisely by the introduction of the truncated unitary patent (see *infra* B.1.), and as likely to occur in the future, given the actual needs of modernizing patent law, see *Ullrich*, in *Ohly, Klippel*, loc. cit. at p. 95 et seq.

exclusive competence<sup>90</sup>. Anticipating on the countervailing argument, “that only the Union can establish unitary patent protection within the Union”, and that therefore, “such unitary patent protection (must be) “a matter of exclusive competence”, the Commission boldly asserts, that any such argument “confuses the notion of the conferral of power ... and the manner in which the power is exercised by the Union”<sup>91</sup>. However, by this assertion the Commission stops its examination where it ought to start. For one thing, Art. 118 para. 1 TFEU confers upon the Union the competence to establish unitary, EU-wide titles of protection precisely (and only) “within the context of the establishment and functioning the Internal Market”<sup>92</sup>. It thus is a competence bound by a purpose, which is to strengthen and to broaden the Internal Market by establishing a framework regulation for innovation based on unified rather than only on harmonized (national) protection of intellectual property.

For another, the question precisely is whether the substance of the competence conferred upon the Union informs its exercise. Non-exclusivity of the competence, which Art. 118 TFEU attributes to the Union, means, that to the difference of an exclusive competence, its exercise is subject to control by the rules on subsidiarity. For obvious reasons, it does not mean that, as long as the Union does not make use of Art. 118 para. 1 TFEU, Member States may exercise the competence to grant EU-wide unitary titles. Pursuant to Art. 2 para. 2 TFEU such, however, is the characteristic of a shared competence. Therefore, qualifying Art. 118 TFEU as introducing a shared competence makes little sense. Instead, a distinction might be in point between, on the one hand, the nature of the competence granted and the intellectual property rights in question, and, on the other, the exercise of the competence in regard of the nature of the intellectual property rights at issue. Even if the Union establishes a system of unitary intellectual property protection, Member States may continue to grant their own titles of protection, and they may do so at different

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<sup>90</sup> See *Council*, Decision authorizing Enhanced Cooperation, loc. cit. OJEU 2011 L76, 53, recital 12; *Stieper*, in *Grabitz, Hilf, Nettesheim*, loc. cit. Art. 118, annot. 28; contra: *Lamping*, loc. cit. 42 IIC at p. 911 et seq. (2011).

<sup>91</sup> *Commission*, Proposal Enhanced Cooperation, loc. cit. sub 4.2.

<sup>92</sup> The English text considerably differs from the French and the German text (“dans le cadre de l’établissement ou du fonctionnement du marché intérieur“, “im Rahmen der Errichtung oder des Funktionierens des Binnenmarktes”), which are both stricter (“context” v. “framework”) and broader (“and” v. “or”). At any rate, Art. 118 para. 1 TFEU is directly concerned with the (well) “functioning” of the Internal Market. Moreover, the Internal Market is characterized by both no “internal” State borders inside, and a common “external” border. Thus, “European” intellectual property rights implies EU-wide coverage by the exclusivity (see *Stieper* in *Grabitz, Hilf, Nettesheim*, loc. cit., Art. 118 annot. 16 with references), whereas “unitary” refers to overcoming the principle of national territoriality inside the Internal Market (“einheitlich” in the German text, “uniform” and “uniforme” in the English and French texts respectively).

terms, whether granted nationally or internationally<sup>93</sup>. By definition, however, it is not them, but only the Union, which may grant EU-wide unitary titles of protection. It is in view of this particularity of the substance of EU competence that the question arises, whether enhanced cooperation is admissible as a way of providing such titles of protection within a limited territory of the Union only, i.e. by way of excluding a more or less large number of EU Member States.

The particularity of the competence provided for by Art. 118 para. 1 TFEU is, indeed, that it does not merely enable the Union to approximate the national laws of Member States, and to give them a common orientation, as do the general rules on harmonization<sup>94</sup>. Rather, it confers upon the Union the power to establish a system of intellectual property protection of its own, thus enabling the Union to develop its own autonomous patent, trademark or design policy via a systematically coherent and basically complete set of rules for the acquisition, the form, the substance, the exceptions from and the limitations to protection<sup>95</sup>, including, as Art. 118 para. 1 TFEU explicitly states, the setting up of centralized Union-wide authorization, coordination and supervision arrangements. While on grounds of expediency the Union may not wish to make full use of the latter powers, but prefer to make use of the services and existing mechanisms of an international organization<sup>96</sup>, it may not leave a matter, which is its own domain and responsibility, to development and governance by Member States, let alone to a limited number of

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<sup>93</sup> The co-existence of national intellectual property, as in trademark and design law, is undisputed, but may create legal and political problems, and also require some harmonization, see *Ullrich*, in *Eger*, loc. cit. sub II.2.1.b); II.3.a), b); *id.* in *Ohly, Klippel*, loc. cit., at p. 102 e seq.; *id.*, Harmony and unity of European Intellectual property protection, in *Vaver, Bently*, Intellectual Property in the New Millennium (Essays in honour of W. R. Cornish), Cambridge 2004, 20. As to the problems arising under Art. 118 para. 1 TFEU with respect to the principle of optionality between the European Union patent and a European bundle of uniform national patent, see *infra* B.2.b); and see already *Ullrich* in *Ohly, Klippel*, loc. cit. at p. 105.

<sup>94</sup> See ECJ of 13 July 1995 case C-350/92, Spain/Council, Rep. 1995 I 1985, nos. 37 et seq.; of 9 October 2001, case C-377/98, Netherlands/Parliament and Council, Rep. 2001 I 6229, at nos. 13 et seq. (27, 28); see also references *supra* n. 93.

<sup>95</sup> Thus, albeit to a different degree, Council Reg. 207/2009 on Community Trade Marks (codifying Council Reg. 40/94), Council Reg. 6/2002 on Community Designs, and Council Reg. 2100/94 on Community Plant Variety Protection establish self-contained-systems of protection referring to national law mainly in cases only where there is an interdependence with general national law (contracts, property, judicial procedure), and so would Art. 14 in combination with Art. 15-24 of the proposed Regulation on a European Union patent, see for example Art. 16 (with Art. 17-24) CTM-Reg., Art. 27 (with Art. 28-34) CDesign Reg., Art. 22 (with Art. 23-29) CPlant Variety Reg.

<sup>96</sup> See *infra* B.1.b) text at n. 138 et seq.

Member States acting in their own interest and pre-determining the long term development of the Union's policy and law<sup>97</sup>.

In this regard, the Union's autonomy is not only put at risk by that enhanced cooperation, however open, establishes its own *acquis*, which pursuant to Art. 328 para. 1 TFEU, Member States wishing to join the cooperating group have to accept<sup>98</sup>. Rather, it is in the very nature of intellectual property protection that its rules create well established rights for the grantees of protection, which as to their existence and substantive scope may not be overruled by subsequent legislation, but may only be modified within rather narrow limits<sup>99</sup>. There are enough examples showing this effect of pre-emption, which enhanced cooperation would have produced, had it been taken resort to every time there was no consensus in the Union over the design of some kind of industrial property protection or over one of its

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<sup>97</sup> For issues of reform see *Ullrich in Ohly, Klippel*, loc. cit. at p. 95 et seq. with references; *European Patent Organisation, Scenarios for the Future*, Munich 2007, passim. Such issues do not only concern the patent as such and its quality or that of the granting procedure (see *Hilty*, The role of patent quality in Europe, in *Drexel et al.*, Technology and Competition – Technologie et concurrence, Brussels 2009, 91), but also the rules on infringement and its exceptions (e.g. as regards research tools), the scope and term of protection (e.g. breadth and/or term of protection tailored to technologies or to the need and length of regulatory approval for marketing), and the remedies (see *Federal Trade Commission, The Evolving IP Market Place: Aligning Patent Notice and Remedies with Competition*, Washington D.C. 2011, 73 et seq. – transparency (notice) of protection, 137 et seq. – scope of damages, injunctive relief).

<sup>98</sup> See supra text at n. 68 et seq., and n. 70. Note that whilst the *acquis* of enhanced cooperation is not tantamount to the *acquis* of the European Union (Art. 20 para. 4, 2<sup>nd</sup> sent. TEU), acceding States wishing to join the enhanced cooperation group will have to accept the former *acquis*. In fact, at least as regards enhanced cooperation for a unitary patent, abstentions by a new entrant to the EU from also joining enhanced cooperation would once more deepen the divide and raise the question, whether enhanced cooperation reaches its objective of furthering integration.

<sup>99</sup> This is why more than marginal reforms of intellectual property laws are rare, concern only the rights acquired subsequently to the reform, and tend to broaden rather than limit protection. A well known example of these difficulties of reform is harmonization of national copyright law, where Art. 1 of Directive 2006/116/EC of 12 December 2006, OJEU 2006L372, 12 (codifying Directive 93/98/EC of 29 October 1993) had to bring the term of protection from the average term of 50 years existing in most EU Member States (as a result of Art. 7 Berne Conventions for the Protection of Literary and Artistic Works of 1886) up to the German term of 70 years (and did so regardless of the nature of the work, even for computer software), see *Parrinder*, The Dead Hand of European Copyright, *Eur. Int. Prop. Rev. (E.I.P.R.)* 1993, 391. Note that the problem (and the miscalculation of a 2-generations term) is generally recognized, see *Dietz*, Die Schutzdauer-Richtlinie der EU, *GRUR Int* 1995, 670, 671. These problems of well acquired rights do not only concern the term, but also the subject-matter (e.g. computer programs) and the scope of protection (e.g. absolute or purpose bound), and they become exacerbated as non-participating Member States may also enhance national protection, but possibly along lines differing from those of the development of protection in the enhanced cooperation-territory (see supra n.70).



particular aspects<sup>100</sup>. More examples are likely enough to occur<sup>101</sup>, and, thus do substantiate the risk that, contrary to the very purpose of Art. 118 para. 1 TFEU, enhanced cooperation may become an escape route from market unity. In view of its historical origin and the justifications given for creating European Union titles of protection as regards trademarks, designs, plant varieties and precisely inventions<sup>102</sup>, it would, indeed, seem that the purpose of Art. 118 para. 1 TFEU is to enable the Union both to enhance market unity in the field of intellectual property and to set a coherent and complete framework regulation of its own for an innovative Internal Market beyond what is possible as a matter of mere harmonization of national laws. Enhanced cooperation for a unitary patent would cut a large piece out of this sovereign power of the Union and allow a number of Member States to appropriate it for their own purposes.

This definitely negative conclusion is not mitigated by that enhanced cooperation allows participating States to make use of the Union's institutions and exercise its (non-exclusive) competences by

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<sup>100</sup> See e.g. as regards the issue of spare part protection by designs Art. 110 with recital 13 CDesign Reg.; *Kur in Drexler*, loc. cit. at p. 313 et seq.; the issue remains unsettled, see *Riehle*, *Immaterialgüterschutz in Sekundärmärkten. Die "Ersatzteilfrage" – Präzedenz für einen Paradigmenwechsel?* In *Bechthold et al.* (eds.), *Recht, Ordnung und Wettbewerb*, Festschrift W. Möschel, Baden-Baden 2011, 1075. As regards the failure of the Proposal for a Community utility model subsequently or alternatively to harmonization of national laws (only a limited number of Member States do provide for utility model protection), see *Commission*, Consultation on the impact of the Community utility model in order to update the Green Paper on the Protection of Utility Models in the Single Market (COM (95) 370 fin.), COM/SEC (2001) 1307 of 26 July 2001; *id.*, Summary report of replies to the questionnaire on the impact of the Community Utility Model, Brussels 1 March 2002 (all available at [http://ec.europa.eu/internal\\_market/indprop/does/model/utilreport\\_en.pdf](http://ec.europa.eu/internal_market/indprop/does/model/utilreport_en.pdf)), *Kraßer*, *Harmonization of Utility Model Law in Europe*, 31 IIC 797 (2000). As regards the definite disagreement of Member States on international exhaustion, see Communiqué from Commissioner *Bolkestein* on the issue of exhaustion of trade mark rights of 7 June 2000 ([http://ec.europa.eu/internal\\_market/indprop/docs/tm/comexhaust\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/tm/comexhaust_en.pdf)).

