Academics confirm flaws in the unitary patent

A short time after the Commission has published its proposal for a regulation on the unitary patent, we have raised some serious concerns with regard to the very legality of the regulation and to the political issue of the governance of the European patent system. Now, some academic studies are confirming all issues we’ve raised one after the other. Such serious flaws cannot be ignored anymore and need to be addressed by the EU legislator. Failing to do so, the unitary patent would unavoidably be no more than a stillborn child.

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Powers waived by EU to EPO

Our first and main concern with the current proposal for a unitary patent is that it amounts for the EU to waive its powers to define a patent policy for the benefit of the European Patent Office (EPO). This shift of powers from Commissioner Barnier goes in the exact opposite of the objectives of previous (failed) attempts to implement a unitary EU patent. Indeed, the Convention (1975) and the Agreement (1989), as well as the Regulation (2000) on the Community Patent, aimed to put the governance of the European patent system in general, and of the European Patent Office (EPO) in particular, under the framework of the European Union (EU).

The current proposal is such a surprising reversal of the framers of the European patent system's spirit, that Professor Hanns Ullrich, from the Max Plank Institute, strongly warns against this loss of powers:

one hardly dares to inquire into the reasons, which have driven the Union?s legislator, Commission, Council, and Parliament, to adopt this monstrous, multi-tentacular patent protection, which they will no more be able to tame.
His colleague, Professor Matthias Lamping⁴ [18], confirms the irreversibility of this shift of powers:

For some time now, the Commission has been on the sidelines in the battle for European patent policy. Recently, this has become a cul-de-sac from which there is hardly any escape. In the course of two decades, the Commission has been unable to present a practicable protection and judicial system that would be attractive to industry and conducive to technological progress, and now sees its powers irreversibly shifting to the EPO, on whose governance and policy it has no direct influence. However, the situation cannot be saved with brute force.

And, Professor Jean-Christophe Galloux⁵ [19], from Pantheon Assas (Paris II) University, points out how harmful is such a waiver of sovereignty for the European innovation:

However, I think it is a pity that we always go towards this logic of a lack of sovereignty. And that, with regard to the patent field, which determines the innovation policy, well this sovereignty is to be delegated [?] to a body which is not controlled by the States, nor by the European Union, with a title, whose granting, an even to a large extent, its existence, won't be controlled. And I find it is a pity that we always go towards this logic of a lack of sovereignty in a field which is the main field of the intellectual property, where an active policy is precisely needed.

The problem is that patents confer a very strong power of exclusion to their owners. The grant of such a strong power is to be balanced with other policy goals and with other rights conferred by law: the freedom of the arts and sciences, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the principle of proportionality and protection of legitimate interests, the freedom of movement of goods, etc. In the current European patent system, the EPO is in charge to grant patents, but these are to be validated by government-dependent national patent offices, and by national courts to be enforced. With the unitary patent, EPO's acts are likely to not be subject to a review by an independent court anymore.

In order to bring back the governance of the European patent system in the hands of the EU, we have proposed an amendment⁶ [21] to write down in EU law, provisions pertaining to substantive patent law, i.e. what can be patented or not, and under which requirements, and another one⁷ [22] to recall exclusions from patentability. More specifically, we have addressed the issue of the EPO currently granting patents on software ideas, against the letter and the spirit of European patent law, with an amendment⁸ [23] which clearly defines boundaries of patentability.
Control of EPO administrative acts

The EPO is an international body, and as such is not bound by EU law. Nevertheless, the EU is about to delegate to the EPO the grant of EU unitary patents. Such a delegation of powers needs a review by an independent EU court. Professor Thomas Jaeger\[24\], again from the Max Plank Institute of Munich, has not failed to notice this requirement:

In sum thus, several principles of EU law seeking to safeguard public as well as individual concerns, namely the autonomy of EU law, but also the principles of legality, rule of law and completeness of the system of remedies, make it imperative that EPO acts in application of EU law are subjected to some form of EU court review.

