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Authorization and implementation of enhanced cooperation in the case of unitary patent protection

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I Introduction

The possibility of obtaining a single patent uniformly valid for the entire territory of the European Union has been desired for decades. Despite of a consensus over the need for such instrument, Member States have still not reached unanimity regarding the exact specifics of the European Union patent system.

Ultimately, 25 Member States resorted to the use of enhanced cooperation. This mechanism exists ever since the Amsterdam Treaty, but was used only once before – to regulate the conflict of law rules regarding divorce.[1] Numerous scholars and experts were convinced that enhanced cooperation would never be applied because they had considered the legal requirements for such cooperation impossible to meet. Others were surprised over why is such a powerful mechanism left aside and avoided. However, the opportunities to assess the application of legal conditions for the use of enhanced cooperation to the real facts were so far scarce. The case of divorce mostly went under the radar, possibly because it merely provides couples with an additional option to choose the applicable law, thus not coming across others' interests and having no influential impact on the internal market.

This second case of enhanced cooperation could shed some light on the topic. Establishing a European Union patent in only some Member States is a highly controversial topic and raises numerous interesting questions substantial for the concept of enhanced cooperation. Can an instrument that is supposed to be a European Union instrument be reached by the means of enhanced cooperation? Does the circumstance that Italy and Spain, the only countries left behind, want to take part in the creation of European Union patent prevent the rest of the Member States to proceed without them? What impact is the enhanced cooperation allowed to have on the internal market, as it is bound to have at least some detrimental effect on the trade with non-participating Member States? Furthermore, patents are a vital economic tool and may present a competitive advantage for participating Member States;

[1] Council Decision 2010/405/EU of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L189/12

is it acceptable for the enhanced cooperation to run contrary to economic interests of some Member States? Regardless of the financial issues, can a European Union act discriminate on the ground of language, as the European Union recognizes the importance of safeguarding the cultural and lingual diversity?

This thesis will reflect upon these latest questions and try to provide some insight into them. In doing so, it will invoke arguments raised by Italy and Spain. Both countries filed actions for annulment of the decision authorizing the enhanced cooperation to the European Court of Justice, claiming that the enhanced cooperation does not comply with necessary requirements.[2]

After the assessment of formal conditions for legality of enhanced cooperation, this thesis will also analyze the proposals for decisions implementing it, in order to review whether the proposed patent protection system and novelties it introduces comply with the European Union law.

The structure goes as follows. Chapter II provides an overview of the background of establishing the unitary patent protection. It outlines the existing systems, their shortcomings and the need for the European Union patent. It also presents the main drawbacks that have delayed the introduction of such patent and have finally triggered enhanced cooperation. Lastly, it gives a short description of the enhanced cooperation decisions.

Chapter III deals with the legality of enhanced cooperation in the case of unitary patent protection, by assessing the decision authorizing enhanced cooperation against the legal requirements. Namely, it refers to the conditions of non-exclusive competence, last resort, non-discrimination and preservation of the internal market and competition.

Chapter IV looks into the substance of the proposed patent protection system to review the legality of the decision proposed to implement the authorized enhanced cooperation. It does so by assessing whether the proposed system has a correct legal basis in the Treaties.

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[2] Case C-274/11 *Spain v Council* [2011] OJ C219/12;
Case C-295/11 *Italy v Council* [2011] OJ C232/22

II. Background

At the moment, patent protection in the European Union can be obtained through national patents or European patents, but both systems have proved to be inadequate.

National patents suffer from the flaws inherent to a system governed by national laws. Rules governing the granting, existence and rights conferred by such patent differ between countries and have the effect only on the territory of the country in question, creating a complex network of patent protection for the same invention through the territory of the European Union. Moreover, in the case of infringement, patent proprietor has to enforce his rights in front of each national court, as there is no mutual recognition of judgments in this area. Multiple procedures and language requirements of each country, particularly the requirement to publish the entire patent in national language, result in high costs, while differences between national systems give rise to diverging decisions that create legal uncertainty and partition the patent protection in the internal market.

European patent system shares the same problems. The European patent can be obtained for one or more of 38 European countries that are parties to the Convention on the grant of European patents,[3] and that is done in a single granting procedure in front of the European Patent Office.[4] However, once the European patent is granted, it turns into a bundle of national patens. It has to be validated in each designated country by paying a validation fee to the national patent office and often by providing a translation of patent into the national language.[5] Afterwards, the existence and enforcement of European

[3] Convention on the Grant of European Patents of 5 October 1973 as revised by the Act revising Article 63 of 17 December 1991 and the Act revising the Convention of 29 November 2000 (European Patent Convention); from now on EPC

[4] International organization created by the EPC, from now on EPO

[5] Article 65 para 1 EPC: 'Any contracting state may, if the European patent as granted, amended or limited by the EPO is not drawn up in one of its official languages, prescribe that the patent proprietor shall supply to its central industrial property office a translation of the patent as granted, amended or limited in one of its official languages at his option or, where that state has prescribed the use of one specific official language, in that language.'

patent are again completely governed by the national laws.[6]

It has been widely recognized that the current situation hinders innovation and hampers the integration of the internal market. A single European Union patent, granted in one procedure without further requirements and having the same effect over the entire territory would put an end to these troubles. Unfortunately, it turns out that is more easily said than done.

The negotiations have started in the 1960', but the European Union patent has still not seen the light of day. There are two main setbacks. The first is the question of abolishing the translation requirements and designating only some languages for patent applications and publications. Albeit that is necessary to lower the costs of patent protection, most of the Member States hesitate to give up on their national language as the official patent language. The second is the issue of recognition of judgments reached by foreign national courts, as the Member States with developed tradition of patent litigation seem reluctant to accept the decisions of judges who are not experienced in patent matters.

In 2009, it became clear that this impasse cannot go on, especially with the economic situation calling for the stimulation of innovation and development, and there was a major breakthrough. It was agreed that the EPO would be endowed with granting of the European Union patents having the effect throughout the Union territory, and that specialized patent courts with exclusive jurisdiction for patents would be established.[7] However, the language regime was subjected to further discussion.[8] The problems regarding translation reoccurred, and at the end of the 2010, an agreement has still not

[6] Article 2 para 2 EPC: 'A European patent shall, in each of the contracting states for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that state, unless otherwise provided in the EPC.'

[7] The issue of courts faced further drawbacks when the European Court of Justice clarified that the proposed system would breach the EU law, but that is not a topic of this thesis. See Opinion 1/09 [2011] ECR 00000

[8] Patents: EU achieves political breakthrough on an enhanced patent system, Press Release IP/09/1880 of 4 December 2009 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1880&type=HTML&aged=0&language=EN&guiLanguage=fr> accessed 29 March 2012

been reached. The proposed system suggested the use of official EPO languages, namely English, German and French, and had fallen short of unanimity by a small margin.[9]

In response, 12 Member States proposed the use of enhanced cooperation for the creation of unitary patent, and were soon joined by another 13 Member States, leaving out only Italy and Spain. With the approval of the European Parliament, the Council adopted a Decision authorizing enhanced cooperation in the area of the creation of unitary patent protection.[10]

Enhanced cooperation is a mechanism provided for by the Treaties, which enables a group of minimum 9 Member States to proceed with integration in a certain area if concerted action proves impossible. The decisions reached through enhanced cooperation are applicable only in the participating Member States. When enhanced cooperation is used, a minimum of two decisions is needed. The first one is a decision authorizing the enhanced cooperation, proposed by the Commission, approved by the European Parliament, and reached by the Council acting unanimously but with only participating Member States having the right to vote. The second one is a decision implementing the authorized enhanced cooperation by adopting substantive provisions and using the relevant Treaty procedures, also with only participating Member States taking part in the vote.[11]

In the case of unitary patent protection, the Authorizing Decision allowed the use of enhanced cooperation, and forms a ground for remaining two implementing decisions: the decision creating unitary patent protection and the decision on the translation agreements for such protection.[12] They two are at the moment in the phase of proposals, namely the Proposal for a

[9] Council of the European Union Press Release 16041/10 of 10 November 2010 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/117687.pdf> accessed 29 March 2012

[10] Council Decision 2011/167/EU of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection [2011] OJ L76/53; from now on the Authorizing Decision

[11] Article 329 and Article 330 of the Treaty on the functioning of the European Union as amended by the Treaty of Lisbon (2007), [2010] OJ C83/47; from now on TFEU

[12] Separate decisions are necessary because the Treaty prescribes a different legislative procedure for the establishing of measures that creating unitary intellectual property rights, then for the translation agreements regarding these rights, see the Article 118 TFEU

Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection and the Proposal for a Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.[13] However, the Authorizing Decision refers to the current versions of the proposals, thus making them eligible for assessment.