<sup>101</sup> See as to whether national copyright laws should be unified into a Community copyright protection *Schack*, *Europäische Urheberrechts-Verordnung: erwünscht oder unvermeidlich?* in *Leistner* (ed.), *Europäische Perspektiven des Geistigen Eigentums*, Tübingen 2010, 173; *Stieper in Grabitz, Hilf, Nettesheim*, loc. cit., Art. 118, annot. 38 et seq.; contra: *Ullrich in Bently, Waver* (Essays Cornish), loc. cit. at p. 36 et seq.. Note that Member States' disagreement on the exceptions from copyright protection resulted in a national à la carte "harmonization" by Art. 5 Directive 2001/29/EC on copyright protection in the information society.

<sup>102</sup> In addition to market unity, the objectives, in part shared with, in part in addition to harmonization are modernization of protection and enhancing international competitiveness, see *Ullrich in Bently, Waver* (Essays Cornish), loc. cit. at p. 22 et seq.; *id.*, *Elevating Intellectual Property Protection to Community Status*, in *Demaret, Govaere, Hanf* (eds.), *30 years of European Regal Studies at the College of Europe*, Brussels 2005, 203, 215 et seq.; *id.*, *Legal Protection of Innovative Technologies: Property or Policy?* in *Granstrand* (ed.), *Economics, Law and Intellectual Property*, Boston 2003, 439, 470 et seq.

applying the relevant provisions of the Treaties (Art. 20 para. 1 TEU). For one thing, as by definition the number of participating Member States is limited, the voting rights limited to them (Art. 20 para. 3 TEU), and their common interest precisely not shared by all Member States of the Union, political initiative, influence and control will shift to them<sup>103</sup>. As Art. 20 para. 1 expressly states, they may make use of the institutions of the Union, meaning they may put them at their service<sup>104</sup>, and exercise the Union's competence – within the limits set by Art. 20 TEU and Art. 326-334 TFEU<sup>105</sup> – as they think opportune<sup>106</sup>.

For another thing, the proposed regulation for unitary patent protection (UPP) tends to maximize the patentee's interest in exclusive protection and the participating Member States' interest in sovereign control over the operation and effects of the system of unitary patent protection while seeking to minimize its exposure to legal oversight and institutional influence by the Union. This disappointing return to the status of 1975<sup>107</sup> follows from the very structure of the proposed unitary patent protection.

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<sup>103</sup> Standard literature on EU law is surprisingly silent as regards this shift of power. While Parliament's position seems to remain unchanged, the role of parliamentarians is bound to become subject to conflicts between the interests of their countries of origin and their obligations towards the Union (see for a critical discussion *Dougan in Ott, Vos*, loc. cit. at 164 et seq.). The privilege of the Commission to initiate legislation (Art. 17 para. 2 TEU) will undergo a change of focus from the Union (Art. 17 para. 1 TEU) to enhanced cooperation, and it will do so despite Art. 20 para. 1, subpara. 2 TEU, since it is within the enhanced cooperation group that the Commission must find a majority.

<sup>104</sup> The German ("können ... die Organe der Union in Anspruch nehmen") and French ("peuvent recourir aux institutions") versions express this power shift more clearly. Apparently, this submission of the EU institutions to use by Member States participating in enhanced cooperation is due to a concern for organisational expediency (see *Blanke in Grabitz, Hilf, Nettesheim*, loc. cit., Art. 20 EUV, annot. 29), but its constitutional implications do not seem to have been fully thought through.

<sup>105</sup> See supra text at n. 63 et seq., 80 et seq.

<sup>106</sup> According to *Blanke in Grabitz, Hilf, Nettesheim*, loc. cit., Art. 20 EUV, annot. 29, use of EU-institutions will "tie the political will of participating Member States to the objectives of the Union". This is rather loose a tie, since, by definition, Member States of Enhanced Cooperation pursue a more advanced objective of integration, whose implementation is entirely up for them to specify. They must remain within the limits of the Council's decision to authorise enhanced cooperation, but where they have had a majority in the Council, as in the case of enhanced cooperation for a unitary patent, they have (been able to) set that limit themselves!

<sup>107</sup> By definition, the convention-approach to creating a Patent for the Common Market was based on that EEC Member States acted as sovereign Contracting States. They actually were unable to overcome their national territorial reservations in precisely the area of prior user rights and compulsory licenses, which again are referred to national law by the proposed Regulation for a unitary patent (see following text). By contrast, they were able to agree on common rules regarding

## B. The prospects for patent protection in the EU

### 1. *The European patent with unitary effect*

#### a) Unitary patent protection by a diversity of (national) laws?

Indeed, the proposed Regulation on the European patent with unitary effect essentially purports only at enabling the grantee of a European bundle of national rights to have the bundle merged into one exclusive right by requesting the EPO, that a registration be made in the “Register for unitary patent protection” to the effect that “European patents granted with a same set of claims in respect of all the participating Member States shall benefit from unitary effect” in these States (Art.3 para.1)<sup>108</sup>. Consequently, while this unitary effect is defined by Art.3 para.2 along traditional lines (uniform protection, equal effect, territorial indivisibility), as compared to the Proposal for a Community (European Union) Patent Regulation, the proposed UPP Regulation contains only a few rules of substantive law of protection. These concern, in addition to the unitary effect as such (Art. 3), the definition of infringing acts (Art. 6, 7), the limitation to (exceptions from) protection (Art. 8), and the principle of exhaustion (Art. 9), all in terms similar to those of the Community Patent Regulation<sup>109</sup>. The rules most conspicuously missing<sup>110</sup> are those on prior user rights<sup>111</sup>

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assignments, licensing etc. of the Community Patent, see Art. 40 et seq. (assignment etc.), Art. 46 et seq., and see the resolution on prior user rights and on compulsory licenses in the Annex of the Convention on a Common Market Patent, loc. cit. supra n. 10.

<sup>108</sup> The wording is that of a possible compromise text, the Commission’s and the Council’s text differing from that suggested by the Legal Committee of the European Parliament (see *Council*, loc.cit. Doc.17578/11 of 1 December 2011).In what follows, unless specified otherwise, reference is made only to the Presidency text – General Approach of 23 June 2011 (Council Doc. 11328/11) as adopted by the Council on 27 June 2011, see supra n. 22.

<sup>109</sup> See Art 2 para. 2, 7-9, 10 Proposal Community Patent Regulation – General Approach. However, as regards the “unitary” effect, Art. 2 of the Community Patent Regulation defines it as “equal effect throughout the EU”, whereas Art. 3 UPP Regulation defines it as providing uniform protection and having effect in all participating Member States.

<sup>110</sup> There are also no rules on the right to the patent (Art. 4-6 Proposal Community Patent Regulation), or on the burden of proof relating to products of patented processes (Art. 13 Proposed Community Patent Regulation), but the latter may be a matter for the arrangement on a unified patent litigation system.

<sup>111</sup> Comp. Art. 12 Proposal Community Patent Regulation – General Approach and note that as regards the European bundle of national patents, Art. 14i Draft Agreement on a Unified Patent Court – Revised Presidency Text, *Council* Doc. 16741/11 of 11 November 2011) provides for a territorially limited prior user right. With respect to the unitary patent, European Parliament originally wished to introduce a prior user right in non specific terms by adding a point (ba) to the list of exceptions of Art. 8 UPP Reg. (see Legal Committee, Draft Report *Rapkay* of 4 October 2011, Doc. 2011/0093 (COD); *Council*, loc.cit., Doc 17578/11 at Art.8, point ba),Am.15). As prior user rights represent sort of a well acquired right of the prior user, it is doubtful whether they come under the referral rule of Art. 10 UPP-

and on the unitary patent as an object of property, meaning rules on assignments, voluntary and compulsory licenses and on government use<sup>112</sup>. As regards assignments, voluntary licenses and other matters of property, Art.10 of the proposed UPP-Regulation declares national law to be generally applicable by virtue of a specific rule of “renvoi”. With respect to compulsory licenses, recital 9a expressly states that the matter is “not covered by this Regulation...”, but shall “be governed by the national legislation of the participating Member States on their respective territories”<sup>113</sup>. Both approaches do raise quite some concern.

(i) As regards assignments, the grant of licenses by way of contract, the quality of the unitary patent as a security or its levy in execution, the applicable national law to which Art.10 proposed UPP-Regulation refers, shall be that of the patentee’s residence or principal place of business, or, by default, another place of business of his/her<sup>114</sup>, on the date of filing the application for the patent<sup>115</sup>. Undoubtedly, by

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Regulation. However different under national law (comp. § 12 PatG with art. L 613-7 French c.prop.int.), prior user rights do have importance as regards process inventions, and, as a matter of balancing the patent system, contribute to lowering the social costs of the grant of an absolute exclusivity (see *Rogge in Benkard, Patentgesetz*, 10<sup>th</sup> ed. 2006, §12 annot. 2), whose purpose – stimulate innovation – actually has already been accomplished by the prior user. Its geographic limitation to the territory of the State granting protection conflicts with free movement principles, see *Ullrich in Immenga, Mestmäcker*, loc.cit., Wettbewerbsrecht, EG/Teil 2, GRUR, A, annot. 101.

<sup>112</sup> Comp. Art. 9a (government use), Art. 15 (assignment), Art. 16-18 (security, levy in execution, insolvency), Art. 19 (contractual licensing), Art. 21, 22 (grant of compulsory licenses) Proposal Community Patent Regulation – General Approach. However, Art. 11(in combination with recital 13) proposed UPP-Regulation provides for the availability of “licences of right”, meaning the registration of the patentee’s willingness to grant any person a license in return for appropriate compensation, albeit in less detailed terms than Art. 20 Proposal Community Patent Regulation – General Approach. Such a declaration will entail a reduction of the level of renewal fees.

<sup>113</sup> Arguably, the recital also covers government use.

<sup>114</sup> In case the patentee has no place of business in a Member State participating in enhanced cooperation, the law of the State, where the EPO has its headquarters, applies, i.e. German law, Art. 10 para. 3 proposed UPP-Regulation. The rule must be read in combination with Art. 10 para. 1, which determines the applicable law *ratione temporis* by reference to the date the patent in question has been applied for (see *infra* n. 115). It means not only, that applicants from outside the EU, but also those from non-participating EU Member States must either have a place of business in the territory of enhanced cooperation at the time of filing a patent application or else accept German law for the lifetime of the patent, irrespective of whether subsequently they establish a place of business in a participating Member State. It would seem, that the rule is in conflict with free movement principles, and the more so as at least in some industries, such as pharmaceuticals, patents typically are and need to be filed long before their commercial potential can be assessed reasonably.

<sup>115</sup> *Ratione temporis*, the applicable law is determined by reference to the date of application for the patent. This means that regardless of the applicant’s changes of establishment, the applicable law remains the same over the lifetime of the patent. The rule is bound to produce problems. As a firm moves its simple place of business

replacing the traditional principle, under which, at least as regards mandatory rules, the applicable law is to be that of the country granting the patent<sup>116</sup>, by a principle making the law of the protected patentee apply, Art. 10 creates uniformity of the applicable law throughout the territory of enhanced cooperation. However, that uniformity comes at the price of 25 different national laws determining the requirements of form for assignments and licenses and their effects on existing licenses<sup>117</sup>, as well as the admissibility of restricted licenses<sup>118</sup>, and the legal quality of such restrictions<sup>119</sup>.