Actually, the need for a review of EPO’s acts by an independent court was recalled by the Advocates General of the Court of Justice of the European Union (CJEU), as quoted by Thomas Jaeger\[25\]:

The idea suggested by the transformation method that the EPO’s acts did not impact the life and legal effects of the unitary patent or that the EPO was detached from an interpretation of the EU regulation on the unitary patent is thus inherently flawed. In fact, the Advocates General in their Statement of Position for Opinion 1/09 had already made it very clear, that the purely formalistic recourse to a transformation approach did not in any way change the effects of EPO acts vis-à-vis EU law and could not remove the requirement to subject the EPO to EU court control: ?40. 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?. As long as the legal basis for the unitary patent is an EU law act (even if adopted within an [enhanced cooperation]) and not an international agreement, this requirement for a sufficient EU court control of EPO will always remain in place and irrespective of whether the relationship between the EU and the EPO is formally denominated as one of delegation or one of transformation.

Jean-Christophe Galloux\[26\] has also warned against the temptation to shirk this issue:
But the main issue is that of judicial review. It is the fact and this has been recalled by the Advocate Generals and the Court of Justice in its Opinion 1/09 that the Union cannot delegate some powers to a judicial body, without ensuring there is an effective judicial review, exercised by an independent court, which is required to comply with Union law and which is authorised, if appropriate, to refer to the Court of Justice for a preliminary ruling. Nevertheless, I should add that disputes over the opposition procedure will address patents with unitary effect, without any judicial review from authorities of the Union. Disputes over post-grant limitation will address unitary titles, without any review. Even disputes it can be conceived that they exist over the very acquisition of the recording of the unitary title, are not envisaged. Will it be attributed to the EPO? I'm sorry to say so and to drive a point home: are boards of the EPO considered as courts in the sense of the European Court of Human Rights? The answer is they are not! The issue remains unresolved. Not tackling it will cause some troubles.

We have proposed an amendment stating explicitly that a recourse against any administrative decision of the EPO is available before a national independent court. Also three other amendments ensure that the European Parliament, as EU co-legislator, will be implied in defining patent policy, instead of leaving Member States alone delegating this task to the heads of their national patent office.

Compliance with EU Law

Moreover, the implementation of this shift of powers is based on a legal architecture which is questionable to say the least. Thomas Jaeger has denounced such legal deficiencies:

The 2011 proposal for the implementation of patent protection is vitiated by several legal deficiencies. They relate to that proposal?s legislative, substantive and institutional aspects

These legal flaws are detailed in sections below, but for the time being, it should be emphasised that their consequences undermine the whole project. Indeed, the Court of justice of the European Union (CJUE) is likely to nullify the regulation on the unitary patent for non compliance with the EU treaties. And even if the project eventually manages to make its way through with brute force, escaping from a constitutional review, it will be detrimental to the EU economy. Thus, Thomas Jaeger explains:

In conclusion, the current proposals show flaws on both the levels of the substantive patent and of its flanking court model. As concerns the substantive patent, several central questions are still unclear. These relate to the overall legality of the [enhanced cooperation] approach, to the benefit derived from a downsized right under an [enhanced cooperation] approach and to the lack of EU court control over the EPO. As long as these issues on the substantive level have not been resolved and the legal basis, nature and scope of the substantive right remain shady, the design of a flanking court cannot be finalized. What is more, a system like the one under the present proposals, which shows significant risks of imbalances, is probably less beneficial than the present system, where right holders and users alike encounter similar obstacles.

Therefore, we have proposed three amendments that restate the primacy and autonomy of EU Law.

Compliance with Art. 118 TFEU

The first legal issue we've raised is about the legal nature of the unitary patent. The Treaty on the Functioning of the European Union (TFEU) gives competence to the EU to create such a unitary patent. But the current proposal defines it as an usual patent granted by the EPO, to which a mere unitary character is attached.