In its current version, the Unitary Patent Protection Proposal still envisages that EPO will grant patens in accordance with the EPC, but provides an option of designating the entire territory of 25 participating Member States.[14] If that is done, the European patent will have unitary effect in the area, thus being limited, transferred and revoked or lapse in respect of all these states.[15] Moreover, once this European patent with unitary effect is granted and registered at EPO, no further national requirements apply.[16]

That is in line with the Translation Proposal, which abolishes the option of requiring further national translations after the application and publication are made in English, French or German. That system will apply after a transitional period lasting for a maximum of 12 years. During the transitional period, patents with French or German as the language of the proceeding will have to be submitted with a full translation in English, and ones with English will have to be submitted with a full translation into any language of the participating Member States that is an official language of the Union. The point of transitional period is to wait for the availability of high quality translation machines, which will then translate patent applications into all official languages of the Union. Until then, all applicants filing a patent application at EPO in one of the Union languages and not in the official EPO language will

[13] Proposal COM/2011/215 of 13 April 2011 for a Regulation of the Council and the European Parliament implementing enhanced cooperation in the area of the creation of unitary patent protection; from now on the Unitary Patent Protection Proposal
Proposal COM/2011/216 of 13 April 2011 for a Regulation of the Council and the European Parliament implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements; from now on the Translation Proposal
[14] Article 2 c) Unitary Patent Protection Proposal
[15] Article 3 Unitary Patent Protection Proposal
[16] Article 10 para 4 Unitary Patent Protection Proposal

have their translation costs reimbursed up to a ceiling.[17]

III Authorization Decision – the legality of enhanced cooperation

1. non-exclusive competence of the EU

The areas eligible for enhanced cooperation are defined in the first paragraph of Article 20 TEU, which stipulates:

> 'Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's **non-exclusive competences** may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties…'

Therefore, to use enhanced cooperation in the area of unitary patent protection, creation of such protection must be a non-exclusive competence of the Union. Article 118 TFEU provides powers to establish European intellectual property,[18] and the Authorizing Decision invokes it as a legal basis for the unitary patent. Both Spain and Italy submitted pleas claiming that the European Union has the exclusive competence to create European intellectual property rights, thus making the Article 118 fall out of the scope of enhanced cooperation.[19]

Article 118 identifies its own framework, by defining that measures it provides for are to be introduced in the context of establishment and functioning of the internal market. Accordingly, introduction of new intellectual property rights should be perceived as an internal market matter, and the internal market is a Union's shared competence.[20]

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[17] Article 6 Translation Proposal

[18] 'In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, coordination and supervision arrangements.
The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.'

[19] Case C-274/11 *Spain vs. Council* [2011] OJ C 219/12 point 3,2;
Case C-295/11 *Italy vs. Council* [2011] OJ C 232/22 first argument

[20] Article 4 para 2 point a) TFEU

Moreover, the creation of unitary patent protection is not mentioned under the Union's exclusive competences. They are numbered in the Article 3 TFEU, and include the areas of customs union, establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, conservation of marine biological resources under the common fisheries policy and common commercial policy.

Of this exhaustive list,[21] patents are related only to competition and common commercial policy. Regarding the common commercial policy, intellectual property rights are closely linked to the trade in products and services to which they apply.[22] However, Article 207 TFEU restricts the scope of common commercial policy to the commercial aspects of intellectual property rights.[23] This novelty, introduced in the Lisbon Treaty, prevents the Council from expanding the area of common commercial policy to non-commercial features of intellectual property,[24] and the creation of unitary patent protection does not, by any means, regulate trade-related aspects of patents.[25]

As for the issue of competition, patents are a State approved monopoly, and there is a body of case law created by the European Court of Justice concerning relation between competition rules and intellectual property rights.[26] Nevertheless, the Unitary Patent Protection Proposal does not deal with this aspect of patents either.[27] It has a special provision stipulating that unitary patent protection is to be without prejudice to the application of

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[21] Amedeo Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between *Sein* and *Sollen*', page 11 <http://centers.law.nyu.edu/jeanmonnet/papers/10/100301.pdf> accessed on 9 March 2012

[22] Opinion 1/94 [1994] ECR I-05267 para 54

[23] 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property…'

[24] Markus Krajewski, 'The Reform of the Common Commercial Policy' (to appear in: A Biondi/P Eeckhout (eds), European Union Law after the Treaty of Lisbon) page 14 <http://www.europarl.europa.eu/document/activities/cont/201012/20101207ATT07788/20101207ATT07788EN.pdf> accessed 9 March 2012

[25] Steve Peers, 'The Constitutional implications of the EU patent' (2011) European Constitutional Law Review, Vol. 7, pp 229-266, page 251

[26] for instance, see Case T-201/04 *Microsoft* [2007] ECR II-03601 and Case T-321/05 *AstraZeneca* [2010] ECR 0000

[27] ibid 20 page 351

competition law and law relating to unfair competition and it omits to regulate compulsory licensing, the most prominent institute dealing with impact intellectual property has over competition.[28]

Even if the proposal included compulsory licenses,[29] it would still not fall under the area of regulating competition. The Article 118 is, in the architecture of the TFEU, under the title dealing with approximation of laws, together with the Article 114 used for harmonization.[30] Both Article 114 and Article 118 delineate improvement in the functioning of the internal market as their objective, and their application should be assessed in the light of whether a legal act shares that intent, regardless of potential ancillary impact it has on neighboring areas.[31] The main idea behind unitary patent protection is to facilitate patents uniformly valid over the entire territory of the internal market. That way, a supposedly single market would not be partitioned into 27 different territories, as it is now with only national patents available and patent protection beginning and ending at each national border.[32] Unitary patent protection therefore does aim to achieve better integration of the internal market and falls under the shared competences of the EU.[33]

The exhaustive list of exclusive competences was introduced at the same time as the Article 118, in the Lisbon Treaty. If the creation of new forms of intellectual property was meant to be an exclusive competence, it would have been explicitly mentioned under the Article 3 TFEU, or implicitly falling under the areas enumerated therein.

Still, Italy argues that only the EU can introduce European rules required to create the 'European intellectual property rights' to which the Article 118 refers, thus elevating it to a *de facto* exclusive competence of the Union. First of all, enhanced cooperation is limited to non-exclusive competences because all Member States agreed to completely transfer their

[28] Unitary Patent Protection Proposal Article 19
[29] as it is suggested in the Chapter IV
[30] Part 3 Title VII TFEU
[31] see Case C-376/98 *Tobacco Advertising* [2000] ECR 2000 I-08419
[32] Victor Rodriguez, 'Constructing a unitary title regime for the European Patent System' (2011) Journal of Intellectual Property Law & Practice, Vol. 6 No. 8, pp 574-580, page 579
[33] On whether it actually achieves to do so, or it raises a contrary effect, see chapter III part 4

sovereignty in areas of exclusive competences to the European Union. Consequently, they are not permitted to regulate those issues on their own, not even by using enhanced cooperation.[34] The existence of a *de facto* exclusive competence does not entail loss of sovereignty, so it should not prevent the use of enhanced cooperation.

Secondly, Article 118 provides authorization to 'establish measures for the creation of *European* intellectual property rights to provide uniform protection *throughout the Union'*. It came to existence as an explicit recognition of the Union's competence to introduce new forms of supra-national intellectual property, which previously had to be adopted under the residual legal basis of the Article 352.[35] Therefore, reference to the creation of the European intellectual property rights can be understood as an emphasis of their trans-national autonomous character, and indication of the Union's territory as a necessity to achieve uniform protection. There are no obstacles preventing Member States from creating *sui generis* supranational intellectual property rights having unitary effect throughout their territories, and consequently over the territory of the European Union. Moreover, there is no reason why those rights would not be European intellectual property rights, such as the European patent that already exists outside of the scope of the EU. The Article 118 indisputably presents an appropriate ground for the creation of European intellectual property, but it does not by itself vest the European Union with exclusive competence for the creation of new intellectual property having effect over the Union's territory.[36] Embarking on the creation of such rights could prove to be more appropriate on the EU level, but that does not imply exclusive competence; it amounts to compliance with the principle of subsidiary. The principle of subsidiary governs EU's actions in the field of shared competences by allowing the EU to act only when such actions are

[34] Carlo Maria Cantore, 'We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU' (2011) Perspectives on Federalism, Vol. 3 No. 3, page 7 <http://ssrn.com/abstract=2006513> accessed 3 March 2012
[35] see Chapter IV part 1
[36] see by analogy of the implied competences, Opinion 1/94 [1994] ECR I-05267 para 100

better achieved at the Union level.[37] If all issues benefiting from the involvement of the European Union would be considered an exclusive competence, use of enhanced cooperation would be prohibited in the entire area of shared competences, contrary to the expression 'non-exclusive' used in the Article 20.

Even if the Article 118 referred to the 'European Union intellectual property rights', which it does not, that would be only natural. Instruments established by the European Union are to be European Union instruments and no one but European Union can do so. That does not mean that every action involving the European Union, every legal basis referring to a European Union institute or every mention of the Union's territory should be considered outside of the scope of enhanced cooperation. Article 20 TFEU unambiguously authorizes Member States taking part in enhanced cooperation to exercise the Union's competences and use the Union's institutions. Although they are regularly used by the Union as a whole and thus referred to as Union's, that does not prevent a group of Member States to utilize them. Enhanced cooperation is in its spirit an exception to the rule. Moreover, it was never used before the Lisbon Treaty, although it was provided for since the Amsterdam Treaty. It would be inappropriate to expect that provisions of the Treaty count on the use of enhanced cooperation and thus omit indicating the European Union in their wording, as well as it would be tenuous to rely on the mention of the European Union as a whole in order to preclude the use of enhanced cooperation, if all other requirements are met.[38]

In the end, the competence for creation of the European intellectual property titles can be categorized as an internal market competence and hence as a shared competence, without entailing the loss of sovereignty regarding national legislation.[39] Therefore, enhanced cooperation in the area of creation

[37] Article 5 para 3 of the Treaty on the European Union as amended by the Treaty of Lisbon (2007), [2010] OJ C83/13; from now on TEU

[38] for whether the aim and effect of Article 118 can be preserved through enhanced cooperation, see Chapter III part 4

[39] Maximilian Brosinger, Oliver Fischer, Alfred Frueh, Thomas Jaeger, Manuela Postl, 'IP Law Reform and the Treaty of Lisbon' (2008) Max Planck Institute for Intellectual Property,

of unitary patent protection complies with the requirement of being established within the framework of the Union's non-exclusive competences.