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(Art. 10 para. 1 lit b) to another State inside or outside the territory of enhanced cooperation, or so moves its residence or principal place of business (Art. 10 para. 1, lit a) it will accumulate in its portfolio patents, which follow different national laws. This increases not only the costs of management of patents, but also the lack of transparency and legal uncertainty for third parties, since patent applications do not indicate places of business, but the residence or principal place of business of the applicant (Rule 41 para. 2 EPO Implementing Regulations). Even if the EPO will come to require the indication of a place of business from applicants domiciled outside the territory of enhanced cooperation, third parties as well will have the problem of observing patents subject to different laws, but pertaining to the same technology.

<sup>116</sup> See *Ahrens, McGuire, Modellgesetz für Geistiges Eigentum*, Munich 2011, Buch 1, § 24; general contract law of licensing may be subject to choice of law by the parties, and, by default, will follow the principles of conflicts of law as enshrined in Art. 4 para.2 Reg. 593/2008 (Rome I), see *Ahrens, McGuire, ibid.*, Buch 1, § 25.

<sup>117</sup> Comp. as regards assignments Art. 15 Proposal Community Patent Regulation – General Approach. Art. 10 para. 4 proposed UPP-Regulation suppresses the requirement of registration of assignments. This is defensible in a one-law system. In the UPP-system of 25 applicable laws it will compound the problems of a lack of transparency and legal uncertainty pointed out in the text. Note also for instance that, as regards the grant of licenses, to the difference of § 15 para. 2 PatG, Art. L. 613-8 French c. prop. int. requires the grant to be in writing. It is enigmatic, how Art. 12, para.1,lit.b) Proposal UPP Regulation-General Approach, which requires Member States to ensure that any transfer or license be registered in a Register to be established by the EPO, may be reconciled with Art. 10. Quite apart from the burden put on the EPO (check 25 national laws!), how is registration to be ensured, if it is not made a condition of validity of the transaction in question? Comp. the reserves made by § 30 para.3 and 4 PatG. On proposal by the European Parliament's Legal Committee the problem has been carried over to Art. 12 para.1,lit.b),Am 21, and lit.h). As regards effects of succession in title comp. . Art. 15 para. 2, 3; Art. 19 para. 3 Proposal Community Patent Regulation – General Approach.

<sup>118</sup> Art. 3 para. 2, sub para. 3 proposed UPP-Regulation admits territorially limited licenses, but is silent as to other restrictions. The provision is systematically misplaced due to that Art. 3 para. 2 of the Commission's proposal prohibited territorially limited licenses and, thus, needed to be corrected by the Council, see Council, loc.cit. Doc. 17578/11 at Art.3,para.2, Am 9.

<sup>119</sup> Comp. Art. 19 para. 2 Proposal Community Patent Regulation – General Approach, which, however, is too broad. Since in rem license restrictions affect the scope of the principle of exhaustion, they need to be defined in conformity with the substantial subject-matter of protection in order to keep them in conformity with the rules on the free movement of goods, see *Ullrich in Immenga, Mestmäcker*, loc. cit., Wettbewerbsrecht, EG Teil 2, GRUR, A, annot. 78 et seq. In principle, the definition of the substantial subject-matter of protection lies with the legislator, but it has to

This diversity of applicable laws will not worry the patentee as long as she/he has only her/his own inventions in the portfolio. However, it will burden trade and competition to which the transaction costs are shifted as to whether an assignee has validly acquired her/his exclusive right, as to whether licenses are still valid after change of ownership<sup>120</sup> or change of the licensee, as to whether goods in circulation are so lawfully, and as to the selection, acquisition and the management of patents or of licenses to be obtained from different patentees owning different technologies needed or pieces of a needed technology<sup>121</sup>. Contrary to the Commission's assertions<sup>122</sup>, therefore, the unitary patent does not really reduce, but only shift transaction costs from one side to the other. This is in systemic contradiction with the very principles of unitary patent protection and of enhanced cooperation. Enhanced cooperation is about further integrating markets. Firms will not offer their unitary patents for sale or licensing only in particular Member States participating in enhanced cooperation, but will do so for the entire internal market of the enhanced cooperation. Nothing in the nature of enhanced cooperation requires abandoning a principle of a common (EU) law governing the unitary patent as property and the transactions typically related to it: Such "common (EU) law rules had been carefully drafted by the proposed Community Patent Regulation, and they had been so drafted essentially in conformity with what had already agreed upon in the Conventions of 1975 and 1985/89<sup>123</sup>.

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have acted on the matter. See as regards the admissibility of quality restrictions, which are not part of the essential subject-matter of protection of patents or of trademarks (see ECJ of 31 October 1974, case 15/74, *Centrafarm/Sterling Drug*, Rep. 1974,11247; of 31 October 1974, case 16/74, *Centrafarm/Winthrop*, Rep.1974, 1183) the express provision in Art. 8 para. 2 lit e) Trademark Directive, Art. 22 para. 2, lit e) CTM Regulation; ECJ of 23 April 2009, case C-59/08, *Copad/Dior*, Rep. 2009 I 3421, nos. 21 et seq.

<sup>120</sup> Change of ownership need not even become transparent from the patent register (see supra n. 116), except if the assignee voluntarily applied for such registration.

<sup>121</sup> Note that these costs arise as a matter of common practice of circumspect firms, and thus irrespective of and at least long before parties might get into litigation, where rules on the burden of proof may re-shift some of the costs back to a patentee claiming infringement.

<sup>122</sup> See *Commission*, Impact Assessment Unitary Patent, loc. cit. sub 4.3.

<sup>123</sup> See Art. 40-44 Community Patent Convention 1975; Art. 39-42 Community Patent Convention 1985/89. Note, first, that requirements of form or the qualification of restrictions of licenses cannot be contracted away by voluntary choice of law (but patentees might choose domicile or place of business with a view to its implications under Art. 10 UPP-Regulation). Second, unless there is an admissible choice-of-law clause in a contract, Art. 10 UPP-Regulation determines the contract law, which is applicable by default. Third, assignments and licenses have become ever more frequent - in some industries licensing has become a mass business -, and need to be made transparent and equally accessible for all market actors by a common law. Likewise, as patents have become business assets, their status as a security, in insolvency proceedings or in execution should result from a common rule.

(ii) As mentioned, with respect to compulsory licenses, recital 9a Proposal UPP Regulation – General Approach states that they are not governed by the UPP-Regulation, but “by national legislation of participating Member States on their respective territories”. While this recognition of compulsory licenses looks like a welcome clarification as compared to the silence on the matter in the Commission’s Proposal for a UPP-Regulation, it really is quite disappointing, if not ultimately misleading. Indeed, if limited to national territories, compulsory licenses covering the territory of enhanced cooperation will remain virtually unavailable, and, if admissible at all, they are systematically useless, if not counterproductive in a system of unitary patent protection for advanced market integration.

First, it is true that the grant of compulsory licenses constitutes an exception both in terms of actual use and of the operation of patent protection as a system of property rights<sup>124</sup>. However, at least in cases of a refusal to voluntarily grant a contractual license to enable a patentee to use his/her dependent improvement patents, of insufficient supply of the market with patented products and of public health concerns<sup>125</sup>, the rules on the grant of compulsory licenses constitute an important component of this property system. Like other rules of the system of protection<sup>126</sup>, they characterize the patent as property, which is functionally bound to the purpose of its grant<sup>127</sup>, in casu to the

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<sup>124</sup> See ECJ of 9 July 1985, case 19/84, *Pharmon/Hoechst*, Rep. 1985, 2281, nos. 25 et seq.; see also ECJ of 5 December 1996, case C-267/95, *Merck/Primecrown*, Rep. 1996I6285 nos. 48 et seq.; “as to copyright ECJ of 28 April 1998, case C-200/96, *Metronome Musik/Music Point Hokamp*, Rep. 1998I1953, no. 24.

<sup>125</sup> Comp. Art. 21 para. 1 and 2 Proposal for a Community Patent Regulation – General Approach. Such rules on compulsory licenses for insufficient use or in cases of patent dependency are very common both in Europe and internationally, but their design varies, see *Van Zimmeren, Van Overwalle, A Paper Tiger? Compulsory License Regimes for Public Health in Europe*, 42 IIC 4(2011); WIPO, Committee on Development and Intellectual Property (CDIP), Doc. CDIP/7/3 of March 18, 2011, Patent-Related Flexibilities in the Multilateral Legal Framework and their legislative implementation at the national and regional levels – Part II with Doc. CDIP/5/4, Annex I and II.

<sup>126</sup> Such as e.g. the requirement of sufficient disclosure (Art. 83 EPC), which, in combination with the rules on experimental use (Art. 8, lit b) Proposal UPP-Regulation) is intended to enable other market actors to add to incremental innovation by improvement or by developing alternative/substitute technologies, and thus to overcome the “vertical” dilemma of patent protection (see infra n. 330). Another example is the exhaustion principle (Art. 9 proposed UPP-Regulation), which mitigates the exclusivity in the interest of trade.

<sup>127</sup> Which most conspicuously results from the limitation in time of the property granted, this limitation serving to overcome the “horizontal” dilemma of patent protection, which is to find a proper trade off or balance between the individual incentive to innovate and the collective interest in broad dissemination of the innovation by way of competition (see for the dilemmata *Ullrich*, loc. cit. Rev. int. dr. écon. (RIDE) 2009 at p.407 et seq., 423 et seq., with references). It may be noteworthy, that the grant of compulsory licenses in case of insufficient supply of the territory of protection is the result of modification by Art. 5 A Paris Convention for the Protection of Industrial Property of the historical sanction of invalidation of

objective of enhancing innovation by improvements and by dissemination of inventive products. In these respects, the availability of compulsory licenses serves as an ultimate remedy to the non-observance of a command of responsible, pro innovation use of the property right. As such, the remedy needs to be effective. This, however, it will never be, if to obtain a compulsory licenses with respect to the territory covered by the unitary patent, interested market actors, which the patentee has already dismissed as licensees<sup>128</sup>, have to go through a large number of national granting procedures following different rules<sup>129</sup> and holding no promise whatsoever of producing at least similar results<sup>130</sup>.

Second, regardless of the legal qualification of the European patent with unitary effect<sup>131</sup>, it is based on and given unitary effect by virtue of Union law, Art.118, para.1 TFEU. Therefore, primacy of Union law would seem to stand in the way of national authorities or courts granting compulsory licenses by virtue of national law. Compulsory licenses affect the very essence of the title of property and of its unitary effect<sup>132</sup>, and thus interfere directly with the primary law establishing and protecting the property.

Moreover, even if the EU legislator wished to leave (or to delegate?) the power to grant compulsory licenses to national authorities or courts, it could not do so by way of a mere recital, but

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the patent. Therefore, the common learning that patent law, to the difference of trademark law, does not provide for an obligation of use, is a half truth at best (nota bene: trademark law's obligation to use serves a different purpose, i.e. that of keeping non-used signs available for use as a trade mark). For a more detailed presentation of the purposive protection of intellectual property see *Ullrich*, Intellectual property: Exclusive rights for a purpose – The case of technology protection by patents and copyright, forthcoming.

<sup>128</sup> Under Art. 31 lit b) TRIPS Agreement an interested party may not be granted a compulsory license unless she/he has first made serious, but unsuccessful efforts to obtain a voluntary license on reasonable commercial terms and conditions, comp. Art.21 para. 6 Proposal Community Patent Regulation – General Approach.