Thomas Jaeger wonders whether the legal nature of the unitary patent is therefore based on EU law, as any right created by the way of an EU regulation, or on international law, as usual patents granted by the EPO, which is an international body installed by an international convention:
Nonetheless, the effective yield of this exercise and the legal nature of the unitary patent remain somewhat murky: Is this type of right intended to be an EU law-based right sui generis endowed with all the characteristics associated with EU law (in particular autonomy in the interpretation of its scope and effects, direct applicability and primacy in case of conflicts) or will it be something different in nature, closer to international law and of a lesser degree of legal autonomy?

This legal construction leads Jean-Christophe Galloux[34] to question whether such a legal nature would be compliant with the TFEU:

Is the European patent with unitary effect a title or not? Everybody agrees that it has some legal effects, it was even created for this reason, but is it a title? The title, no it isn't, this is not a new title, really! And here we are faced with a legal platypus, because we have a title that is not a new title, but the governing law is substantially different from what it should have been before.

Is it consistent with Article 118.1 TFEU, since a new title has not been created? This is a particular issue.

But, according to Matthias Lamping[36], the unitary patent cannot be anything but a genuine Union right:
The “European patent with unitary effect” creates the impression of being merely a European bundle patent whose effect extends over 25 contracting states. De facto, however, the unitary patent is a genuine Union right. The Regulation proposal states that the unitary effect of the European patent is to arise within the entirety of the territories of the participating Member States upon registration. European patents that were granted with different sets of claims for different Member States shall not benefit from unitary effect. In addition, European patents with unitary effect shall have a unitary character. They shall provide uniform protection and shall have equal effect in all Member States. They may only be limited, transferred, revoked or lapse in respect of all the Member States. Seen this way, the content of the right is not any different to the traditional Community patent envisaged by the original “Regulation on the Community Patent”. The main features of the unitary patent are identical to those of the Community trademark or the Community design: unitary character, uniform protection, equal effect in all participating Member States. The decisive factor, ultimately, is that the legal nature of patent protection is based on a legal act of the Union; the sphere of national legislation is left behind and the creation of protection is confirmed by means of European law. The terminological difference between the European patent with unitary effect and a conventional European title such as the Community trademark or the Community design is of no legal significance (falsa demonstratio non nocet). With regard to the division of powers, the European patent with unitary effect is thus a case of misleading labeling. Enhanced cooperation would accordingly have to be rejected.

And the indisputable EU nature of the unitary patent is confirmed in details by Hanns Ullrich:

Either way, the drafters of the [Unitary Patent] Regulation got it wrong, just as wrong as they got the entire idea of a European patent muting from a bundle of separate internationally uniform national rights into such a bundle hold together by a “unitary effect”, and yet remains the same “European patent” or “bundle” of (national?) patents. The truth rather is that the unitary effect transforms and unites the separate rights into one right of European Union law.

Indeed, the theoretical concept of national patents or a “European” patent continuing to exist as such while producing exclusive effects and becoming an object of trade as a matter of European Union law represents but a doctrinal bubble. It is these effects of exclusivity, which constitute the property right. There are no national patents nor can there be a “European” patent without such legal substance. [...] The transformation of the patent from a bundle of national rights into a unitary right thus affects its very existence, raising it from the Member State level to that of the Union (of which enhanced cooperation is but a part). There does not remain so to speak some “European” legal leftover on the ground, since even the specification of the patent represents nothing unless supported by some substantive law, in casu by Union law.

In order to clarify this ambiguity, we have proposed an amendment stating explicitly that the unitary patent is a title of the EU.

**Autonomy of the unitary patent**

But if the unitary patent is by nature a right of the EU, it has to be governed exclusively by EU law. To say it another way, the unitary patent should have an autonomous character. This doesn't prevent the grant of unitary patents to be delegated to an extra-EU body, namely the EPO. But the provisions of the European Patent Convention which carry out such a delegation of powers, shall be contemplated as included in EU law, and, as such, are subject to the same rules as if unitary patents were granted by an EU agency. This is a *sine qua non* condition for the CJEU to ensure that rights granted according to EU law are fully compliant with the legal and judicial framework of the EU.