2. last resort

Enhanced cooperation can be a powerful tool for overcoming political impasse.[40] However, it should not be used to circumvent legislative procedures in cases of simple disagreements over policy choices, as that would jeopardize the institutional balance within the EU.[41] The second paragraph of Article 20 sets a safeguard against that, by reading:

> 'The decision authorizing enhanced cooperation shall be adopted by the Council as a **last resort**, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole…'

A group of Member States can recourse to the use of enhanced cooperation only if a concerted action of all Member States proves impossible. Italy claims that the Authorizing Decision was adopted without an appropriate inquiry regarding the last resort condition and without adequate statement of reasons.[42] Spain issued a similar plea, and complemented it by claiming that enhanced cooperation arises to a misuse of powers, since the objective of creating unitary patent protection could have been achieved by means of a special agreement provided in the Article 142 of EPC.[43]

Italy and Spain generally want to take part in the creation of unitary patent, but they oppose the proposed languages system. They agree with policy, but are left behind because of linguistic reasons.[44] Therefore, the real question seems to be whether it is necessary for the cooperation of Union as a whole to

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Competition & Tax Law Research Paper, No. 09-03
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340861> accessed 3 March 2012

[40] ibid 30 page 10, quoting Craig Paul, 'The Lisbon Treaty – Law, politics and treaty reform' (2010) OUP

[41] Thomas Jaeger, 'All back to square one? – An assessment of the latest proposals for a patent and court for the internal market and possible alternatives' (2012) Max Planck Institute for Intellectual Property and Competition Law Research Paper, No. 12-01, page 6

[42] Case C-274/11 *Spain vs. Council* [2011] OJ C219/12 third argument

[43] Case C-295/11 *Italy vs. Council* [2011] OJ C232/22 points 1 and 3.1

[44] ibid 30 page 13

be impossible because some Member States are unwilling or even incapable to integrate in the area, or is it enough to be impossible because of differing opinions and lack of agreement.[45]

When the Amsterdam Treaty introduced enhanced cooperation, then called 'closer cooperation', the last resort principle was worded to emphasize the inability to attain Union's objectives, by reading that enhanced cooperation 'is only used as a last resort, where the *objectives of the said Treaties* could not be attained by applying the relevant procedures laid down therein.'[46] That was in line with enhanced cooperation coming to existence as an institutional response to progressive enlargement of the EU, as EU began to encompass countries vastly diverging in economic and institutional background.[47] The core idea of enhanced cooperation was to strike a balance between countries that are able and willing to foster further integration and countries that are not.[48] If such discrepancies were to endanger the very objective of the Union, enhanced cooperation could provide a solution.

The Nice Treaty kept the last resort principle, but changed its wording to stipulate that 'enhanced cooperation may only be set up when it has been established within the Council that the *objectives of such cooperation* cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.'[49] This amendment sets focus on the enhanced cooperation objectives instead of the EU and Treaties objectives, thus emphasizing that such mechanism would be used as a solution in case of a potential political deadlock. Enhanced cooperation is in its current version perceived as a method to avoid any severe decision-making paralysis, rather then an instrument for advancement in policy areas where only some Member States find acceptable to integrate.[50] The provision stayed the same in the Lisbon Treaty, and it does not

[45] ibid 37 page 6
[46] Article 43 para 1 c) TEU
[47] ibid 30 page 5
[48] ibid page 5, quoting Bribosia (2007)
[49] Article 43 para 1 a) TEU
[50] Dragotm Negrescu, Gilda Truic, 'Can EU's enhanced cooperation mechanism provide solutions to the single undetaking problems of the WTO?' (2006) Romanian Journal of European affairs, Vol. 6 No. 2, pp 5–23, page 15 <http://www.ier.ro/documente/rjea_vol6_no2/RJEA_Vol6_No2_Can_the_EUs_Enhanced_Co-

by any means imply that the reasons why action's objectives cannot be attained play a role when deciding is the condition of last resort satisfied. Therefore, it should be considered fulfilled as long as an agreement cannot be attained in the foreseeable future, and not only when Member States reject the very idea of proposed policy.[51]

The first authorization of enhanced cooperation confirms this approach. Its implementing act is the Rome III Regulation, which approximates conflict of law rules in the matter of divorce.[52] TFEU prescribes special legislative procedure with the Council acting unanimously for the adoption of rules on family law with cross-border implications,[53] and it was impossible to reach unanimity as some Member Sates opposed the Regulation in so far as it occasionally provided for the application of foreign divorce law. Mostly Scandinavian states, which share a liberal approach to divorce, did not consider appropriate to apply more restrictive laws.[54] It should be noted that they did not oppose the approximation in the field of family law itself, but they considered that it should provide more flexibility to satisfy the concerns of all Member States. Therefore, there was a consensus regarding the policy, but a disagreement regarding its substance. The Rome III Regulation has not so far been contested and there are sufficient reasons to believe that enhanced cooperation met the legal requirements.[55]

The fact that Italy and Spain want to take part in the Unitary Patent Proposal and the Translation Proposal, but not under given conditions, should hence not be taken into account when assessing the condition of last resort.[56]

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operation_Mechanism_Provide_Solutions_to_the_"Single_Undertaking"_Problems_of_the_WTO.pdf> accessed 9 March 2012

[51] ibid 20 page 250

[52] Council Regulation 1259/2010/EU of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/10

[53] Article 81 para 2 TFEU

[54] Proposal COM/2010/104 of 24 March 2010 for a Council Decision No .../2010/EU authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation, point 4

[55] Steve Peers, 'Divorce, European Style: The First Authorization of Enhanced Cooperation' (2010) European Constitutional Law Review, Vol. 6, pp 339-358

[56] See by analogy the Court of Justice's ruling that a non-participant in the Schengen acquis cannot demand that the other member states amend draft legislation building on that acquis, so that it can participate, Case C-482/08 *UK v. Council* [2010] ECR 00000

Spain's claim that the availability of other options outside of the European Union amounts to a misuse of enhanced cooperation seems displaced. In all situations eligible for enhanced cooperation, namely in the areas of non-exclusive competences, there is an option of intergovernmental agreement between willing Member States. Point of the claim is not that either Italy or Spain would join such special agreement under current conditions and thus facilitate a higher level of unity, but just that enhanced cooperation is not the only choice for achieving unitary patent protection between 25 Member States.[57] The second paragraph of Article 20 TEU permits the use of enhanced cooperation as a last resort option, and unequivocally defines the last resort as a situation where 'the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole', not as a situation where no other options outside of the Union exist. The assessment of the availability of enhanced cooperation should thus be restricted to asserting is it feasible to expect reaching an agreement on the European Union level in the foreseeable future.

As for the unlikelihood of attaining unitary patent protection within a reasonable period, it should suffice to say that the history of cumbersome efforts to create European patent with trans-national unitary effect goes even further back in the past than the European Union itself;[58] it starts in 1957 and is so far without a success.[59]

The intergovernmental approach, taken up to the 90', resulted in the Community Patent Convention from 1976[60] and its amendment from 1989,[61] both signed but never ratified. They were meant to introduce a single Community Patent uniformly valid over the entire territory, but have failed

[57] Italy and Spain opposed the trilingual language system from the beginning, and there are no reasons to believe that their attitude would change with agreement being concluded outside of the EU

[58] Van Empel, 'The Granting of European Patents: Introduction to the Convention on the Grant of European Patents' (A.W. Sijthoff 1973), chapter 1

[59] Thomas Jaeger, 'The EU patent: Cui bono et quo vadit?' (2010) Common Market Law Review Vol. 47, pp 63-115, page 63

[60] Convention 76/76/EEC of the 5 October 1973 for the European Patent for the common market, [1976] OJ L17/1

[61] Agreement 89/695/EEC of 15 December 1989 relating to Community patents, [1989] OJ L401/1

because of a disagreement over the issue of translations. They had kept the requirement of filing national translations and thus did not meet the standard of cost-effectiveness. Based on the position taken in the Commission Green Paper in 1997,[62] the approach was changed from an intergovernmental agreement to a European Union Regulation, resulting in the Community Patent Regulation Proposal. The first draft in 2000[63] had contained a language system similar to the current Translation Proposal. It has been highly supported by the industry, but has not been politically acceptable. The second draft in 2004[64] changed the language regime to require translations in all national languages. That resulted in the loss of support from industry because of lack of added value; and the proposal was finally rejected in 2004 after no consensus was reached in the Council. The issue was re-launched in 2007,[65] with the Translation Proposal in 2010[66] abolishing the requirement of national translations, in line with the Community Patent Regulation Proposal of 2000. Despite several Council meeting, it proved impossible to reach a unanimous agreement and the result is currently approved enhanced cooperation.

Not only has the issue of unitary patents been thoroughly discussed over the last 60 years, but the proposed translation system solution also exists ever since the Community Patent Proposal of 2000. Just for comparison, the debate over approximating conflict of law rules regarding divorce lasted since the Green Paper in 2005 up to the request for enhanced cooperation in 2008, and that was considered to be sufficient to find insurmountable difficulties.

Last resort if, of course, not just a matter of years spent negotiating, but when it comes to the unitary patent and solutions for its translations, all viable options were already discussed over a lengthy period of time; if there was a consensus to be reached, there had been enough situations at hand. Nothing in the past or present situation gives ground to believing that agreement could be

[62] Green Paper COM/97/314 of 24 June 1997 on the Community patent and the patent system in Europe
[63] Proposal COM/2000/412 of 1 August 2000 for a Council Regulation on the Community patent
[64] Preparation 7119/04 of 8 March 2004 for the meeting of the Council on 11 March 2004
[65] Enhancing the patent system in Europe, Communication COM/2007/165 of the 3 April 2007 from the Commission to the European Parliament and the Council
[66] Proposal COM/2010/350 of 30 June 2010 for a Council Regulation on the translation arrangements for the European Union patent

made in the foreseeable future by the Union as a whole. Consequently, there should be no doubts over the unitary patent fully satisfying the condition of last resort.

3. discrimination

Enhanced cooperation derogates the Treaties only so far as they prescribe legislative procedures necessary to adopt certain decisions, and that is mitigated by making the enhanced cooperation acts binding just for the participating Member States.[67] The rest of the Treaties and EU rules still regularly apply, as stated in the first paragraph of Article 326:

> 'Any enhanced cooperation shall **comply with the Treaties and Union law.**'

Therefore, it should be assessed whether the Authorizing Decision and implementing proposals violate EU law and its principles.