<sup>129</sup> See supra n. 125 and comp. e.g. the detailed provisions of Art. L 613-11 to L 613-15 French c. prop. int. with § 24 PatG (no definition of non-use, no requirement of a public interest in cases of insufficient use under art. L 613-11 c. prop. int. as required by § 24 para. 4 read in combination with § 24 para. 1 PatG; by contrast, as regards compulsory licenses in cases of dependent patents, art.L 613-15 c.prop.int. requires the existence of a public interest whereas § 24 para.2 PatG does not; in addition, the waiting periods differ). In Germany, jurisdiction to grant (or refuse) compulsory licenses lies with the Bundespatentgericht with (limited) appeal to the Federal Supreme Court; in France it lies with the Tribunal de grande instance, subject to appeal to the Cour d'appel and to a request for "cassation" to the Cour de cassation.

<sup>130</sup> See also *Jaeger et al.*, Comments of the Max-Planck-Institute, loc. cit. 40 IIC at p. 831 (2009). The costs, risks and the fragmentation of compulsory licenses may be one of the causes contributing to that they have become rather rare.

<sup>131</sup> See infra b)

<sup>132</sup> See. ECJ of 9 July 1985, case 19/84, Pharmon/Hoechst, Rep. 1985, 2281



only by express provision. Such express authorization could not be cast either in terms of a general territorial limitation of compulsory licenses, because it would then amount to creating an obstacle to the free movement of goods, given that the exhaustion rule as developed under Art. 34 TFEU does not apply to goods sold under a compulsory license<sup>133</sup>.

More generally, referral of compulsory licenses to national law and national territorial limitation of the compulsory license runs contrary to the very rationale of advanced market integration by enhanced cooperation. This is so not only, because the alternative to incurring the high transaction costs of a bundle of compulsory licenses covering the entire territory of enhanced cooperation would consist in limiting the number of requests to only a few national territories with a view to obtain at least an economically sustainable minimum part of the geographic market, this meaning again a division of the “internal” market of enhanced cooperation. Rather, the very concept of national compulsory licenses for a unitary patent runs contrary to the rationale of enhanced cooperation in the field precisely of unitary protection. Such compulsory licenses would, indeed, not only be granted with a territorial limitation, but on national terms, i.e. on terms, which may vary, and which typically are established by reference to national markets<sup>134</sup>. Such parochial orientation of the grant of compulsory licenses with its effects on the conditions of competition, in particular on market actors’ risks and expectations, practically is inherent in the referral to national rules on compulsory licenses, but not at all a necessary result of enhanced cooperation or of the nature or structure of the unitary patent. Quite to the contrary. There is, indeed, a fundamental contradiction in the proposed UPP-Regulation, which is that where the use of a unitary patent granted with respect and in the interest of the internal market of enhanced cooperation results in blocking the realization of a European Union’s public interest (or, for that matter, a public interest of the enhanced cooperation group), that blocking situation can be overcome only by national compulsory licenses to be requested from 25 national jurisdictions<sup>135</sup>.

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<sup>133</sup> See supra n. 124.

<sup>134</sup> See as regards compulsory licenses to remedy insufficient supply of domestic markets Art L 613-11 lit b) c. prop. int., § 24 para. 4 PatG. Compulsory licenses may be granted to the holder of improvement patents only in case these constitute a “substantial technical advance of considerable economic importance/interest” (see § 24 para. 2, no. 2 PatG; art L 613-15 para. 2 c. prop. int.), a criterion which invites understanding it in national terms. Likewise, the public interest requirement of § 24 para. 1 and 4 PatG or public health concerns justifying the grant of compulsory licenses (see *Van Zimmeren, Van Overwalle*, loc.cit. 42 IIC at p. 27 et seq.(2011)) are likely to be defined by reference to national needs.

<sup>135</sup> Distinctions between the Union’s public interest and a Member States’ public interest tend to become blurred anyway as integration advances, at least national public interests and those of the Union become interdependent and their satisfaction

In short, the matter of compulsory licenses for unitary patents ought to be regulated on the level, on which the problems arise. This is the more true as, like under the proposed Community Patent Regulation<sup>136</sup>, for all cases the authority to grant compulsory licenses could be vested with the court having jurisdiction over litigation concerning the unitary patent, thus eventually with the Unified Patent Court. As it stands, however, possibly contrary to its intentions, the Proposal *de iure* exempts the European patent with unitary effect from any public interest limitation of the exclusivity by way of compulsory licensing, be the interest of national or European concern, and regardless of whether it relates to overcoming impediments to innovation or to public health.

b) A unitary European, non-EU patent?

The rules of the proposed UPP-Regulation, which subject the unitary patent as an object of property to national law, do not only favor both the patentee's interest over the interests of other market actors and Member States national interests over those of the Community. Rather, by creating an unbalanced system of semi-unitary character, which does not meet the objectives of enhanced cooperation, they mirror a profound conceptual ambiguity, if not an intended ambivalence of the "unitary" patent. It is presented as if it really consisted merely of a bundle of national patent rights, which in some respects only are tied together by the attribution of a unitary effect covering the territories of all participating Member States, namely in respect of the transfer, the limitation, the revocation or the lapse (Art. 3 para. 2) of the (overarching?) "European patent", and which in respect of infringement only (Art. 6-9), are subject to uniform rules. This "unitary bundle" is considered not to have an autonomous character<sup>137</sup>, and its existence not to be rooted in European Union law. It is insinuated that, both as regards its grant and its revocation, its legal basis must be looked for and will be found either in the national laws of participating Member States or – more likely – directly in the European Patent Convention<sup>138</sup>. Thus, Art. 3 para. 1 proposed UPP-

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a common concern, see as regards access to affordable medicines in parts of the EU exposed to risks of pandemic diseases the contributions by *Godt* and others in *Godt*, *Differential Pricing of Pharmaceuticals inside Europe – Exploring Compulsory Licenses and Exhaustion for Access to Patented Essential Medicines*, Baden-Baden 2010.

<sup>136</sup> Comp. Art. 21 Proposal Community Patent Regulation – General Approach.

<sup>137</sup> This to the difference of what is expressly stated in Art. 2 para. 3 Proposal Community Patent Regulation – General Approach. There is, however, no such affirmation in either the Community Trademark Regulation (see Art. 1 para. 2) or the Community Design Regulation (see Art. 1 para. 3) or the Community Plant Variety Regulation (see Art. 2), whose "autonomous" character is without doubt. It simply follows from the autonomy of (secondary) Union law.

<sup>138</sup> See to this effect *Stauder* in *Singer*, *Stauder*, *Europäisches Patentübereinkommen*, loc. cit. Art. 1 annot. 2, Art. 2 annot. 2 et seq.; apparently

Regulation attributes the unitary effect to patents, which have already been granted, and while mentioning revocation in Art. 3 para. 2, the draft UPP-Regulation is entirely silent as to the grounds for revocation. Such an understanding, however, raises not only conceptual and practical problems, but misses the nature of the unifying effect of providing a “European patent” with a unitary effect.

A first conceptual and practical problem arises from that the grant of the European patent takes effect from the date on which the European Patent Bulletin mentions the grant (Art. 97 para. 3 EPC). On that date the patent produces its full effect under national law (Art. 64 para. 1 EPC). Therefore, the registration of the unitary effect (Art. 3 para. 1 Draft UPP Regulation), as requested<sup>139</sup>, must either be made

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also *Binctin*, Le projet de brevet européen à effet unitaire: en attendant un brevet de l’Union?, Prop.int. 2011, 270, 271. This view, however, is in conflict with Art. 2 para. 2 and Art. 64 para. 1, EPC, the wording “same effect as a national patent” simply had to be chosen, because there are also national patents granted via the national route. Art. 2 para. 2 makes clear that, whatever the granting route is, the result will be a national patent. It is, indeed, only from national law that the patent derives its substance, and it is revoked on the basis of national law (see Art. 138 EPC and infra n. 140) just as it lapses in case national renewal fees are not paid in due time. The EPO does not grant just one “original” patent, which, like a totipotent stem cell, develops into 38 separate, yet identical patents, which thereafter by a miracle take on the national nature and substance given to them by 38 different national laws, nor does this “European patent” remain there so that, upon its revocation as a “European patent”, all the 38 national off-springs will disappear as if their lives had been attached to that of the stem cell. Rather, like most imagery terms in legal analysis, the concept of a “bundle” of patents only obfuscates a doctrinal difficulty. This difficulty is that 38 national patents are granted on uniform conditions (Art. 52 et seq. EPC) by one administrative decision, and that they may all be revoked on the same uniform grounds only (Art.100 EPC) by one decision in opposition proceedings, i.e. within the administrative procedure (Art.99 et seq. EPC, more particularly Art.99 para.2), but, that, thereafter, they are entirely independent as to their existence and substance, more particularly, that they may be revoked (only) by national authorities, yet again only on the same uniform grounds (Art.138 EPC). A proper legal analysis will clearly distinguish uniformity of the rules from unity of the patent, and not elevate the former to the level of the latter by way of a transfiguration as if one decision must mean one “overarching” patent simply because a (national!) patent granted the EPO route is called a “European patent” (Art.2 para.1 EPC expressly uses the plural!). Rather, the different phases of the grant, the revocation in opposition proceedings, and the revocation, once the patent grant has become definite, have to be assessed in accordance with their own terms as specifically set by the legislator. In sum, there is no bundle, but only a number of rights, which simply have a common administrative origin, and follow a few rules of internationally harmonized (uniform) law (Art. 63, 64 para. 2, 69, 138 EPC).

<sup>139</sup> In view of the principle of optionality (see recital 22 Draft UPP-Regulation and infra 2.b)), the applicants needs to “request” a patent with unitary character (recital 5 Draft UPP-Regulation – General Approach), but the nature, form and delays for such request are not set forth by the Draft UPP Regulation. Art. 12 lit.a) provides only for the conferral on the EPO of the task to administer those requests. It would appear to be a matter of logic that the request must be filed before the grant of the patent.

before or at least on that date – which as a matter of procedural logic is hardly possible – or else Member States must accept and make sure that the “national” effect, which the patent produces between the date of its public mention in the European Patent Bulletin and the date of registration of the unitary effect, be retroactively suppressed, namely be deemed not to have occurred (Art. 4 para. 2 draft UPP Regulation). Obviously, this absurd rule is bound to create confusion in cases, where the patented invention is already used by other market actors<sup>140</sup>. Moreover, it arguably constitutes a departure from Art. 64 para. 1 EPC, thus requiring an amendment of the European Patent Convention<sup>141</sup>.

A second conceptual and practical problem is that the grounds for revocation of a European patent must be established by the law providing for the legal basis of the patent, Art. 138 EPC providing only for a limitation of such grounds without itself being directly applicable<sup>142</sup>. Consequently, all national laws establish rules on the

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<sup>140</sup> Note that Art. 3 para. 1 Draft UPP Regulation links the unitary effect to the identity of claims, irrespective of whether and which Contracting States, participants of enhanced cooperation, have been designated in the application (Art. 79 EPC provides no assurance in this respect, in particular not where an applicant is hesitating between a European and a unitary patent). Note also that national laws may diverge so that conduct by market actors may have been lawful in one State and unlawful in another under national law, and unlawful or lawful under Art. 6-8 Draft UPP Regulation.

<sup>141</sup> To this effect *Koch*, Centrum für Europäische Politik (cep), Europäisches Patent mit einheitlicher Wirkung, Politikanalyse v. 27.06.2011 (available at [www.cep.eu](http://www.cep.eu)).