Previous attempts to implement a unitary patent have all defined it as having an autonomous character, from the Convention on the Community Patent of 1975 to the last revision of the Regulation on a Community Patent on 2009. Even the measures implementing enhanced cooperation outlined by the Commission in its explanatory memorandum of the proposal for a Council decision authorising enhanced cooperation in the area of the creation of unitary patent protection (COM(2010) 790) included such an autonomous character of the unitary patent. But, for some unknown reasons, the final proposal for a regulation on the unitary patent is silent on such an autonomy.
Hanns Ullrich confirms that defining the autonomy of the unitary patent is in no way prevented by the enhanced cooperation procedure, and that this autonomy must actually be defined:

Nothing in the nature of enhanced cooperation and its relationship with the European Patent Organization stands in the way of conceiving the unitary patent, as one must, as an autonomous title of protection, which is fully based on European Union law, albeit of territorially limited scope.

One of our proposed amendments clearly reaffirms the autonomy of the unitary patent.

Substantive patent law

The flaws highlighted above were pointing to some lacks in the regulation on the unitary patent to include provisions related to substantive patent law. Conversely, the current proposal for a regulation defines a small subset of substantive patent law: article 6 defines what constitutes a direct infringement to a unitary patent, article 7 defines what constitutes a indirect infringement to a unitary patent, article 8 defines limitations to rights conferred by a unitary patent, and article 9 defines the exhaustion of the rights conferred by a unitary patent.

Nevertheless, these minimal inclusions of substantive patent law into the regulation on the unitary patent seem to be already too much for the patent microcosm, fearing that it would expand too far away the issues which could be referred to the CJEU for a preliminary ruling. The patent microcosm has proposed to move these articles from the regulation on the unitary patent to the related international agreement on a unified patent court. Such a move would amount to ask for a jurisdiction of exception where patent litigations would not be subject to the same requirements than any other litigations.

Hanns Ullrich, confirming our own comment, explains why such a move has rightfully been rejected by the Committee on Legal Affairs of the European Parliament:

Note, that such substance and uniformity may not be maintained by transposing Art. 6 ? 9 of the Proposal of a [Unitary Patent] Regulation to the draft Agreement on a Unified Patent Court, as proposed by a resolution of 28/29 October 2011 of the ?Intellectual Property Judges Association? under the strongly voiced presidency of R. Jacob, and supported by an opinion given by Kraßer for the European Patent Lawyers Association (all available at http://www.eplawpatentblog.com). This lobby initiative has been carried to the EP Legal Committee by MEP Wikström (see EP Legal Committee, Draft Report Rapkay, EP Doc. 2011/0093 (COD) of 27 October 2011, Amendment 65 ? 67), but for good reason has not been retained. Not only does this proposal empty Art. 118 para.1 TFEU of its substance and carry the unitary patent out of the Council?s authorization of enhanced cooperation, since this agreement is to be concluded between the Member States alone as an international convention outside the framework of the EU. Rather, it also means that all the substance of the unitary patent will be derived from public international law, and, thus, although part of the framework regulation of the Internal Market, will be outside the reach of the EU as regards any future amendments as well as beyond the reach and oversight of the ECJ. The latter, of course, is precisely the objective of the judges? move, the reasons given being fears of delays in infringement proceedings, and, indeed, that ?the rulings of the non-specialist CJEU would (not)be clear?, and that ?the whole point of creating a specialist patent court for Europe would be lost? (Jacob, ibid.). This shows that every possible attempt is made to escape EU law. However, the purpose of Art. 118 TFEU precisely is to confer upon the EU the power to establish an intellectual property system and a policy of its own. The provision has not been introduced to enable the EU to delegate that policy to Member States. In this respect, enhanced cooperation does not make a difference. Rather, it must be implemented in the same EU-perspective, since its objective is to intensify market integration with a view to expand it to the entire EU.