The most controversial element of unitary patent protection is the question of language. The Translation Proposal suggests a general rule under which patent applications can be made only in English, French or German, with no additional translation requirements allowed.

Italy and Spain claim that this trilingual system violates the principle of non-discrimination.[68] Freedom from discrimination is a core value of the European Union,[69] and the Charter explicitly prohibits any discrimination based on the ground of language.[70] Moreover, a separate article of the Charter emphasizes the respect for language diversity.[71] Therefore, it should be reviewed whether a restriction to only three languages amounts to discrimination and disrespect regarding the remaining twenty Union

[67] Article 20 para 4 TEU
[68] Case C-274/11 *Spain vs. Council* [2011] OJ C219/12 point 3,2;
Case C-295/11 *Italy vs. Council* [2011] OJ C232/22 argument four
[69] Ian Bryan, 'Equality and Freedom from Discrimination: Article 13 EU Treaty' (2002) Journal of Social Welfare and Family Law, Vol. 24 No. 2, pp. 223-238 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1423842> accessed 2 March 2012
[70] Article 21: 'Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'
[71] Article 22: 'The Union shall respect cultural, religious and linguistic diversity.'

languages.

The Court has already ruled that a similar language regime of the Community Trademark Regulation does not fall under the scope of principle of non-discrimination.[72] The regulation designates English, Italian, French, German and Spanish as official languages, and was contested for allegedly discriminating against all other languages. The Court has at both instances held that the Treaties' references to the use of languages do not form a general principle of law which would confer a right on every citizen to 'have a version of anything that might affect his interests drawn up in his language in all circumstances.'[73] At the time of the judgment, the Treaties included general principle of non-discrimination, as well as rules providing citizens of the Union with a right to correspond with Union's institutions in any Union language. However, the Charter of rights did not exist at the point, and its explicit mention of language may have broadened the applicable scope of discrimination.

If the proposed language system does present an *a priori* case of language discrimination, attention should be paid to the Charter's provision on the scope and interpretation of rights and principles. Article 52 permits the limitation of rights recognized by the Charter if certain conditions are met. Such limitation must be provided for by the law, respect the essence of rights in question, and be subjected to the principle of proportionality, which requires that limitations are necessary and genuinely meet the objectives of general interest recognized by the Union.[74]

The Translation Proposal is based on the second paragraph of Article 118, which authorizes the establishment of language arrangements regarding

[72] Case C-361/01 *P Kik* [2003] ECR I-8283, upholding the Court of First Instance judgment in the Case T-120/99 *Kik* [2001] ECR II-2235
[73] ibid para 82
[74] Article 52: 'Any limitation on the exercise of the rights and freedoms recognized by this Charter must be **provided for by law** and **respect the essence** of those rights and freedoms. Subject to the principle of **proportionality,** limitations may be made only if they are **necessary** and **genuinely meet objectives of general interest recognized by the Union** or the need to protect the rights and freedoms of others.'

European intellectual property rights.[75] The term 'language arrangement' entails the possibility of restraining from the use of all national languages, or else a special arrangement would not be needed. Moreover, the Article 118 was drafted with EU patent in mind.[76] As it was already obvious that the translation costs must be reduced, the second paragraph was added to subject language limitations to unanimity in the Council, thus making them binding only for the consenting Member States. At the time this provision was adopted, current trilingual model was already tabled.[77] Therefore, the limitation of languages used for patents is founded on law. It falls under the Article 118, which was both drafted and adopted in the light of such language arrangements.

With regards to respecting the essence of language diversity, it would be very difficult to argue that technical language of patents reflects the essence of multilingualism. Patents do not embody culture and the limitation of languages in patent applications does not result in loss of tradition or national identity.[78] As Steve Peers poetically puts it, 'it can hardly be claimed that the richness of languages of Cervantes and Dante is dependent upon their use in patent claims.'[79]

As for the necessity, the high cost of patent protection in the European Union is considered to be one of the main drawbacks of the existing system, and patent users univocally emphasize the need for cost-reduction.[80] At the

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[75] 'The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.'

[76] See, for example, Report Session of House of Lords' European Union Committee <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf> accessed 7 March 2012

[77] that is, by adopting the Lisbon Treaty

[78] Jason R. Riley, 'The Community patent, or: How I learned to stop worrying and love the English language', (2002) Santa Clara Computer & High Technology Law Journal Vol.18 No.2, pp 299-324, page 304 <http://digitalcommons.law.scu.edu/chtlj/vol18/iss2/6> accessed on 5 March 2012

[79] ibid 20 page 256

[80] for small and medium enterprise, see Think Small First - A Small Business Act for Europe, Communication COM/2008/0394 of 25 June 2008 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions;
UEAPME Expectations on the Proposal for a European Small Business Act <www.ueapme.com> accessed on 5 March 2012;
Response to the Consultation on a Small Business Act for Europe <http://www.eurochambres.eu> accessed on 5 March 2012;

moment, obtaining the patent protection in 13 Member States costs 12 500 EUR, and reaches over 32 000 EUR if obtained for the entire EU territory; with overall expenses of patent protection in the EU amounting to estimably 193 million EUR per year.[81] Furthermore, a patent is on average validated in only five Member States,[82] as the translation in five languages alone costs more than obtaining a patent in USA or Japan,[83] thus making the patent protection in the EU about ten times more expensive than in the latter countries.[84] With 70% of the total costs being translation costs,[85] if there is any perspective for approachable, affordable and wider reaching patent protection, the issue of language translations must be tackled. In that light, the idea of keeping the requirement of translating a patent application or even only patent claims into all Union languages is unanimously rejected.[86] Consequently, the restriction of language diversity in patent applications is necessary to establish an efficient EU patent system, until the high quality translation machines become available.

Introduction of unitary patent protection system aims at promoting scientific and technological advance, a general objective of the Union recognized in the Article 3 TEU. Patents are crucial for innovation; they provide the incentive for dissemination of ideas and increase the activity of research and development sector.[87] Moreover, they facilitate economic growth, with

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For results of consultations with stakeholders, see The consultation document, replies from stakeholders and a report on the preliminary findings of the consultation <http://ec.europa.eu/internal_market/indprop/patent/consultation_en.htm> accessed on 5 March 2012

[81] Impact Assessment, Commission staff working paper SEC/2011/482 of 13 April 2011, page 16

[82] For example, Study on the Cost of Patenting carried out by Roland Berger Market Research in August 2004

[83] ibid 74

[84] Didier François, Bruno van Pottelsberghe de la Potterie, 'The Cost factor in Patent Systems' (2006) Université Libre de Bruxelles Working Paper WP-CEB 06-002, page 17 <https://dipot.ulb.ac.be:8443/dspace/bitstream/2013/6307/1/bvp-0063.pdf> accessed 5 March 2012

[85] ibid 62 page 2

[86] ibid 77 page 6;
ICC Policy statement: The EC Green Paper of 5 November 1997 on the Community Patent and the Patent System in Europe <http://www.iccwbo.org/id374/index.html> accessed 17 March 2012

[87] Dominique Guellec, Bruno van Pottelsberghe de la Potterie, 'The Economics of the European Patent System' (Oxford University Press, 2007);

intellectual property becoming a crucial aspect of business and its market value increasing.[88] The European Union recognized the importance of intellectual property numerous times: Europe 2020 Strategy aims towards an economy based on knowledge and innovation, which is to result in high levels of employment, productivity and social cohesion;[89] and Single Market Act emphasizes that the internal market must be as conducive as possible to innovation and creativity in order to face the international competition.[90] Efficient patent system is hence a legitimate aim for the European Union to pursue.

When it comes to proportionality of the restriction, the Translation Proposal keeps the EPO language system in place by adopting its official languages. The Unitary Patent Protection Proposal delegates EPO to grant patents; if EPO procedures will be used, maintaining their already established language system seems rational and makes an objective distinction between languages.[91] Reasons that are even more substantial also distinguish English, French and German out of the pool of twenty-three Union languages when it comes to patent applications. According to EPO statistics over the last 10 years, Germany is without doubt European country with most patent applications, starting with over 26000 in 2001 and progressing up to 33000 in 2010.[92] France is second, with a steadier progress starting at 8000 in 2001 and 11000 in 2010, followed by the United Kingdom with approximately 7000 applications each year. For the comparison, Italy has 4000, and Spain barely reaches 2000 applications per year. Only Netherlands comes close to the number of UK

Patents and innovation: Trends and policy challenges, OECD 2004 <http://www.oecd.org/dataoecd/48/12/24508541.pdf> accessed on 17 March 2012;

[88] Eurostat data 2008 <http://www.oceantomo.com/productsandservices/investments/indexes/ot300> accessed 17 March 2012

[89] Europe 2020, Communication COM/2010/2020 of 3 March 2010 from the Commission

[90] Single Market Act, Communication COM/2011/0206 from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions

[91] on whether EPO system should be maintained without further changes, see Chapter IV part 5 and 6. However, those assertions do not apply to the question of language.

[92] Austria's 2000 application per year should be added to German applications, as they are also in German language; applications from Denmark, the Netherlands and Sweden have nominated English for translations of the application, so should be added to the number of applications in English (although with a reserve)

applications, and The Netherlands designated English for the language of patent applications.[93] All other European countries fall way back.[94] Designating languages of the countries that are most active in using the patent system as languages for the application of unitary patent is a clear and objective criterion, and presents the least restrictive option. With models that would require translation into all Union's languages not being feasible, it is proportionate to limit the languages to ones that are mostly used in the patent system.

Furthermore, such system would lower the translation costs to 680 EUR for the entire area of the European Union, thus bringing the expenses down to 2% of the current price and saving 49-65.2 million EUR when compared to the present system.[95] Studies have shown that such cost reduction leads to an increase in patent filings,[96] which makes this strategy suitable for reaching the Union's objectives.