<sup>142</sup> This has always been clear from the wording of Art. 138 EPC, see *Rogge in Benkard* (ed.), EPÜ, Munich 2002, Art. 138 annot. 6; BGH of 12 May 1992, GRUR 1992, 839 – Linsenschleifmaschine; of 4 May 1995, GRUR 1996, 757, 759 – Zahnkranzfräser) until the reform of the EPC in 2000 deleted the words “under the law of a Contracting State” in Art. 138 para. 1, 1<sup>st</sup> half sent. EPC, see *Schennen in Singer, Stauder*, Europäisches Patentübereinkommen, lic. cit. Art. 18 annot. 1, claiming self-executing effect of Art. 138. It seems, however, to be a bit of wishful (Dutch, German?) thinking that national courts would revoke national-territorial monopolies, whose substance is defined by national law on the basis of international authority. Rather, it would seem that the purpose of Art. 138 EPC remains unchanged, which is to prevent Contracting States from introducing additional or other grounds of revocation, as this would impair the uniformity of the rules on patentability. To wit, Art. 138 EPC is worded as a limiting, rather than as an enabling rule, let alone as a prescriptive rule providing, as it should, for that patents have to be revoked on (any!) of the grounds mentioned. For the same reasons, Art. 38a para.2 Draft Unified Patent Court Agreement - Revised Presidency text of 11 November 2011, Doc.16741/11 does not provide for the authority of the Court to revoke the patent, but only for a limitation of its competence. Indeed, this international court may not without authority given by the Union’s legislator, revoke patents, to which this legislator has given unitary effect and substance. After all, revocation of a patent does not simply mean withdrawal of the (European) letters patent, because they do not specify a new and sufficiently inventive technical teaching, but invalidation (on these grounds) of the legal exclusivity as defined by the Union’s legislator. Note that Art. 3, para 3 Proposal UPP Regulation rules only on the – self-evident – effects of revocation, not on the grounds for revocation as did Art. 28 Proposal Community Patent – General Approach for good reason. Note also

grounds of revocation, and so did Art. 28 of the Proposal for a Community Patent. Therefore, the silence of the draft UPP Regulation either seems to mean that national laws apply or else it is due to an over-interpretation of Art. 138 EPC. Either way, the drafters of the UPP Regulation got it wrong, just as wrong as they got the entire idea of a European patent muting from a bundle of separate internationally uniform national rights into such a bundle hold together by a “unitary effect”, and yet remains the same “European patent” or “bundle” of (national?) patents<sup>143</sup>. The truth rather is that the unitary effect transforms and unites the separate rights into one right of European Union law.

Indeed, the theoretical concept of national patents or a “European” patent continuing to exist as such while producing exclusive effects and becoming an object of trade as a matter of European Union law represents but a doctrinal bubble. It is these effects of exclusivity, which constitute the property right. There are no national patents nor can there be a “European” patent without such legal substance. Even if the UPP-Regulation does not aim at establishing unitary patents “ab ovo” in the same way as does national law under Art. 64 para. 1 EPC, it will produce this effect subsequently as a matter of Union law, namely when the request for unitary effect has been registered in conformity with Art. 3, para.1, Art. 12, para.1,lit.h) proposed UPP Regulation<sup>144</sup>. By virtue of the

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that with regard to European patents proper, Art. 38a, para.2 of the Draft Agreement is redundant if Art. 138 EPC is considered to produce direct effect.

<sup>143</sup> See recital 7 in fine Draft UPP Regulation “... the unitary effect attributed to a European patent should have an accessory nature and should cease to exist or be limited to the extent that the basic European patent has been revoked or limited”. This statement represents a truism (what else should happen once the patent has been revoked or limited?) and creates confusion (can the essence of the patent be accessory it?).

<sup>144</sup> See *Jaeger*, loc.cit., 43 IIC at p... (sub II.3) (2012), contrasting the different approaches of delegating Union authority to the EPO or of transforming the European into a a unitary (Union) patent. Note that Art. 142 EPC. allows the EPO to grant patents “jointly” in respect of all those States forming a group of EPC Contracting States, so with an effect of its own, once a “group of Contracting States has provided (by special agreement) that a European patent granted for those States has a unitary character throughout their territories”. Clearly, Art. 142 EPC does not have an effect of its own, but presupposes an enabling “agreement” by EPC Contracting States (or, for that matter, a “joint” regulation, see Art.1, 2<sup>nd</sup> sent. Proposed UPP Regulation), and it is based on the assumption of a “joint” grant. Thus, Art. 142 EPC assumes that the unitary effect is inherent in that joint grant precisely because of the enabling agreement/Regulation made by the group. Since, however, Art. 3,para.1 Proposal UPP Regulation – General Approach attaches the unitary effect not simply to that “the European patents (have been) granted with an identical scope in respect of all participating Member States”, but to the registration of the unitary effect as requested by the applicant in view of the principle of optionality (see n.143), the registration must have a constitutive effect. In other words, the delegation/registration issue has only been shifted from the grant of the European patent to the registration of the unitary effect, thus making it even more

UPP Regulation, the registration will transform 25 national patents into one single patent. It will determine this unitary patent's status as tradable property by reducing the applicable national laws from 25 to one single (national) law<sup>145</sup>, give it a specific language regime and a proper design of the exclusive right it confers, bring it under its own, Union related jurisdiction<sup>146</sup>, and, last but not least, impose its own "unitary" renewal fees, which, if not paid, will result in the lapse of the entire protection<sup>147</sup>. The transformation of the patent from a bundle of national rights into a unitary right thus affects its very existence, raising it from the Member State level to that of the Union (of which enhanced cooperation is but a part). There does not remain so to speak some "European" legal leftover on the ground, since even the specification of the patent represents nothing unless supported by some substantive law, in casu by Union law<sup>148</sup>. More important, and

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evident, that it is Union law, which brings about the unitary effect, defines the exclusive rights constituting the patent and gives them legal force.

<sup>145</sup> As regards the unitary patent as an object of property, so as regards assignments, licensing, the status as a security or in case of insolvency, the transformation is from 25 applicable national laws into one covering the entire territory of enhanced cooperation, and it so covers the unitary patent throughout the territory of enhanced cooperation by virtue of Art. 10 Draft UPP Regulation. Rather than constituting simply a choice of law rule, Art. 10 as well transforms the national rights of the European "bundle" into one right with a view to ensuring a uniformity of protection as required by Art.118 TFEU (see the English and French texts – uniform/uniforme protection - as distinguished from the German text – einheitlicher Schutz; all have to be read together: unitary and uniform as correctly stated by Art.3 para.2, 1<sup>st</sup> subpara. Proposal UPP Regulation – General Approach). Therefore, at least in principle, Art.10, para.1 cannot be contracted away or around, in particular not as regards the qualification of the patent as property (e.g. as regards levy in execution, status in insolvency etc.), form and effect of assignments or of licenses (see supra n.116 – 119) or other matters, where the interests of third parties are directly affected.

<sup>146</sup> See supra n.20, and infra 2.a).

<sup>147</sup> Art. 14 para. 2 Draft UPP Regulation. Art. 15 para. 2 provides that the level of renewal fees should be set so as to, inter alia, foster competitiveness of European business and reflect the size of the market, thus expressing a common patent policy. Admittedly, the distribution of income from renewal fees among participating Member States, as provided for by Art. 16 para.2 Draft UPP Regulation flies in the face of a common patent policy. Yet, the same approach was envisaged for the European Union patent by *Council*, Conclusion Enhanced patent system in Europe, loc. cit. at no. 39.

<sup>148</sup> Note, that such substance and uniformity may not be maintained by transposing Art. 6 – 9 of the Proposal of a UPP Regulation to the draft Agreement on a Unified Patent Court, as proposed by a resolution of 28/29 October 2011 of the "Intellectual Property Judges Association" under the strongly voiced presidency of R. Jacob, and supported by an opinion given by Kraßer for the European Patent Lawyers Association (all available at [www.eplawpatentblog.com/...](http://www.eplawpatentblog.com/)). This lobby initiative has been carried to the EP Legal Committee by MEP Wickström (see EP Legal Committee, Draft Report *Rapkay*, EP Doc. 2011/0093 (COD) of 27 October 2011, Amendment 65 – 67), but for good reason has not been retained. Not only does this proposal empty Art. 118 para.1 TFEU of its substance and carry the unitary patent out of the Council's authorization of enhanced cooperation, since this agreement is to be concluded between the Member States alone as an international convention outside the framework of the EU. Rather, it also means that all the

really to begin with, the unitary patent is asked for as such by the applicant, not as a national, but as an EU-wide (or, for that matter, an enhanced cooperation-wide) title to exclusivity with its own characteristics. It needs to be treated as such.

Nothing in the nature of enhanced cooperation and its relationship with the European Patent Organization stands in the way of conceiving the unitary patent, as one must, as an autonomous title of protection, which is fully based on European Union law, albeit of territorially limited scope. It is true that, due to enhanced cooperation by only a number of EU Member States, it will not be legally or politically opportune for the EU as such to join the European Patent Organization as a member<sup>149</sup>. One must, however, be careful not to confuse the organizational links with the EPO, which are required to make the unitary patent system work<sup>150</sup>, with the substantive nature of the unitary patent. Art 142 et seq. EPC presuppose the establishment not simply of a joint or simply a uniform patent system of several Member States, but precisely of a unitary Community patent, albeit

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substance of the unitary patent will be derived from public international law, and, thus, although part of the framework regulation of the Internal Market, will be outside the reach of the EU as regards any future amendments as well as beyond the reach and oversight of the ECJ. The latter, of course, is precisely the objective of the judges' move, the reasons given being fears of delays in infringement proceedings, and, indeed, that "the rulings of the non-specialist CJEU would (not)be clear", and that "the whole point of creating a specialist patent court for Europe would be lost" (*Jacob*, *ibid.*). This shows that every possible attempt is made to escape EU law. However, the purpose of Art. 118 TFEU precisely is to confer upon the EU the power to establish an intellectual property system and a policy of its own. The provision has not been introduced to enable the EU to delegate that policy to Member States. In this respect, enhanced cooperation does not make a difference. Rather, it must be implemented in the same EU-perspective, since its objective is to intensify market integration with a view to expand it to the entire EU, see *supra* A.2.b) (iii), text at n. 94 et seq..

<sup>149</sup> Membership of the EU, as once envisaged and necessary for the Community (European Union) patent to be granted by the EPO, would require an amendment of Art. 166 EPC to the effect that not only States, but international organisations (or expressly the EU) may join the EPO. It does not need Machiavelli like afterthoughts to see that keeping the EU out of the EPO will not only help to speed up the UPP project by avoiding a revision of the EPC (but see *supra* n.141 and *infra* n.151), to which, in addition to Spain and Italy, non EU Contracting States of the EPO would have to be associated regardless of the required majority (see Art. 172 EPC). Rather, it will allow EPO Contracting States including its EU members to remain *inter se* instead of having to directly deal within the Organisation with the political ambitions of an EU having its own patent system and policy.

<sup>150</sup> See Art. 12, 13, 16, 18 Draft UPP Regulation and Art. 143, 144-147 EPC. Clearly, the role attributed to the Commission by Art. 18 Draft UPP Regulation will be rather ambivalent, given that she will always be faced with the question whose policy it is, that she has to develop. In fact, the Commission's position will be rather weak as all the delegated powers, which it had claimed in Art. 15 – 17 of its Proposal, in particular all influence on setting the level for renewal fees, have been shifted to the self-interested participating Member States, see Council, Doc. 17578/11, at Art. 15, para.2 and 3, Art. 16, para. 4, Art.17 (entirely deleted).

one based on convention law<sup>151</sup>. Their main concern is with the acceptance within the EPO of a “block” of Contracting States, not with the nature of the patent the EPO has to grant, because the post grant rules are beyond its remit any way.