And Thomas Jaeger goes a step further, describing this attempt as almost schizophrenic, and bound to fail, no matter how provisions of substantive patent law are detailed in the regulation on the unitary patent:
While the patent judges? move can hardly achieve the desired effect since the ECJ will necessarily be competent to adjudicate on the scope and effects of an EU law-based right in final instance irrespective of the level of detail to which those effects are laid out in the corresponding regulation, it is nonetheless evidence the somewhat contradictory and almost schizophrenic attempt to, on the one hand, ground the unitary effect in EU law by virtue of the legal basis afforded by Art. 118 TFEU while, on the other hand, trying to dissociate the patent as far as possible from the nature and institutions of the EU legal order.

While there is no more question on the unavoidable inclusion of articles 6-9 in the regulation on the unitary patent, some players could still be tempted to require their removal. Therefore, we ask the European Parliament to still reject firmly such attempts.

Usage of Art. 142 EPC

Another legal flaw that we've raised concerns the usage of Article 142 of the European Patent Convention (EPC), which allows a group of EPC Contracting States to reach an agreement in order to add a unitary character to the usual patents granted by the EPO. The problem is that it is a provision of the EPC, which is an international agreement, whereas the regulation on the unitary patent is a normative act of Union law. Assuming that this regulation can be viewed as an agreement in the sense of Art. 142 EPC mixes two fields of law ? municipal law and public international law ? which are subject to different rules, apply to different legal entities, and therefore are unlikely to be compatible.

This is underlined by the head of legal division of the Spanish patent office, Raquel Sampedro:

With regard to the regulation implementing the enhanced cooperation and foreseeing the uniform protection, I just want to point out that the legal basis is actually the Article 142 of the European Patent Convention. And then, we are wondering whether a community regulation can be an agreement between contracting States, in the sense of Article 142. We, in Spain, consider that a regulation, according to Article 288 TFEU, is a legal act of the Union, and that it is not an act of the Member States, but of the Union, as a person or an international body. Then, the legal basis of the regulation is not actually the Article 118 of the Treaty. No community title is created, as it has been already said.

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

Moreover, according to Matthias Lamping[33] [52], the power to create a unitary patent should be interpreted as an exclusive competence of the EU. Therefore, Member States have no power to conclude an international agreement as specified by Art. 142 EPC, to create such a unitary patent:

The competence established by Art. 118 TFEU is admittedly interpreted as a shared competence within the meaning of Arts. 2(2) and 4(2) TFEU. As a result, the Union would be bound by the principle of subsidiarity and could only make use of its competence if and in so far as the objectives of the action under consideration cannot be sufficiently achieved by the Member States (Art. 5(3) TEU). This cannot however apply to the creation of ?European intellectual property rights? within the meaning of the Art. 118(1) TFEU, such as the Community trademark, the Community design or the EU patent, but at best to the language arrangements to be applied to them (Art. 118(2) TFEU). It is a characteristic of exclusive competence that only the Union is at all entitled to become active, which primarily depends on whether a ?blocking effect? to the detriment of the Member States is necessary in order to allow the EU to effectively fulfil its duties. Accordingly, the exclusive competences include those areas ?where it is essential that Member States do not act by themselves, even if no Union solution can be found?. With respect to the creation of an EU patent, however, the question of whether an exclusive action on the part of the Union is essential for the smooth functioning of the internal market does not even arise. After all, it can by definition not be part of the competence of the Member States to create rights that result by virtue of a Union act. Nor would a different interpretation be compatible with Art. 20(4) TEU, since acts adopted in the framework of enhanced cooperation shall not be regarded as part of the acquis. It would lack coherence to permit the creation of ?European rights? within the framework of enhanced cooperation but not to regard them as such. As a result, there are plausible reasons to assume that enhanced cooperation should not be admissible on the basis of Art. 118(1) TFEU. Thus, irrespective of where the provision is anchored in the Treaty text, the creation of ?European rights? must be regarded an exclusive competence of the Union.