Therefore, even if the proposed language system does fall under the scope of non-discrimination principle, the restriction is justified under the requirements for legality of such limitation. The restriction it is based on the Treaty, has a recognized, legitimate aim of technological and scientific advancement, does not go over what is necessary to achieve that aim and does not endanger the essence of right to language diversity.

4. internal market and distortion of competition

While the first paragraph of Article 326 sets a general provision on the compliance with the Union law, the second paragraph emphasizes that enhanced cooperation must not have a detrimental effect on the internal market, by reading:

> 'Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not **constitute a barrier to or discrimination in trade between Member States, nor**

[93] ibid
[94] EPO statistics, filing 2001-2010 per country of residence of the applicant
[95] ibid 77 page 32
[96] Jérôme Danguy, Bruno Van Pottelsberghe, 'Patent fees for a sustainable EU (Community) patent system' <http://ec.europa.eu/internal_market/indprop/patent/index_en.htm> accessed on 17 March 2012

shall it distort competition between them.'

This caveat seems to send a clear message: although a group of Member States is allowed to integrate, the general objective of establishing the internal market is still a higher priority and it must not be hindered by the use of enhanced cooperation.

a) barriers to trade

Regarding barriers to trade, the unitary patent protection facilitates better market integration of the area it covers. However, it should be assessed whether enhanced cooperation, namely limiting the unitary patent protection to 25 Member States, raises barriers to trade in respect of the non-participating Member States, as Italy and Spain claim.[97]

The unitary patent protection covers the territory of only 25 Member States and does not include the territories of Italy and Span, thus partitioning the internal market into three separate protection areas. The aspect in which the use of unitary patent protection potentially hinders trade is regarding the products protected just in the participating, or just in the (one or both) non-participating Member States. Such territorial divergence in protection could discourage or even prevent the import of products from one area to another and impede the free movement of goods.[98]

At the moment, the same problem exists in regard of all 27 national territories. Also, it is not just a hypothetical problem. The high costs and complexity of the national validation required in the existing system result in a patent being averagely protected on the territory of only five Member States,[99] hence partitioning the internal market not as an exception, but as a rule.

Still, The European Court of Justice has taken a position that these national systems and their requirements to file translations into national languages do not impede intra-Community trade.[100] The Court accepted the argument claiming that the costs and complicated validation requirements

[97] Case C-274/11 *Spain vs. Council* [2011] OJ C219/12 point 3.2;
Case C-295/11 *Italy vs. Council* [2011] OJ C232/22 fourth argument
[98] exclusivity is the essence of the rights patents confer on their proprietor, and import of products which would infringe the patent can be opposed.
[99] see Chapter III part 3, also footnote 86
[100] Case C-44/98 *BASF* [1999] ECR I-06269

might result in a patent being protected only in some Member States, thus dividing the market into a zone of protection and a free zone.[101] Moreover, it acknowledged that having patent protection in only some Member States causes differences in movement of goods.[102] But the Court then emphasized that such differences depend on 'the actual, unforeseeable decisions taken by each of the operators in the light of the economic conditions existing on the various markets',[103] which makes them too uncertain and too indirect to be characterized as creating obstacles to trade in the meaning of prohibition of quantitative restrictions or measures having equivalent effect.[104] Consequently, the division of the market caused by the existence of 27 different national systems was asserted not to undermine the internal market.

The unitary patent protection creates a third level of patent protection, not to replace but to supplement the exiting European and national systems. Furthermore, it is only the territory of such protection that is limited to participating Member States, as the unitary effect can be obtained regardless of the residence or nationality of the patent proprietor. The choice of patent system and the area applied for protection are still completely dependent upon the decision of the patent proprietor. Effects of those decisions should, according to the Court's case law, be considered too uncertain and too indirect to impede cross-border trade.

Additionally, the possibilities for heterogeneous patent protection increase with the number of areas for which the paten can be protected, so three protection areas should be considered more convenient than 27. In addition, it is more probable that the product will not be protected for the entire internal market with only national systems existing, then with the unitary patent protection available. The main ambition of the proposed system is to make patent protection more feasible by lowering the overall cost for the patent protection on the entire territory of the internal market,[105] and such

[101] ibid para 17
[102] ibid para 20
[103] ibid
[104] ibid para 21
[105] see Chapter III part 3

savings could have a spillover effect on the Italian and Spanish market as well.[106]

Perception of the unitary patent protection system as an obstacle to trade would mean applying a much stricter criteria than the one used for the current system. The differences in trade caused by fragmented patent protection were so far considered as not to infringe the free movement of goods. The proposed unitary protection does not create new disparities; on the contrary, it works to eliminate them. It completely abolishes the borders between the participating Member States, and could have a positive effect for the non-participating ones as well.[107] Of course that the integration of the internal market would be better if unitary patent protection was available for the entire Union territory, but if that option was possible, enhanced cooperation would not be used.[108] If the detrimental effect is to be assessed in the light of whether it would be better if all Member States cooperated, it is difficult to conceive a case of enhanced cooperation in the area of the internal market that would pass such scrutiny.[109] The area of the internal market is consider eligible for enhanced cooperation ever since the Treaty of Amsterdam,[110] and a change of approach on that issue would be unfounded on law.

b) distortion of competition

Further on, Italy and Spain claim that the choice of languages in the Translation Proposal distorts competition by giving a competitive advantage to business in the countries whose official language is English, French or German.[111] Both countries would rather have English as the only official

[106] ibid 36
[107] Enrico Bonadio, 'The EU Embraces Enhanced Cooperation in Patent Matters: Towards a Unitary Patent Protection System'(2011) European Journal of Risk Regulation, Vol. 3, pp. 416-420, page 420
[108] the last resort principle would prevent the use of enhanced cooperation, see Chapter III part 2
[109] this is the first case of enhanced cooperation in the area of the internal market, as the Rome III Regulation concerns the Area of Freedom, Security and Justice
[110] The Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty respectively broadened the scope of application of enhanced cooperation
[111] Case C-295/11 *Italy vs. Council* [2011] OJ C232/22 argument 4
Case C-274/11 *Spain vs. Council* [2011] OJ C219/12 point 3.2

language of patent applications, as they consider that it would give an equal footing to all (non English speaking) companies.[112] In addition, Spain submitted a plea claiming that the proposed system disrespects Spain's interests. With those regards, a closer look should be taken into the impact the proposed language regime will have over competition between companies from English, French or German speaking countries and those from other countries. Also, the issue of Spain's interest, and appropriateness of assigning only the English language should be asserted.

In the proposed system, a patent application can be submitted in any language, but has to be translated in English, German or French. The costs of translation in one of those languages for the application submitted in any other Union's official language will be reimbursed up to a certain ceiling.[113] Such reimbursements are to be financed from the renewal fees for the unitary patent protection. Furthermore, the proposed transitional period is of crucial importance here. For twelve years after the proposed legislations come into force, patents in French or German will have to be submitted with an English translation, and patents in English with a translation into any other Union language.[114] The point of this translation period is to wait until high quality translation machines are available. After the transitional period lapses, mentioned additional translations will be abolished, and the translation machines will translate all applications into all Union's languages.[115]

Therefore, during the transitional period, companies from countries that do not share the official patent application languages can submit the patent application in any Union language, including the Italian and Spanish. They will have to translate it into English, French or German, but will also receive a reimbursement for that cost. If they choose to translate it into English, there will be no further requirements. On the other hand, companies from English, French or German speaking countries can submit a

[112] ibid 29 page 13
[113] Article 5 Translation Proposal
[114] Article 6 Translation Proposal
[115] ibid

patent application in their languages, but have to accompany it with a translation in English, for which they will not be reimbursed. In effect, it does not seem like they will have any competitive advantage regarding the language of application, let alone one sufficient to cause the distortion of competition.

After the translation period, all languages will still be eligible for patent application, but high quality translation machines would then translate them in all Union languages. In this phase, all companies will truly be on equal footing.

Still, it seems that both Spain and Italy would support a proposal designating only English as the official language of patent applications. Some stakeholders have also expressed the desire for unilingual, English model,[116] and English is a customary language in the field of international research,[117] commonly used in technical fields and by most patent experts.[118]

The option of unilingual model was reviewed in the Impact Assessment from 2010,[119] but rejected when it was asserted that it would be detrimental for the users of the current EPO regime. Companies that at the moment file applications in French and German would be incurred by additional costs and logistic complexities, as they would have to undergo significant practice changes.[120] These companies are not only French or German businesses, as 48% of the applications submitted to EPO from the European Union use one of these two languages.[121]

The reasons for not using only English go even further.[122] Germany and France submit the most patent applications in Europe,[123] and are not

[116] Impact Assessment, Commission staff working paper SEC/2010/796 of 30 June 2010, page 3
[117] ibid 73 page 303
[118] UNICE Position Paper on the Green Paper on the Community Patent and the Patent System in Europe (1997) Intellectual Property Rights Vol.7, No.8 <http://www.unice.org/unice/docum.nsf/all+by+description/041A4F216C32AFA6CI 2568B0004 A76D3/$File/Ipr-doc.pdf.> accessed 17 March 2012
[119] ibid 112
[120] ibid
[121] Internal EPO data 2009
[122] Also, the issue of legal certainty can be raised. The disclosure of information is a main purpose of patents, and having a translation into only one language, especially English, is not as precise as having it in at least two.

reimbursed for the costs under the currently proposed system. If English was the only language, there would be no ground to deny the proprietors who use French or German in their applications a fair reimbursement for translation costs, received by all users not sharing the official language with the system. That would significantly raise the number of given reimbursements and result in an increase of the renewal fees from which such payments are administrated, thus having a negative effect for all users of the unitary patent protection.