## 2. *The European “bundle” of internationally uniform, national patents*

Insisting on the basis of and the embedment in Union law of the “patent with unitary effect” is not simply a matter of academic resistance to attempts of some circles to doctrinally exempt it by all means from Union law by conceptualizing it as an international European title of protection rather than as an exclusive right based on European Union law<sup>152</sup>, as if enhanced cooperation for a unitary patent were not itself to take place as part of and within the framework of the Union. Rather, a proper qualification of the unitary patent is necessary to fully understand its position in a unified patent litigation

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<sup>151</sup> Art. 142 EPC was meant to constitute the link to the once companion Convention on the Community patent. When the Union took over the project with a view to establish a system of patent protection of its own, the Art. 142 EPC route was blocked. Instead, the Union had to become a member of the EPO, this accession requiring an amendment of the Art. 166 EPC (see supra n.149). One reason why interested circles began to push for cutting the language issue by moving to enhanced cooperation was the assumption that it might open again the Art. 142 EPC route, thus helping to avoid another loss of time and the risk of complications associated with a revision conference for the EPC. Accordingly, Art. 1, 2<sup>nd</sup> sent. Draft UPP Regulation pretends, by way of a legal fiction, that the UPP Regulation constitutes the “agreement” within the meaning of Art. 142 EPC. This may well be the intention of the Member States participating in enhanced cooperation. But does this intention matter or rather the text of Art. 142 EPC, which is a rule of public international convention law? Is it the will of the group wishing to have the EPO granting unitary patents for them, which is decisive, or the will of the framers of the EPC and of all its Contracting States? The question seems to be trivial, given that the UPP Regulation guarantees the unitary effect as required by Art.142 EPC. However, there is not only a taint of circumvention of the law by Art. 1 proposed UPP Reg., which results from the desire to escape the constraints of a revision of the EPC. Rather, it matters both for the EPO and for the EU, whether the Union will be able to act as a member, whether it will at least be able to act as a common spokesman, who is legitimized by that enhanced cooperation is a matter also of the EU and by that, in its substance, the unitary patent will rest on EU law, or whether it is some Contracting States only, which, as such, act as a group within the EPO. At the latest, when all EU Member States will join enhanced cooperation, thus transforming it into a full EU group, both the EPO and the EU will realize that Art.142 EPC was a shortcut leading into the wrong direction.

<sup>152</sup> See supra n.148; comp. also *Tilmann*, Das Europäische Patentgericht nach dem Gutachten 1/09 des EuGH, GRURInt 2011,499,500. *Tilmann* is the chairman the Committee for intellectual property of the Deutsche Anwaltverein and the rapporteur of its Stellungnahme Nr.27/2011 of May 2011 zum Entwurf eines Vorschlags für eine Verordnung des Europäischen Parlaments und des Rats über die Umsetzung der Verstärkten Zusammenarbeit im Bereich der Schaffung eines einheitlichen Patentschutzes (KOM (2011)215/3), available at [www.anwaltverein.de](http://www.anwaltverein.de).



system, which is to be developed concomitantly. The Council is, indeed, setting up a “Draft Agreement on a Unified Patent Court and its Statute”<sup>153</sup>, by which it intends to carry over the EEUPC project to enhanced cooperation<sup>154</sup> while seemingly complying with opinion 1/09 of the Court of Justice<sup>155</sup>. Whether and to what extent the Council’s approach to the creation of a unified Patent Court (UPCt) will work out, is a matter beyond this contribution<sup>156</sup>. There is, however, one issue, which the Court explicitly has not considered in its opinion 1/09<sup>157</sup>, but which needs to be dealt with here briefly. It pertains to the autonomous role, which the unitary patent ought to play in the Union’s area of enhanced cooperation, but which may be affected by the co-existence, if not the dominance of the European “bundle” of internationally uniform, national patents.

a) European and unitary patent protection: Different patents, parallel rules

The Court’s abstention is, indeed, to be regretted, because there is a link between the two types of patents, at least they will influence each other. For one thing, it is precisely because of the objective to bring the EU patent, now the UPP, and the EPO bundle of internationally uniform national patents (with its extension to third countries) together into a unified litigation system that the draft EEUPC Agreement and now the Draft UPCt Agreement provide for the establishment of an independent international court, which has

<sup>153</sup> See reference supra n. 20. The draft is worked out under the auspices of the Council by the “Friends of the Presidency Group”, which has a political mandate rather than merely one of expertise, see *Council*, Decision of 8 July 2011, Doc.12661/11

(<http://register.consilium.europa.eu/pdf/en/11/st12/st12661.en11.pdf>).

<sup>154</sup> While the establishment of a unified litigation system formally is not part of enhanced cooperation as authorized by the Council (see supra n.2), there is a political will to maintain the link between the two projects, see *Council*, Draft Agreement Unified patent Court – Guidance for future work, loc.cit., Doc. 17539/11, at no.6; *European Parliament*, Committee on Legal Affairs, Draft Report *Rapkay*, on the proposal for a UPP Regulation, loc.cit. amendment 41; Id. Draft Report *Lehne* on a jurisdictional system for patent disputes, Doc. 2011/2176(INI) of 23 September 2011.

<sup>155</sup> See supra sub II.2.b).

<sup>156</sup> See *Jaeger*, loc.cit., 43 IIC at p... sub III.2. (2012), *Baratta*, loc.cit. 38(4) Leg.Iss.Eur.Integr. 299 (2011). Surprisingly, in its opinion 1/09 the Court has not addressed the issue of whether review of decisions regarding the grant or the revocation of European Union patents by the EPO ultimately ought to also come under its jurisdiction (see Gen. *Kokott*, submissions of 2 July 2010 on behalf of all Advocates General in case avis 1/09, sub nos. 68 et seq., *Jaeger*, loc. cit. 47 CML Rev. 101 et seq., 109 et seq. (2010); *Jaeger et al.*, Comments of the Max-Planck-Institute, loc. cit. 40 IIC 830 et seq. (2009)). The issue remains to be settled also with regard to the European patent with unitary effect, see *Jaeger*, loc.cit., 43 IIC at p...sub II.4.(2012).

<sup>157</sup> ECJ, supra n.20, at no. 59; see also Adv. Gen. *Kokott*, submissions of 2 July 2010 on behalf of all Avocates General for opinion 1/09, sub no. 60.

jurisdiction also over the unitary (ex EU) patent<sup>158</sup>. For another, and more importantly, like the draft EEUPC Agreement, the Draft UPCt Agreement, which is to be concluded only between the Member States of enhanced cooperation, these acting also in their capacity as EPC Contracting States, will entirely redefine the relative position of the unitary (ex EU) patent and the EPO bundle of uniform national patents, and, thereby, the position also of the Court of Justice.

This it will be, because the draft UPCt Agreement will split the bundle of national patents granted by the EPO into two varieties, thus broadening the spectrum of patent protection in the EU to four categories. In between the UPP on the one side, and, on the other, the national patent as available via the purely national route, there will be two types of an EPO granted “bundle” of national patents. One is the traditional EPO bundle of patents, which are national in all of their substantive features. Although they are bound to disappear, they will remain with us as “old” EPC patents to the extent that parties wish so expressly<sup>159</sup>.

The other one will be new and may be called the EPC/UPCt patent, since Art. 14f to 14i of the Draft UPCt Agreement will subject patents granted by the EPO to a uniform law of patent infringement, i.e. to internationally uniform rules regarding the definition of infringing acts as well as regarding the definition of the exceptions to the exclusivity. Thus, the EPC/UPCt patent will consist of exclusive rights, which, whilst territorially fragmented and, therefore, national as to their form, are identical as to the conditions of their grant, the substance and the scope of exclusivity they confer upon their owner.

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<sup>158</sup> Note that unless all national patent laws were to be harmonised by a EU directive, any joint litigation system for the European bundle of national patents needs to be established by way of an international convention providing for the “harmonization” of the law of infringement of the patents of the bundle, for the remedies and for a procedure, or else a common judiciary would never function efficiently, see supra sub 2.a)(ii) as to the experience made with the CPC 1989 and its Protocol on Litigation.

<sup>159</sup> See Art. 58, para.3 Draft UPCt Agreement establishing an opt out-route for European patents existing at the time of entry into force of the Agreement. This opt out-rule regarding substantive law and UPCt jurisdiction has to be distinguished from the transitional period provided for by Art. 58, para. 1 with respect to the exclusivity of the UPCt’s jurisdiction only. See for the interplay of Art. 58, para. 1 and para. 2 *Luginbuehl*, Transitional Provisions of the draft European and EU Patents Court (available at [www.ceipi.edu/media/luginbuehl\\_01.pdf](http://www.ceipi.edu/media/luginbuehl_01.pdf)). Note that the UPCt Agreement will enter into force already upon ratification of a limited number of Contracting Member States (Art.59,para.1), meaning that the EPO bundle of the traditional, essentially national type of patents is likely to continue to exist not only outside, but also inside the territory of enhanced cooperation. Note also that the UPCt Agreement will be accessible by all EU Member States, whether participating in enhanced cooperation or not (see Art. 2, nos. 2,3; Art.58b)). Thus, Italy is likely to join the UPCt Agreement while remaining outside enhanced cooperation with respect to the unitary patent.

Albeit not unitary, they are internationally uniform for all purposes of protection<sup>160</sup>, and, as such, make the EPC/UPCt patent a perfect substitute for the unitary patent<sup>161</sup>. With regard to them, the Unified Patent Court will have exactly the same broad jurisdiction over the same important types of actions, which it will have had with respect to the unitary patent. When adjudicating litigation over a patent out of the internationally uniform bundle of EPO-granted national patents, it will follow exactly the same rules regarding the conditions of the grant of the patent, the terms of its protection (scope of claims, and scope of exclusivity), the conditions for revocation, the remedies for infringement, the ways of taking and assessing evidence and the modes of procedure, as it would apply were a litigation on a EU patent before it. This is so because, first, the conditions for the grant of the unitary patent and the EPO-bundle of patents are the same as are some of the terms of protection and the grounds of revocation<sup>162</sup>. Secondly,

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<sup>160</sup> The only exceptions from this uniformity of the law relating to the EPC/UPCt bundle of patents result from that draft UPCt Agreement does not touch on the issue of compulsory licences. The exhaustion principle, which is not covered either, is governed by primary Community law anyway (Art. 34 et seq. TFEU). As to prior user rights, they are covered and recognised in their territorial limitation, see Art. 14i draft UPCt Agreement.

<sup>161</sup> Note that, as regards compulsory licenses, the unitary patent and the EPC/UPCt patent will also be subject to the same rules, given that the proposed UPP Regulation refers the matter to national law, see supra 1.a),(ii). The same holds true for prior user rights, unless an amendment by the Parliament will be accepted, which would bring prior user rights within the list of exceptions of Art.8 draft UPP Regulation, see *Council*, loc.cit., Doc 17578/11at Art.8 point ba, Am.15, and see supra n. 111. The major remaining differences concern, first, the status of the EPC/UPCt patent as property, since each of the national patents composing the “bundle” will be subject to its national law, meaning that as many laws become applicable to the “bundle” as there are countries covered by designation. As a result, transaction costs for exploitation of the EPC/UPCt patent by contract rather than by production will be relatively high. Second, there will be differences of costs of acquisition and renewal depending on where and for how many territories protection will be looked for, in particular, whether and when protection in less than all of the territories of enhanced cooperation will satisfy user needs as well. While it remains to be seen what the EPO fees will be for the grant and the renewal of a unitary patent, and how Member States will set renewal fees for national (bundle or purely national) patents, once the renewal fees for the unitary patent are known, transaction costs of managing a bundle of national patents, which are registered in various countries, may make quite a difference. Third, whether warranted or not, there is this fear of the jurisdiction of the ECJ over unitary patent matters, see supra n.148,152.