In order to solve this legal issue, we have proposed some amendments[34] [53] to delete from the regulation provisions that mistakenly use Art. 142 EPC onwards.
Other deficiencies

In our own analysis of legal deficiencies of the regulation on the unitary patent\textsuperscript{35} [54], we have focussed on issues which are described above, since they are so fundamental, that if they are not solved, the regulation is likely to be found illegal. But academics have underlined other flaws.

Rights of prior use, compulsory licences and entry into force

As we have noticed above, the current proposal includes only a small subset of substantive patent law, while, as a right of the EU, the mandatory autonomous character of the unitary patent should require the regulation to embrace every aspect of law related to such a substantive right.

This mainly includes conditions on patentability, but as underlined by Matthias Lamping\textsuperscript{36} [55], some essential provisions are also missing, namely rights of prior use and compulsory licenses:

Unlike the Commission's proposal for a ?Regulation on the Community Patent? which up to November 2010 was still the subject of negotiations in the Council, neither the Commission's current draft nor the Council's compromise contains provisions on compulsory licences or rights of prior use. The Commission's proposal even refrains from making any provision, while the preamble of the compromise text at least states that ?compulsory licences for European patents with unitary effect should be governed by the national legislations of the participating Member States on their respective territories?. This however means abandoning control over an essential aspect of balancing the conflicting interests involved in the context of patent protection. As a result, the proposed Regulation merely unifies the creation of protection and the acts of infringement, while there is a huge deficit with regard to the functional balance of the system. This gives the impression that the patent is an exclusive right without limiting contours. In turn, this is precisely what it is not. By misleadingly reducing ? or elevating ? the patent to a ?sacred property right?, the Regulation proposal fundamentally misconceives the policy function that patent law ought to fulfil as a framework regulation of the market economy. This falls short of the need for market integration and the institutional requirements of a patent system, which is apt to satisfy private and public interests equally on all levels.

Hanns Ullrich\textsuperscript{37} [56] explains that the lack of provisions on compulsory licenses at the EU level is detrimental for public interest and innovation:

As it stands, however, possibly contrary to its intentions, the Proposal de jure exempts the European patent with unitary effect from any public interest limitation of the exclusivity by way of compulsory licensing, be the interest of national or European concern, and regardless of whether it relates to overcoming impediments to innovation or to public health.

Another practical issue is that patent holders can request for a unitary effect after an usual European patent has been granted, creating legal uncertainty for any legal action that could happen between the date when the patent is granted and the date when its unitary effect is recorded. Hanns Ullrich\textsuperscript{38} [57] points out this impracticable situation:
A first conceptual and practical problem arises from that the grant of the European patent takes effect from the date on which the European Patent Bulletin mentions the grant (Art. 97 para. 3 EPC). On that date the patent produces its full effect under national law (Art. 64 para. 1 EPC). Therefore, the registration of the unitary effect (Art. 3 para. 1 Draft [Unitary Patent] Regulation), as requested, must either be made before or at least on that date ? which as a matter of procedural logic is hardly possible ? or else Member States must accept and make sure that the ?national? effect, which the patent produces between the date of its public mention in the European Patent Bulletin and the date of registration of the unitary effect, be retroactively suppressed, namely be deemed not to have occurred (Art. 4 para. 2 draft [Unitary Patent] Regulation). Obviously, this absurd rule is bound to create confusion in cases, where the patented invention is already used by other market actors. Moreover, it arguably constitutes a departure from Art. 64 para. 1 EPC, thus requiring an amendment of the European Patent Convention.

It is obvious that all these deficiencies have to be fixed by way of amendments, otherwise the unitary patent will be practically unusable.