The English language is under the current proposal given an enhanced role, as companies not using German of French can submit an application in their own national language and supplement it only with English translation. Spanish companies at the moment use English in 93% of their applications, and will be allowed to continue doing so in the future.[124] However, Spain still considers that its rights are not respected. The Article 327 refers to the impact enhanced cooperation is allowed to have over the non-participating Member States, by reading:

'Any enhanced cooperation shall respect the competences, **rights** and obligations of those Member States which do not participate in it.' Ever since the enhanced cooperation was introduced, it has been considered that use of enhanced cooperation must not harm the non-participating Member States. The Amsterdam Treaty has been setting a high threshold for the rights of non-participating Member States, by specifying that enhanced cooperation 'shall not *affect* the competences, rights, obligations and interests of those member states which do not participate therein'.[125] This provision was changed in the Nice Treaty, which replaced the term 'affect' with 'respect', as it stands today.[126] This was clearly not just a slight terminological modification; it mitigated the requirement.[127]

In effect, even if the Translation Proposal does not take the interests of

[123] See above, EPO statistic, Chapter III part 3
[124] Rapporteur: Italy is substantially isolated on patent issue <http://www.euractiv.com/innovation-enterprise/rapporteur-italy-substantially-isolated-patent-issue-interview-505917> accessed on 17 March 2012
[125] Article 41 para 3 of the Treaty of Amsterdam [1997] OJ C340/1; from now on the Amsterdam Treaty
[126] Article 41 of the Treaty of Nice [2001] OJ C80/1; from now on the Nice Treaty
[127] ibid 29 page 6, quote by Rossi and Craig

Spanish companies in account, that does not amount to disrespect for the rights of Spain and hence an infringement of the Article 327. When deciding on the case of Community Trademark Regulation, the Court has reflected upon the issue of languages used in intellectual property systems.[128] The fact that intellectual property is not created for the benefit of all citizens, but for economic operators, was taken into account. Users of the system are not obliged to utilize it;[129] they do so in the context of their professional activity that leads to making profit.[130] Consequently, the argument that the users must bear the costs was upheld.[131] The Court then described the language regimes of intellectual property systems as the 'result of a difficult process which seeks to achieve the necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings.'[132] The conclusion was that limiting the regime to most widely know languages is proportionate, and suggestion of the use of only one language was rejected. This decision authorizes legislation to derogate from the interests of economic operators, as those interests are not absolute, but have to be balanced with other interests and circumstances.

The Translation Proposal does not create a competitive advantage for companies from English, French or German speaking countries, nor does it deteriorate the competitive advantages of companies from other countries. English language model is not necessary for preservation of competition; on the contrary, it would harm all the users of the system. Lastly, even if the enhanced cooperation does not respect Spain's interest, that does not result in violation of rights, as the Court's case law clearly reads that interests of a Member State do not amount to a right. In overall, all aspects of enhanced cooperation comply with the prohibition of undermining the internal market.

[128] ibid 67
[129] ibid para 88
[130] ibid para 89
[131] ibid
[132] ibid para 92

IV Unitary Patent Protection Proposal – a correct legal basis

1. legal basis for unitary patent protection

The European Union's competence to create new forms of intellectual property has been recognized for over 20 years now. Although previous versions of the Treaties did not explicitly provide powers to do so, establishing legal instruments for protection of intellectual property was considered to fall under the Article 235; a residual legal basis for measures necessary to attain the Treaties' objectives.[133] The European Court of Justice repeatedly confirmed this approach,[134] and Article 235 was invoked for the creation of Community trademark[135] and Community design.[136]

The issue was simplified with the Lisbon Treaty,[137] as the Article 118 TFEU now explicitly authorizes the European Union to establish measures creating European intellectual property. The first paragraph of Article 118 defines both the object to be created and the goal that object is to achieve, by stipulating:

> '… the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the **creation** of European intellectual property rights to **provide** uniform protection of intellectual property rights throughout the Union…'

If this provision is to be applied, the aim of providing unitary protection must be achieved by the means of creating European intellectual property rights, with the term 'creation' unquestionably referring to making of something new.

The Article 118 is invoked as a legal basis for unitary patent protection in the Authorizing Decision, and consequently in the Unitary Patent Protection

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[133] Article 235 of the EEC/EC, then Art. 308 EC as from the entry into force of the Treaty of Amsterdam; now Article 352 TFEU

[134] Case C- 350/92 *Spain v Council* [1995] ECR I-1985, para 24;
Opinion 1/94 ECR I-5267, para 59;
Case C-377/98*, Netherlands v Parliament and Council* [2001] ECR I-07079, para 24

[135] Council Regulation EC/40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1

[136] Council Regulation EC/6/2002 of 12 December 2001 on Community designs [2002] OJ L3

[137] simplified because there is no need to prove the necessity of the measure, and because of change in legislative procedure: Article 352 requires unanimity in the Council and gives the European Parliament advisory role, while Article 118 prescribes ordinary legislative procedure for the introduction of new rights; special legislative procedure with the Council acting unanimously is required only for translation agreements. However, this mitigation did not help the case of unitary patent to avoid use of enhanced cooperation.

Proposal. Although recourse to the Article 118 seems like an appropriate choice for the creation of unitary patents, it is doubtful whether the Unitary Patent Protection Proposal complies with the requirements specified in the first paragraph of Article 118; namely, whether it introduces a new intellectual property right.

2. what constitutes a new intellectual property right

To ascertain is the Unitary Patent Protection Proposal correctly grounded on the Article 118, it is first necessary to establish what constitutes a new intellectual property right. The European Court of Justice created a body of case law regarding the issue when deciding upon the legal basis for previously introduced intellectual property protection mechanisms, and has set a high threshold for whether certain modifications amount to creating a new intellectual property right.

In that light, the Directive on biotechnological inventions only approximates laws, and does not create a new right.[138] Even though this directive changed an essential, substantive element of patents by altering the scope of products eligible for patent protection, the Court nonetheless perceived patents issued under the directive as 'old' national patents. The decisive factor was that they are still granted through national procedures and derive their force from national law. Additionally, it was significant that the creation of a Community patent is neither the purpose nor the effect of this directive.[139]

Likewise, Regulation creating supplementary protection certificate,[140] which prolongs the duration of patents, was also considered as not to give rise to a new right. Length of protection period is fundamental for defining the concept of patents, but the Court emphasized that it does not affect the

[138] The Directive 98/44/EC of 6 July 1998 of the European Parliament and of the Council on the legal protection of biotechnological inventions [1998] OJ L213/13
[139] Case C- 350/92 *Spain v Council* [1995] ECR I-1985, para 25
[140] Council Regulation EEC/1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products [1992] OJ L182/1

substance of rights.[141]

On the other hand, the Community trademark is appropriately recognized as a new, EU form of intellectual property.[142] The Community Trademark Regulation provides a new title, regulates both procedural and substantive trademark law, priority, use and licensing of trademarks, as well as conditions for revocation and invalidity.[143]

Therefore, when assessing whether the legislation introduces a new intellectual property right, attention should be paid to its aims and effects, as well as to does it, in a full-rounded manner, govern the conditions and procedure for granting, existence and substance of the right in question.

3. application to the proposal

Under the criteria established by the European Court of Justice, it is no longer certain that the Unitary Patent Protection Proposal actually introduces a new intellectual property right and can thus be based on the Article 118.

The very titles of the Decision authorizing enhanced cooperation in the area of the *creation of unitary patent protection* and the Proposal for a Regulation implementing enhanced cooperation in the area of the *creation of unitary patent protection* reveal that they focus directly on the goal of unitary protection. Both documents completely leave out the mention of creation of rights when rephrasing Article 118 in their preambles, and the Unitary Patent Protection Proposal discovers why: the aim of Article 118 is to be achieved by giving unitary effect to European patents granted by EPO.[144] Consequently, the Unitary Patent Protection Proposal does not introduce a new patent title.

The main added value of the proposed system is providing a patent proprietor with the possibility to register unitary effect for the European patent already granted by EPO.[145] Such European patent with unitary effect could be limited, transferred, revoked or lapse only for the entire territory of all Member

[141] Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-07079, para 15 and 27
[142] confirmed in Case C- 350/92 *Spain v Council* [1995] ECR I-1985, para 23
[143] Council Regulation EC/207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1
[144] Preamble para 7 Unitary Patent Protection Proposal
[145] Article 3 para 1 Unitary Patent Protection Proposal

States taking part in enhanced cooperation.[146] Regardless of its possible practical importance, this novelty only adds another characteristic to the existing, non-EU instrument of European patent.[147]

The nature of unitary protection is accessory to the European patent,[148] which is granted according to the rules, procedures and conditions provided by EPC and implemented by EPO.[149] Therefore, all European patents go through the same established EPO procedure and have to abide the same EPC substantive provisions. The only change Unitary Patent Protection Proposal introduces regarding acquisition of right is the abolishment of national validation. National validation is required after the grant of European patents, but will not be a prerequisite for the European patents with unitary effect.[150] The validation procedures consist in registering a patent in the national patent office, by paying a registration fee and publishing a translation into national language.[151] The Unitary Patent Protection Proposal provides an alternative possibility of registering a European patent for unitary effect, which will be done solely at EPO.[152] Although the elimination of national validation could prove to be beneficial for cost-effectiveness, the change is purely administrative.

On the other hand, substantive questions of validity, infringement and limitation through compulsory license, crucial for the existence of right after granting, are not regulated by the Proposal. They remain to be governed by national laws,[153] resulting in European patent with unitary effect not having an autonomous character.[154]

Consequently, the granting phase remains to be governed by EPC, while

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[146] Article 3 para 2 Unitary Patent Protection Proposal
[147] Legal basis for the unitary patent: do not play with fire! <http://unitary-patent.eu> accessed 1 March 2012
[148] Article 3 para 3 Unitary Patent Protection Proposal
[149] Article 2 b) and c) Unitary Patent Protection Proposal
[150] Article 4 and Article 10 para 4 Unitary Patent Protection Proposal
[151] ibid 27 page 575;
ibid 5 and 6
[152] Article 12 para 1 b) Unitary Patent Protection Proposal
[153] Preamble 8 and 9 Unitary Patent Protection Proposal
[154] Helena Olsen, 'European patent with unitary effect – Reduction of high costs relating to patens valid throughout the EU?' (2011), page 40

the post-granting life of patent is still subjected to national provisions. The Unitary Patent Protection Proposal refers to the unitary protection as an instrument of its own,[155] and fails to address issues necessary for the genuine creation of rights. It does not, in its aim or effect, introduce a new European intellectual property right and therefore cannot be based on the Article 118.