<sup>162</sup> See EPC, Art. 1, 52 et seq. (patentability), 63 (term of protection), 64 para. 2 (protection of products resulting from a patented process), 69 (interpretation of claims), 83 (disclosure requirement), 138 (limitation of grounds of revocation to conditions of grant of patent). Note that whereas Art. 52 et seq., directly define the terms of the grant, Art. 138 EPC only provides for an obligation of Contracting States not to introduce any other grounds for revocation than those enumerated by that provision, see supra n.142. As to Art. 63 and 69 EPC, the proposed UPP Regulation does not contain any EU-counterpart, apparently on the assumption that they have direct effect or that the unitary patent still is somehow rooted in national law. However, as the scope of the claims also determines the scope of the unitary effect, and as the unitary effect will last only as long as the “united” patents, both the

the scope of the exclusivity is the same, Art. 14f – 14i draft UPCt Agreement mirroring Art. 6 -8 Proposal for a UPP Regulation. Third, the remedies and procedure are the same, the draft UPCt Agreement containing, as it must in view of its purpose, one set of such rules for both types of patents<sup>163</sup>.

The result of this complex set of parallel and in part identical rules is an overlap of jurisdiction and a likelihood of conflicts of interpretation of the law. Thus, apart from the interpretation of general EU law, which takes primacy over national or conventional patent law, in proceedings for preliminary rulings, the ECJ will have the last word to say only on the interpretation of those rules concerning the unitary patent, which are directly derived from EU law. With regard to rules of the UPCt Agreement, which concern both the unitary patent and the EPC/UPCt-bundle of patents, it will have only some form of concurrent jurisdiction with the UPCt, namely in so far as these apply to unitary patents, but not in so far as these same rules apply to the EPC/UPCt bundle patent<sup>164</sup>. When it comes to the application of provisions of the EPC or of the infringement law of the draft UPCt Agreement (Art. 14f et seq.) to the EPC/UPCt bundle patent, the Court of Justice will have no saying at all, notwithstanding their parallelism to corresponding rules of EU/UPP law. However, whatever these subtle distinctions may be worth in doctrinal terms<sup>165</sup>, unless abandoned in favor of a prerogative of the ECJ to interpret all

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interpretation of claims and the control over the duration of the unitary patent are matters of Union law.

<sup>163</sup> See Chapters III (Art.32 – 34) and IV (Art. 34a-43) Draft UPCt Agreement, Chapter IV substituting itself to chapter IV of the original Community Patent Proposal, as deleted by Draft Community Patent Regulation – General Approach.

<sup>164</sup> See generally with respect to EPC-law Adv Gen. *Kokott* conclusions of 2 July 2010 for opinion 1/09, loc. cit. sub no. 60; with respect to parallel rules of the EPC and the EU patent *Jaeger*, loc. cit. 47 CML Rev. 108 (2010); as regards “joint rules” of the Draft EEUPC Agreement, literature is still silent, but see for the related point of whether the EEUPC Agreement needs to be construed in the light of EU law even when applied to EPC bundle patents *Haedicke, Grosch*, loc. cit. ZGE/IPJ 2 (2010) at 104 et seq.

<sup>165</sup> Comp. Adv. Gen. *Kokott*, conclusions on behalf of all the Advocates General of 2 July 2010 for opinion 1/09”, loc. cit. sub no 69 et seq, insisting on that jurisdiction to review decisions of the EPO regarding the grant or refusal of EU patents may not depend on whether the grant rests on delegation of EU powers to the EPO or on an automatic transformation of the patent as granted into a EU patent see also supra n.144. What matters is the effectiveness of judicial review and the uniform and, more particularly, the autonomous application of EU law. This is the concern underlying the ECJ’s jurisprudence on primacy of EU law over national law, and it largely explains its insisting on that international law be properly integrated into the EU legal order (see recently ECJ of 21 December 2011, case C-366/10, *ATA et al./Secretary of State for Energy and Climate change*, Rep. 2011 I ..., not yet officially reported). The question, therefore, is whether a concurrent or rather a rival international system of protection and of regulating competition in the Internal Market really is acceptable, as Advocate General *Kokott*, *ibid.* at no.60, seems to admit.

European international law governing the Internal Market rather than only the European Union's supranational law constituting the Internal Market, they only tend to obfuscate a shift of priority from the unitary patent to the EPC/UPCt bundle of patents. The result will be a limitation of the guidance, which the ECJ is called upon to provide for the development of a coherent legal order of the European Union<sup>166</sup>.

b) Optionality: Opting out of the EU judicial system?

The mechanism setting the beat for this shift of political priority and judicial power is the so-called principle of optionality. Originally, this principle of optionality between the Community patent and the EPO-bundle patent, as enshrined first in the Community Patent Convention as a transitional regime<sup>167</sup>, and, subsequently, consolidated into a principle by the Community patent legislator<sup>168</sup>, meant an option between a unitary supranational and a bundle of truly fragmented national patents. It was on this assumption that earlier attempts to set up a specialized litigation system always focused on the Community (or EU) patent only. In accordance with its original objectives as a predecessor and companion of the Community Patent Convention, the EPC was understood as establishing merely a patent granting organization, which, by a centralized granting procedure, offers an easier cost-saving access to patenting inside and outside the EU for both firms inside and outside the Common Market. The substantive law applying to the patents of this bundle was to remain national, and, within the European Union, subject only to harmonization to the extent necessary. Consequently, jurisdiction relating to litigation over these patents was to remain national, and subject to guidance by the ECJ to the extent required by primary Community law<sup>169</sup>, or eventually by secondary Community law as set by harmonization directives<sup>170</sup>.

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<sup>166</sup> For the role of guidance of the ECJ, see its opinion 1/09, supra n.1, at no. 83, *Ullrich*, in *Eger*, loc.cit., passim, in particular sub II.5.

<sup>167</sup> See Art 86 Community Patent Convention 1975, Art. 81 Community Patent Convention 1989, the former ultimately allowing termination of the transitional period by decision of a qualified majority, the latter only by unanimous vote.

<sup>168</sup> See *Council*, Proposal for a Council Regulation on the Community Patent – General Approach, recital 4b; *Commission*, Proposal for a Council Regulation on the Community Patent, loc. cit. recital 4; for the UPP see recital 22 draft UPP Regulation.

<sup>169</sup> See *Ullrich* in *Eger*, loc. cit. sub II. 4., 5. with references.

<sup>170</sup> See e.g. as regards the construction of the terms of Directive 98/44 on the legal protection of biotechnological inventions of 6 July 1998 (OJEC 1998 L 231, 13) ECJ of 6 July 2010, case C-428/08, *Monsanto/Cefetra*, Rep. 2010 I ...; of 18 October 2011, case C-34/10, *Brüistle/Greenpeace*, Rep. 2011 I ...; other examples may be presented by problems of properly interpreting Directive 2004/48/EC of the Parliament and the Council on the enforcement of intellectual property rights, OJEU 2004 L157,45.

The historical meandering of efforts to create a Community patent judiciary, due to their weakness, and also due to industry's foreseeable reluctance to welcome a Community patent unless it is accompanied by an "acceptable" litigation system, led to the EPO tutored initiative to design and propose a "European Patent Litigation Agreement (EPLA)"<sup>171</sup>, which was to be concluded between volunteering Contracting States of the EPC. It provided for the establishment of a highly specialized, semi-centralized European Patent Court having exclusive jurisdiction over litigation concerning the revocation and the infringement of the European bundle patent, but, due to opposition by the EU, never matured into a formal negotiation project<sup>172</sup>. Yet it was there, presented the model for the later EEUPC and now for the UPCt. Moreover, by providing for a full set of substantive rules regarding infringement<sup>173</sup>, it foreshadowed an and the concomitant upgrading of the EPO-bundle patent to a full-fledged system of potentially Union-wide, pre- and post grant uniform patent protection. Given the parallelism of the rules on infringement of both the EU patent (now the UPP) and the EPC bundle patent forms of protection, all this meant, that the focus of the choice between an EU patent (now the unitary patent) and an EPC bundle patent (now the EPC/UPCt patent), changed from which form of protection presents the more attractive substantive law to where would be the more convenient jurisdiction: national courts adjudicating matters of the EU patent (now the UPP) as ordinary Union courts, or the EPLA Patent Court? The Union's late move towards creating a unified patent litigation system for both the EU patent and the EPO-bundle patent, the EEUPC, looked like reaction to the change of operation of the optionality rule, and so it looks at present with respect to the UPCt. However, it gives the wrong answer. It really puts both courts, the ECJ and the EEUPC, now the UPCt, under the permanent pressure of the optionality rule in that both must be aware of that, in reaction to their rulings, parties subsequently and firms in general will switch to the patent system "run" by the Court giving the more "desirable" rulings<sup>174</sup>.

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<sup>171</sup> Text available at [www.epo.org/law-practice/legislative-initiatives/epla/agreement.html](http://www.epo.org/law-practice/legislative-initiatives/epla/agreement.html).

<sup>172</sup>For the development see *Jaeger*, loc.cit. 47 CMLRev. At p.63 et seq.(2010); *Luginbuehl*, in *Leibl, Ohly* (eds.), *Intellectual Property and Private International Law*, loc.cit at p. 231; *Ullrich*, in *Ohly, Klippel*, loc.cit. at p.73 et seq.,see also *Commission*, Preliminary findings of the patent consultation – Future Patent Policy in Europe, sub II, in particular Sect. 2. and 3. ([http://ec.europa.eu/internal\\_market/indprop/patent/consultation\\_en.htm](http://ec.europa.eu/internal_market/indprop/patent/consultation_en.htm), sub: Public hearing on future patent policy in Europe); *id.*, *Enhancing the patent system in Europe*, Doc. COM (2007) 165 final of 3 April 2007, sub 1., 2.2.

<sup>173</sup> See Art. 32 – 37 EPLA.

<sup>174</sup> See for more details *Ullrich*, loc.cit. *Essays in honour of G. Rahn*, at p. 86 et seq.; *id.* in *Eger*, loc.cit. sub II.4.b),(iv).

By its opinion 1/09 the Court of Justice<sup>175</sup> implicitly showed its reluctance to subject itself to such pressure, as, indeed, it does not correspond to the position attributed to the Court by the Treaty. For one thing, being a specialized and centralized judiciary, the EEUPC was set to develop its own uniform interpretation of the law essentially in accordance with the inner logic of patent protection, and so is now the UP Ct. It will do so with respect to both the unitary patent and the EPC/UP Ct bundle of internationally uniform national patents. However, in regard of the latter it will be exempt from any mechanism of review or guidance by the ECJ, meaning not only that its proceedings will not be exposed to any risks of delays and that it will take the rank of a court of last instance. Rather, in accordance with its very *raison d'être*, it is bound to accumulate an expertise and experience, whose benefits are unlikely to similarly accrue to the ECJ, given that it will be entirely excluded from reviewing or at least elaborating on the UP Ct jurisprudence regarding the EPC/UP Ct bundle patent<sup>176</sup>. Instead, it will see and be confronted with only some part of the activity of the UP Ct, namely that related to the unitary patent. As a result, the ECJ will be put at a disadvantage as regards its task to provide guidance for the interpretation of EU law by developing its own full line of jurisprudence<sup>177</sup>. The function of ensuring uniformity of the law simply is distributed asymmetrically between the two courts, the UP Ct having full oversight over both international and supranational patent protection, but the ECJ only one over a limited field. By the same token, there will hardly be full cooperation between them. In fact, even if the UP Ct would wish to engage in broader cooperation, it could not do so precisely because both Art. 267 TFEU and Art. 14b draft UP Ct Agreement limit the right to request preliminary rulings to questions of EU law<sup>178</sup>.