**Unified Patent Court**

Inseparable from the regulation on the unitary patent, the whole project also includes a regulation on its linguistic aspects, and an international agreement setting up a Unified Patent Court. This website focuses mainly on the former regulation, since it is decided through the ?co-decision? procedure by the European Parliament and the Council of the EU (i.e. ministers of participating Member States), citizen are able to give some inputs to their representatives, and to be influential on the policy making decisions. Whereas, the second regulation on language aspects of the unitary patent is decided only by the Council, with the European Parliament having a mere consulting role. As concerns the agreement on a Unified Patent Court, it is discussed by Member States only.

Nevertheless, the latest is a very important piece of this project, since the envisaged court is supposed to have exclusive competence for litigations on unitary patents, as well as on usual European patents granted by the EPO. Our opinion is that such an agreement does not comply with EU law as long as the EU, as a legal entity by itself, is not a party to this agreement, as it is the case in the current draft. This comes from the inability of Member States to conclude an international agreement covering some elements of EU law. It doesn't matter whether some third non-EU States are parties to this agreement, or that it is concluded between some Member States only, because in either case Member States acting by themselves could endanger the consistency of the EU legal construction and policy. This issue has been raised by the Luxembourg, but, unfortunately, the opinion of the legal service of the Council is only partially available to the public, with any substantial legal answer being hidden.

This exclusion of the EU is particularly puzzling since the previous version of this agreement (the European and European Union Patent Court, or EEUPC) included the EU, as well as non-EU Contracting States of the EPC. This previous draft was judged to not comply with the EU treaties by the CJEU precisely because it was not sufficiently inserted in the EU judicial and institutional framework. The exclusion of non-EU States can be understood as a reply to CJEU's criticisms that the patent court should be included in the EU jurisdictional framework, in the same way as national courts are included. But nothing in the CJEU's opinion can explain the non-participation of the EU itself. Rather, the CJEU's opinion implies the contrary. And one cannot but think that this exclusion of the EU has been made purposely to avoid the CJEU to review the compliance of the agreement on a Unified Patent Court with the EU treaties. But such a tricky move is bound to fail sooner or later, since anybody involved in a litigation judged by the Unified Patent Court will be able to contest the legality of the agreement before the CJEU. As any Member State, specially non-participating Member States, can do so as soon as the agreement is signed.

Thomas Jaeger is also of the opinion that the current draft for an agreement on a Unified Patent Court does not answers to the concerns raised by the CJEU:
As concerns the proposals for a flanking court system, those look essentially like a copy of EPLA with an EEUPC brush-up. By contrast, those proposals are in no way substantially similar to the BENELUX court model. EPLA was marred for concerns over the division of vertical competences, whereas the EEUPC was marred for incompatibilities with EU law. The follow-up model proposed by the Commission and the Council does not remedy those ancient concerns and appears to be far from compatible with EU law. Essentially thus, we are now essentially back to square one in the discussions over the design of a patent court.

Furthermore, we think that such an envisaged specialised court is not able to balance patent law with other concerns, such as fundamental freedoms, or competition law. Our opinion is based on the example of the United-States patent system, where such a specialised patent court exists for about thirty years, and has proven to have introduced some bias in favour of patents owners.

This is confirmed by Jeffrey Samuels[45] [64], from the University of Akrai:

Some of the general public contended [?] that the Federal Circuit has become too identified with the interests of the patent community, and with expanding rights of patent holders too far, that it was in effect captured by the patent bar.

Today the Supreme Court serves as a valuable check on the Federal Circuit. Perhaps the Court of Justice will serve the same or a similar role vis-à-vis the UE Patent Court.

This underlines the need for an overview by the CJEU, and, conversely, the attempt by the patent microcosm to have the CJEU as less involved as possible.