4. how did we end up here

To fully understand the relevance of discrepancy between legal basis and content of the Unitary Patent Protection Proposal, it should be examined how did the proposal end up with invoking an article which implies creation of new intellectual property without actually introducing a *sui generis* right.

Even before the explicit legal basis was introduced in the Lisbon Treaty, all previous drafts and discussions aimed at an independent, EU legal instrument, referring to it as a crucial element for establishment of internal market.[156] The European Union is well aware that intellectual property by its nature affects the trade in goods and services, as well as competitive relationships within the internal market.[157] Moreover, by fostering innovation and technological development, patents are indispensible for reaching some of the EU objectives, such as economic growth and overall progress.[158] Europe 2020 Strategy aims to improve framework conditions for business to innovate by creating EU Patent;[159] and the Commission refers to the EU patent as a key element for making the 'fifth freedom', movement of knowledge, a reality.[160] Patent protection is intertwined with numerous areas relevant to the European

[155] Preamble 1 Unitary Patent Protection Proposal
[156] Competitiveness (Internal Market, Industry and Research), Press release 17076/09 of the 4 December 2009 of the 2982nd Council Meeting <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/intm/111744.pdf> accessed on 5 March 2012
[157] Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, para 22
[158] Article 3 para 3 TEU
[159] ibid 84 page 12
[160] An Industrial Property Rights Strategy for Europe, Communication COM/2008/456 of the 16 July 2008 from the Commission to the European Parliament, the Council and the European and Social Committee, page 3;
Also, Commission's stated that *'strong protection of industrial property rights should be accompanied by rigorous application of competition rules'*, page 9

Union,[161] and the creation of the European Union patent governed by EU law and under supervision of the European Court of Justice would facilitate proper balancing and coordination of EU patent policy with other vital issues.[162] For example, additional aims of the EU patent system should be furthering market integration and producing competitive advantages for EU innovators.[163]

All previous documents, including the Proposal for a Council Regulation on the Community patent of 7 April 2009,[164] were straightforwardly introducing a specific EU patent title and regulating all requirements necessary to form a new European intellectual property right.[165] This last proposal was also designating EPO to grant Community patents, but with a significant difference of EU accessing to the EPC, thus bringing the rules on granting of patents under the EU law.[166] After the grant, Community patent was to be completely governed by EU law. Regulation included rules on all essential elements of patent protection, such as rights the Community patent confers on the patent holder,[167] its effects and limitations,[168] possibility of contractual and compulsory licensing,[169] as well as conditions for revocation, invalidity and lapse.[170] Moreover, Community patent proposal included provisions openly stating the supremacy of the EU law.[171]

With the discussion on the Unitary Patent Protection Proposal being veiled in secrecy and held behind closed doors,[172] the reasons for change of

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[161] Opinion 1/09 of Advocates General of 2 July 2010, para 80

[162] general intellectual property policy (plant varieties, trade marks, etc...), competition, internal market issues, regional and SME policies

[163] Jens Schovsbo, 'Constructing an Efficient and Balanced European Patent System: Muddling through' (2011), page 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932690> accessed 1 March 2012

[164] Revised proposal 8588/09 of the 7 April 2009 for a Council Regulation on the Community patent; from now on Community patent proposal

[165] Community patent convention, Regulation proposal 2000, Regulation proposal 2004

[166] Case C-181-73 *R & V Haegeman v Belgian State* [1974] ECR 00449, para 5

[167] Articles 7, 8 and 11 Community patent proposal

[168] Article 9 Community patent proposal

[169] Articles 19 and 20 Community patent proposal;
for the compulsory license see Article 21

[170] Chapter III Community patent proposal

[171] Article 2 Community patent proposal

[172] '*On November 22nd, 2011, the Legal Affairs Committee of the European Parliament voted for a mandate, allowing the rapporteurs on the proposal for a unitary patent to pursue negotiations with the Commission and the Council behind closed doors, without any involvement from the rest of the Members of Parliament or any reporting to citizens.*', Unitary Patent: the debate will go on

approach it undertakes when compared to the Community patent and all previous proposals can only be speculated. However, two factors are certainly distinguished.

The circumstance that enhanced cooperation is used prevents the EU from being included in the EPC system as a territory for which unitary patent can be granted, which was to be the official goal of EU's accession to the EPC.[173] The entire territory of EU is not covered with only some Member States taking part in unitary protection, consequently rendering EU's accession to such system impossible. Instead, the Unitary Patent Protection Proposal refers to the Article 142 EPC, allowing a group of Contracting States to give unitary character to a European patent granted for their wholesome territory.[174] Effect is quite the opposite of the previously proposed 'Europeanization' of EPO rules - a supposedly EU form of unitary patent protection is completely incorporated and subordinated to the EPC system.

Further reason for restraining from regulating substantive patent law in the Unitary Patent Protection Proposal can be found in conforming to the desires of 'patent microcosms', an expression commonly used for a collective of intellectual property judges and attorneys.[175] Although supporting unitary protection, its members have been very persistent in expressively opposing the idea of the European Union regulating substantive patent law, as that would subject it to the jurisdiction of the European Court of Justice.[176] Their main

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in secret, <http://www.unitary-patent.eu/content/unitary-patent-debate-will-go-secret> accessed 2 March 2012

[173] Preamble 3 Community patent proposal

[174] Article 1 Unitary Patent Protection Proposal

[175] creation of this term is assigned to Hubert Legal, Director of the Legal Service of the Council of the European Union, former Judge of the Court of First Instance, who used it in his assertion of Unitary Patent Court, <http://www.ceipi.edu/uploads/media/Legal_01.pdf> accessed on 2 March 2012

[176] Solutions for a unified patent litigation system: The way forward after the opinion 1/09 of the CJEU Non-paper of the Commission services <http://www.unitary-patent.eu/content/non-paper-commission-services-solutions-unified-patent-litigation-system> accessed on 2 March 2012;
Winfried Tilmann, 'More Hope for the European Patent Court' <http://www.eplawpatentblog.com/2011/April/WTPagenbergReply.pdf> accessed on 2 March 2012;
An inside view of the patent microcosm <http://www.unitary-patent.eu/content/inside-view-patent-microcosm> accessed on 2 March 2012;
'As a result, rules which deal with substantive patent law should only be included into the

concern was the European Court of Justice interpreting substantive patent law contrary to established technical standards, resulting in unpredictable outcomes of patent litigations.[177]

Therefore, the choice of legal basis that requires establishing an independent patent right is not incidental, as an independent EU patent system is considered to be a necessity for safeguarding specific EU interests. Current drawbacks from that aspiration came to existence as a consequence of non-participation of the entire EU, and as a compromise towards interests of legal practitioners.

5. why is that bad

If the EU is about to latently relinquishing prospects of its control over an originally EU concept of unitary patent, both protection of EU interests and very efficiency of such patent are at risk.

EPO is endowed with the governance of patents in the pre-grant phase. It would be completely displaced to believe that the EPO is fit to guard any of EU's interests intertwined with patent protection, as it does not even consider itself to be subjected to the rules of the EU law.[178] Moreover, EPO is assigned with not only the implementing, but also the legislative role. By giving unitary effect to European patents, all future amendments of the EPC are blankly accepted, as the EU has no influence over them whatsoever.[179]

The EU has lately been criticized for its own lack of democratic legitimacy, and is in response striving to augment the role of the European

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Agreement and the Regulations if this is absolutely necessary.' <http://www.bardehle.com/en/news/ip_news_and_information/release/article/work-on-a-european-patent-jurisdiction-system-continues.html> accessed on 2 March 2012;

[177] Jochen Pagenberg, 'Little Hope for an EU Patent Court after the CJ Opinion', para 6 <http://www.eplawpatentblog.com/2011/April/Pagenberg%20Little%20hope.pdf> 2 March 2012

[178] *'Directive 98/44/EC of the European Parliament and of the Council of 6th July 1998 (hereafter the Directive) on the legal protection of biotechnological inventions entered into force on the 30 July 1998. EU member states are required to implement it in national law by 30 July 2000. 3. The European Patent Organization itself is not subject to this formal requirement.'*, paragraph 2 EPO OJ 8-9/1999, page 573;
'The Boards of Appeal apply the provision [the Directive] because it is law under a specific Rule of the Implementing Regulations to the EPC, and not because the Directive is a source of law to be applied directly.', Decision of the Enlarged Board of Appeal of the EPO G 1/06, point 6

[179] they reflect a compromise of whishes between 38 contracting states

Parliament in legislative process.[180] The course of action presented in the Unitary Patent Protection Proposal runs contrary to that ambition. It suggests circumventing the legitimizing role of the European Parliament, for the benefit of intergovernmental organization frequently criticized for lack of democratic legitimacy by academics, EPO staff, governmental studies, and even the European Parliament and the Commission themselves.[181]

The post-grant phase of patent existence is left for national laws, which raises concerns about the added value of unitary patent protection. Can a piece of legislation claim to introduce unitary effect, without defining essential aspects of that effect any further than stipulating that it is unitary? The Unitary Patent Protection Proposal specifies that European patent with unitary effect may be limited, transferred, revoked or lapse only in respect of all Member States,[182] but it does not regulate transfer, revocation or lapse of rights in question. By doing so, aspects vital for the existence of mentioned unitary protection are still not regulated uniformly, and the stakes are higher as a decision made under one national law should be recognized all over the territory of unitary protection. Divergence of national legal systems is thus even more emphasized and it arises to a threat to legal certainty, an essential prerequisite of the aims envisaged for the EU patent.[183] Furthermore, rights stemming from national provisions are not supplemented with the characteristics of the EU law that would improve efficiency of unitary patent protection,[184] namely autonomy in interpretation, direct applicability and