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<sup>175</sup> See supra n.1

<sup>176</sup> The Court's position will thus be fundamentally different from what it is under the Union's system of Community trademark protection and Community design protection or Community plant variety protection, where it ultimately "sets the full picture" of the system of protection. Indeed, under these systems it ultimately is, on the one hand, called upon to review the administrative decisions of the OHIM and the CPVO respectively, and, on the other, to give preliminary rulings in inter partes litigation before national courts (including, additionally, those relating to harmonized national trademark and design protection), see *Ullrich in Eger*, loc. cit. sub II.3.c).

<sup>177</sup> As to the ECJ's role of providing guidance see ECJ of 8 March 2011, avis 1/09, Rep. 2011 I ..., at nos. 83 et seq. ("le mécanisme préjudiciel ... tend à assurer cette application (du droit de l'Union) en ouvrant au juge national un moyen d'éliminer des difficultés que pourrait soulever l'exigence de donner au droit de l'Union son plein effet dans le cadre des systèmes juridictionnels des Etats membres" ... "une coopération directe ... dans le cadre de laquelle (les juridictions nationales) participent de façon étroite à la bonne application ... du droit de l'Union"); *Ullrich in Eger*, loc. cit. sub II. 5.

<sup>178</sup> It is because of this divide, that the preliminary rulings mechanism of Art. 14b UP Ct Agreement will not satisfactorily meet the requirements of autonomy of the

For another thing, due to its function as a choice of forum-rule, which the principle of optionality will take on as a result of the elevation of the EPC/UPCt-bundle patent to the status of a full fledged system of effective international patent protection, the Court of Justice will be excluded from overseeing the interpretation and application<sup>179</sup> of an entire system of protecting inventions by patents, which potentially covers the entire Internal Market, or at least essential parts of it. In its opinion 1/09 the Court<sup>180</sup> has already stressed the broad range of important types of actions, that were to come under the exclusive jurisdiction of the EEUPC and will now come under that of the UPCt. This concern about the scope of the legal subject-matter, with respect to which the preliminary rulings mechanism would not,

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EU legal order, irrespective of whether the UPCt will have a full international status like once the EEUPC, or a mixed international/national status as Art.14b UPCt Agreement pretends (see the criticism by *Jaeger*, loc.cit. 43 IIC at p...sub III.2.b) (2012); *Baratta*, loc.cit. 38(4) Leg.Iss.Eur.Integr. at p. 315 et seq.(2011)). The problem might be mitigated by expressly giving the ECJ jurisdiction to also apply EPC-law as it relates to EPO bundle patents covering EU Member States (see ECJ of 8 March 2011, avis 1/09, Rep. 2011 I ... sub no. 75. However, other problems remain as the preliminary rulings mechanism is not well adapted to work in the relationship between the ECJ and the UPCt. Due precisely to its function as a central, highly specialized court, the UPCt will by its own jurisprudence ensure uniformity of the law throughout the territories of the unitary and the UPCt patent (see *Ullrich*, Essays G. Rahn, loc.cit. at p. 86 et seq.; id. in *Eger*, loc.cit. sub II.4.b),(iii),(iv). Therefore, what the preliminary rulings procedure must stand for in this context is ensuring the full integration of EU wide patent protection, in particular of harmonized or unitary patent protection, into the general legal order of the EU. In other words, it is precisely the specialization and centralization of the UPCt, which ought to be mitigated through guidance to be requested from the ECJ (see *Ullrich*, A Unified Patent System, loc.cit. (forthcoming). An example in point is presented by the *Brüstle* case, supra n. 170: Should such issues, although pertaining to patent law, really be left to decision only by a specialized court or shouldn't it be decided in last instance by the supreme general court?

<sup>179</sup> Note that the Court refuses to answer "abstract" questions of law, as requests for preliminary rulings result from actual controversy. It will develop its interpretation of the law against the backdrop of the case from which the issue arises. Whilst this approach tends at times to blur the dividing line between the interpretation of the law and its application, which is the task of the national judge submitting the request, it allows the Court to develop a "case law", and, by the same token, will work out well only, if the Court sees a sufficient number of cases. See for the Court's approach in more detail *Broberg*, *Fenger*, Preliminary References to the European Court of Justice, Oxford 2010, 308 et seq., 419 et seq.; *Schwarze* in *Schwarze*, EU Kommentar, 2<sup>nd</sup>. ed. Baden-Baden 2009, Art. 234 (now Art. 267), annot. 34 et seq.; *Karpenstein* in *Grabitz*, *Hilf*, Das Recht der Europäischen Union, Munich (looseleaf 2008), Art. 234 annot. 26, 34 et seq., 94 et seq.; for an illustration ECJ of 2 April 2009, case C-260/07 *Pedro IV Servicios/Total Espana*, Rep. 2009 I 2437 at 26 et seq., all with references. On the other hand, the ECJ has limited the scope of the obligation to request preliminary rulings, in particular by the doctrines of "acte" and "acte éclairé" (see *Broberg*, *Fenger*, *ibid.* at p. 230 et seq.). Therefore, fears of undue delays of litigation seem to be exaggerated. There is also no reason to assume that the preliminary rulings procedure would burden patent litigation more heavily as e.g. litigation relating to competition law.

<sup>180</sup> ECJ of 8 March 2011, avis 1/09 Rep. 2011 I ... sub 72, 79.



under the EEUPC, have worked in relation to the EU patent as intended by Art. 267 TFEU, equally applies with respect to the system of EPC/UPCt bundle patents as such.

Indeed, since the EPC/UPCt bundle of internationally uniform national patents is likely to attract at least a considerable number of applicants and applications, excluding the Court of Justice from giving preliminary rulings in relation to them means excluding the Court from overseeing an essential body of law, which governs the Internal Market and which regulates the terms of competition, in particular the terms of dynamic competition for innovations and their dissemination. This is so because a system of patent protection does not simply operate as a mechanism for granting entitlements to protection in the form of property rights, which serve in and for competition<sup>181</sup>. Rather, by the very definition of the conditions for the grant and of the terms of protection, its duration, scope and limits, a patent system also determines the conditions and terms of competition for inventions as well as the terms and conditions of their use and exploitation in the process of innovation. It thus represents a constitutive part of the framework regulation of markets, a part which is informed by a State's patent policy, this being a matter of its industrial policy<sup>182</sup>. Consequently, patent law may not be understood or interpreted in isolation<sup>183</sup>, but precisely as part of a polity's legal order, in particular its general economic law. With respect to the European Union and the role, which the Court of Justice has to play within its legal order, it would, therefore, appear that the Court may not a priori be excluded from also overseeing the interpretation and application of the rules of the patent system forming the EPC/UPCt bundle of internationally

<sup>181</sup> For details see *Ullrich, Heinemann in Immenga, Mestmäcker, Wettbewerbsrecht*, 5<sup>th</sup> ed. Munich 2011, EG/Teil 2, sub GRUR, Teil B at nos. 21 et seq.; *Ullrich, Propriété intellectuelle concurrence et regulation – Limites de protection et limites de contrôle*, *Rev int. dr. écon. (RIDE)* 2009, 399, 407 et seq., 423 et seq..

<sup>182</sup> See as regards the importance attributed to the patent system for innovation, international competitiveness and the Internal Market only *Commission, Green Paper on the Community patent and the patent system in Europe*, COM (97) 314 final of 24 June 1997; *id.*, *Promoting innovation through patents – The follow-up to the Green Paper on the Community Patent and the patent system in Europe*, COM (1999) 42 final of 5 February 1999; *id.*, *Commission proposes the creation of a Community patent*, press release of 5 July 2000 accompanying the Proposal for a Community Patent Regulation; *id.*, *Enhancing the patent system in Europe*, COM (2007) 165 final of 3 April 2007; *id.*, *Proposal for a Community Lisbon Programme 2008-2010*, COM (2007) 804 final of 11 December 2007 (sub 3.3); *id.*, *An Industrial Property Rights Strategy for Europe*, COM (2008) 465 final of 18 August 2008; *id.*, *Towards a Single Market Act*, COM (2010) 608 final of 11 November 2010, sub 1.1; *id.*, *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*, Doc COM(2011)287 final of 24 May 2011, sub 3.1. See also generally *Ullrich, Legal Protection of Innovative Technologies: Property or Policy*, in *Granstrand* (ed.), *Economics, Law and Intellectual Property*, Boston 2003, 439, 466 et seq.

<sup>183</sup> See ECJ of 8 March 2011, avis 1/09, Rep. 2011 I ... at no. 78.

uniform national patents, and the less so as the UPCt Agreement will cover and may only cover EU territory. The EPC/UPCt patent and its uniform rules, therefore, are Union specific. Yet, by excluding the ECJ from overseeing the system of EPC/UPCt bundle patents, the coherence of the EU legal-economic order will be put at risk.

### III. Conclusion

This contribution does not fill quite as many pages as the history of the efforts to create a Union patent counts for years. Its conclusion cannot be more positive than is the result of these efforts of half a century. The attempts to both cut the Gordian knot of the language regime by moving to enhanced cooperation and to circumvent the legal obstacles to creating an independent international patent judiciary, has produced a Pandora's box of problems. Enhanced cooperation has been used to unexpectedly make the Community patent degenerate into a "European patent with unitary effect" of imperfect structure and unbalanced design. Instead of simply adapting territorial coverage to that of enhanced cooperation, it splits "unitary protection" into exclusivity and property. On the one hand, it thus reinforces patent dependencies in the same way as it relegates any other public interest concern to the national level. On the other, by subjecting the unitary patent as property to (one) national law, transaction costs are likely to arise, which only firms with a large patent business will be able to control<sup>184</sup>. Moreover, transaction costs will multiply as the unified patent litigation system for both the unitary patent and those patents, which are left under its umbrella, splits European patents into two varieties, and as the optionality rule also allows purely national patents (and utility models) to continue to exist. This multi-layer system of patent protection and of patent jurisdictions will not be under full control by the Union, since the unified patent litigation system practically exempts EPC/UPCt bundle patents from its sovereign legislative authority of harmonization<sup>185</sup> and unfortunately also from effective judicial oversight by the ECJ. Given the industrial policy ambitions of the Union<sup>186</sup> on the one hand,

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<sup>184</sup> One may even suspect, that the unitary patent has been conceived of by interested circles mainly for the new forms of portfolio or pool based exploitation of patent as assets sold or licensed on standard terms by "patent subsidiaries" of large firms or by independent patent merchants. The unitary patent virtually is not subject to any public interest liens, it has a sufficiently large territorial scope covering the most profitable markets, and it can be enforced effectively. However, there are more and more important demands, which a patent system must satisfy.

<sup>185</sup> With the exception of biotechnological inventions, substantive law is from the late sixties, and the biotechnology reform was transposed to the EPC Implementing Regulations only, and only by a „trick“, see *Ullrich in Ohly, Klippel*, loc.cit. at p.91 (n.122); for the deficit of modernization *ibid.* at p.95 et seq.

<sup>186</sup> See *supra* n. 182.

and, on the other, its experience with patenting strategies of industry<sup>187</sup>, one hardly dares to inquire into the reasons, which have driven the Union's legislator, Commission, Council, and Parliament, to adopt this monstrous, multi-tentacular patent protection, which they will no more be able to tame.

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<sup>187</sup> See *Commission, Pharmaceutical Sector Inquiry, Report of 8 July 2009* (<http://ec.europa.eu/competition/sector/pharmaceuticals/inquiry/index.html>). There is, indeed, no better playground for strategic patenting to hinder competitors than a complex system of protection.