[180] Beate Kohler-Koch, Berthold Rittberger, 'Debating the democratic legitimacy of the European Union', page 10 <http://books.google.hr/books?hl=en&lr=&id=wgHfdYqoHy4C&oi=fnd&pg=PA1&dq=EU+principles+autonomy+supremacy&ots=DjTywX2hYg&sig=AnGXHhuBt56whhT-33YRGTskWlA&redir_esc=y#v=onepage&q&f=false> accessed 5 March 2012;
also Bundesverfassungsgericht judgment in Lisbon case

[181] Susana Borrás, Charalampo Koutalakis, Frank Wendler, 'European agencies and input legitimacy: EFSA, EMeA and EPO in the post-delegation phase' (2007) Journal of European Integration, Vol.29 No.5, pp. 583-600;
Criticism of governance of the European patent office, <http://unitary-patent.eu/content/criticisms-governance-european-patent-office> accessed 2 March 2012

[182] Article 3 para 2 Unitary Patent Protection Proposal

[183] L Karamountzos, 'Community Patent and European Patent Court: State of play in the Council' (2009) <http://www.europarl.europa.eu/stoa/events/workshop/20090317/karamountsos_en.pdf > accessed 17 March 2012

[184] Ibid 54

primacy in case of conflicts.[185]

The Unitary Patent Protection Proposal presents a threat to the EU legal order, as it entrusts patent protection to an intergovernmental institution that does not respect the autonomy and supremacy of the EU law, and jeopardizes the democratic principles. Moreover, this proposal does not offer a satisfying level of legal certainty.

6. how can it be fixed

When reasons behind abandoning the idea of EU patents are assessed against dire consequences such course of action would have for the functioning of system, it becomes evident that the situation of wrong legal basis should be corrected not by introducing another legal basis,[186] but by amending the proposal so as to introduce a EU *sui generis* patent right.

Fact that only some Member States are taking part in unitary patent protection does not prevent the EU from bringing EPC rules on granting of patents under the umbrella of EU law, as the main function of enhanced cooperation is to promote use of EU institutions and EU rules.[187] Accessing to EPO is not the only option to do so; instead, the Unitary Patent Protection Proposal could on its own codify the EPC rules for granting of patents. This turns out to be an even more viable option since practice shows that some EPC rules seem to require further interpretation due to the newest developments in area of patents.[188] Therefore, referral to the Article 142 EPC should be deleted,[189] a specific patent title should be introduced, and substantive patent law

[185] Ibid 36 page 7
[186] A new Authorizing decision would be necessary, as this one referrers to the Article 118. Also, area should be covered by Treaty, thus making enhanced cooperation questionable (there is no such basis besides 118!)
[187] Editorial comments, 'Enhanced cooperation, A union a taille reduite or a porte tournante?' (2011) Common Market Law Review, Vol. 48, pp 317-327
[188] EPO's Enlarged Board of Appeal explicitly requested the legislative clarifications, in the Opinion G 3/08 published on May 12 2010: *'When judiciary-driven legal development meets its limits, it is time for the legislator to take over'*
[189] it is not even certain whether EU Regulation can be considered a special agreement since it is not a typical international law act, and furthermore, even if it could, whether the Member States could have the competence to enter into such agreement, if relevant parts of substantive patent law were codified on a EU level (see Case 22-70 *ERTA* [1971] ECR 00263, on development of competences)

regarding both granting and existence of patents should be added.

Concerns about the European Court of Justice interpreting substantive patent law should be disregarded. The Court has already entered into the substance of intellectual property by defining functions and subject matters of intellectual property rights when developing a doctrine of exhaustion,[190] as well as by taking an active role in the interpretation of Community Trademark Regulation provisions. Moreover, The Court analyzed certain aspects of the Agreement on trade related aspects of intellectual property, concluded by both EU and Member States and thus providing the Court with jurisdiction to interpret provisions harmonizing substantive patent law.[191] However, in doing so, the Court does not go into technological specifics. Under the Courts jurisdiction to interpret EU law, interpretations of substantive intellectual property law are given abstractly, without establishing the facts of the case or applying given clarifications to them.[192] In result, intellectual property areas in which the Court is already enrolled did not suffer deterioration.

Including the substantive law provisions in the Unitary Patent Protection does not touch on the interests of non-participating Member States, while it would enhance and democratize the governance of proposed patent system. It would facilitate purposive navigation of the general developments in patent law and provide control and legitimization to EPO decisions.[193] Also, it would not endanger the quality of patents and patent litigation. Complex issues requiring technical expertise would be left for the competent courts, while European Court of Justice would be entrusted with what it is fit to do the best: balancing EU patent policy with neighboring areas, thus reflecting the actual policy

[190] for example, Case C-15/57 *Centrafarm v. Sterling Drug* [1974]
[191] ibid 16;
Case C-53/96 Hermes [1998] ECR I-3603;
Joined Cases C-300/98 and C-392/98 Dior [2000] ECR I-11307
[192] Clement Salung Petersen, Jens Schovsbo, 'On Law and Policy in a European and European Union Patent Court (EEUPC) - What Will It do to Patent Law and What will Patent Law do to It?', page 14 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1572521> accessed 2 March 2012
[193] I. Schneider, 'Governing the patent system in Europe: the EPO's supranational autonomy and its need for a regulatory perspective' (2009) Science and Public Policy, Vol. 36 No. 8, pp 619-629, page 628

reasons and special circumstances surrounding the substantive patent law.[194] That would also bring the Unitary Patent Protection Proposal in line with the requirements regarding unitary patent litigation stated in the Opinion of Advocate General[195] and the Opinion 1/09.[196] Both acts respectively emphasize that the tasks entrusted to EPO require judicial review by the court able to ask preliminary questions to the European Court of Justice. Therefore, the Court's jurisdiction over substantive patent issues should not be feared and must not be avoided.

Moreover, greater unification of patent protection would be achieved. Rules applying to patent with unitary effect would be uniformly legislated and interpreted, leading towards legal certainty and predictable litigation outcomes. Control over the substantive rules on patents, their administration and implementation would on the one hand preserve interests of the EU, and on the other enable EU patent system to reach the benefits of providing efficient unitary patent protection.

In conclusion, the mistake is not in the choice of a legal basis that requires the creation of new intellectual property, but in the content of the Unitary Patent Protection Proposal that does not introduce an autonomous EU patent, and should be accordingly amended.

V Conclusion

At first glance, it seems doubtful whether the introduction of unitary patent protection by enhanced cooperation complies with the legal requirements of such cooperation. Nevertheless, a closer insight reveals that the issues contested for violations actually present the inherent characteristics of the system.

On the one hand, the introduction of cost effective and efficient unitary

[194] Ibid 193 page 5

[195] *'The European Union should not either delegate powers to an international body or transform into its legal system acts issued by an international body without ensuring that effective judicial control exists, exercised by an independent court that is required to observe Union law and is authorized to refer a preliminary question to the Court of Justice for a ruling, where appropriate'*, para 72

[196] Opinion 1/09 [2011] ECR 00000 para 83-88, referring to Case C-224/01, *Köbler* [2003] ECR I-10239 and Case C-129/00, *Commission v. Italy* [2003] ECR I-14637

patent protection has an impact on numerous issues considered to be of the vital interests for the European Union. It encompasses the matter of unity of the European Union, preservation of language diversity, integration of the internal market, enhancement of competitiveness and incentive for the research and development. It is a field in which various interests collide, making certain compromises indispensible for the establishment of the European Union patent system.

On the other, the enhanced cooperation is in its nature an exception to the rule. If it is ever to be utilized, the territory over which it has effect and the use of the European Union institutions will be restricted to the participating Member States. Accordingly, it is capable of facilitating direct internal market integration only for those Member States. However, when the reaching of consensus on the European Union level turns out to be impossible, the institute of enhanced cooperation seems better than the alternatives, namely taking no action or taking the cooperation out of the European Union.

Furthermore, it appears that the use of enhanced cooperation in the case of unitary patent protection complies with the law and respects the set safeguards. Creation of European intellectual property is an internal market measure and not an exclusive competence of the Union, as it falls under the field of shared competences and does not prevent the non participating Member States to establish their own transnational intellectual property instruments. The enhanced cooperation is used as a last resort, as no agreement seems possible in the foreseeable future. The chosen language regime does not amount to discrimination, but even if it did, it would be a justified limitation, as it is necessary, suitable to achieve the Treaties' objectives, respects the essence of the right to language diversity and is proportionate. It would not create a competitive advantage for the countries using the designated languages and thus does not discriminate in trade or distort competition. It achieves a better integration of the internal market between the participating Member States, and according to the Court's case law should not be considered as creating obstacles to trade towards the non-participating Member States.

However, the implementation of the enhanced cooperation is worrisome. The Unitary Patent Protection Proposal does not introduce a new intellectual property right, and thus fails to comply with the invoked legal basis. That could prove to be detrimental for the efficiency of the unitary patent protection, as well as for the interests of the European Union as a whole. It would be quite a missed opportunity if the legitimate case of enhanced cooperation would fail to address all issues necessary for the optimal patent protection system. Therefore, the Unitary Patent Protection Proposal should be revised and accordingly amended. The language regime is, on the other hand, dependent on the agreements regarding reimbursement fees during the transitional period, and the foreseen availability of the translation machines after the period lapses. Only the future can show whether the fees will be appropriately distributed and whether the machines will actually come to existence. Failure in each of these tasks could prove to be fatal for the European Union patent system.

The European Court of Justice will have the final say on the legality of the enhanced cooperation, and will hopefully clarify this overlooked instrument and determine some of the conditions for its application. In the meantime, the proposed system needs to be modified. The efforts to establish a European Union patent system would be rendered pointless if the quality of the system is overlooked, even more so if it ends up being detrimental for the European Union.

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