Justine Pila[46] [66], from the University of Oxford, express clearly why an overview by the CJEU is required:
Lesson 1 is that patent law does not belong exclusively to the worlds of commerce, industry and technology, but rather has other social and cultural dimensions, which ought to be considered by the legislator and court when developing underpinnings. Lesson two is that a patent is an exceptional grant which must (therefore) be limited to that which merits the patentee his monopoly protection. Furthering find: the patentability and patent scope cannot be separated. Now, both of these initial lessons concern substantive law, raising the question how they to be headed. Many would say ?No?, but I would like to venture ?Yes? for at least two reasons. First, they commercially go coherence and democracy. And second, they temper with respect the expansionist and insulate tendencies of specialised technical tribunals. Hence, lesson three: there is value in a European patent system which forms part of a general European legal order and which is headed by a generalist superior court.

We advise the European Parliament, even if its opinion is non-biding, to decline giving its consent to any agreement where the patent court would not be fully integrated in the EU judicial and institutional framework. This includes the requirement for the EU to be party of such an agreement, and for the CJEU to rules on subject matters of substantive patent law.

Enhanced cooperation

Finally, the first issue that the project has to overcome is the legality of the cooperation procedure itself. Matthias Lamping [47] [68] demonstrates that there are many serious grounds to consider that the enhanced cooperation procedure does not comply with the EU treaties:

However, the situation cannot be saved with brute force. Enhanced cooperation in the area of unitary patent protection, as envisaged in the current Regulation proposals, constitutes an infringement of the Treaties in a number of respects. In particular, (1) it is in tension with the rationale of differentiated integration; (2) it dismisses the protective function of unanimity with respect to language arrangements; (3) it relates to an area of exclusive competence; (4) it has a prejudicial effect on the Member States not participating, which conflicts with the requirement of openness; (5) it undermines the coherence of the internal market, leads to discrimination and a distortion of competition; (6) it cannot be regarded as a last resort for a solution to the language issue.
Enhanced cooperation has been introduced in the treaties as a way for a group of Member States to move forward in the EU integration, without having to wait for all other Member States which could not be ready yet, but still expected to join the more advanced group sooner or later. Using this procedure, as for the unitary patent project, to bypass a requirement for unanimity could constitute an endangering precedent for the Union integration, as warned by Matthias Lamping:

As a consequence, the Member States would actually be required either to enter into further negotiations or to cooperate at an intergovernmental level (which would amount to an amendment of the EPC). That the Commission wishes to bring European patent policy under the umbrella of the Treaties is understandable and also desirable. The benefits of a unitary patent for the internal market (accompanied by a practicable judicial system) are beyond doubt. However, the desire for deeper integration in this respect should not be an occasion for subjecting European constitutional principles to political pragmatism or even opportunism. The line between objective differences of characteristic and subjective differences of taste or political preference is admittedly hard to draw, but the current events are more likely to be seen as the latter. This makes recourse to enhanced cooperation unsuitable. Past experience indicates that the adoption of policy regimes to accommodate differences has depended on a strong norm of solidarity — for good reasons. This is something the current approach definitely falls short of. Differentiation on the basis of ?coordinated coercion? instead of ?closer cooperation? tilts the EU away from solidaristic norms and practices. This is all the more worrying because differentiation strikes at the core of commitments that characterize the EU: the internal market.

Italy and Spain have filed a recourse before the CJEU about the very legality of the enhanced cooperation. Would the CJEU find it does not comply with the treaties, the whole project for a unitary patent would be nullified:

Ultimately, it is for the Court of Justice to safeguard the EU’s credibility as a legal and political entity based on solidarity. This is by no means an easy task. Not only must the ECJ protect the constitutional essence of the EU, but it must do so within a context in which the entire value structure of the old Community-based ideology of integration has been called into question and is being undermined by political opportunism. Increased asymmetry must inevitably call forward a stronger and more explicit conception of which principles, values and policies integrally define the EU. The Commission has apparently sacrificed its function as the guardian of these values to the political struggle for control over the European patent system.

**Remedies**

All the quotes we have listed above are strongly speaking in favour of serious revisions of the current proposal for a unitary patent. For each and every flaw to fix, we have proposed some amendments and recommendations. But until now, both the Council and the Committee on Legal Affairs of the European Parliament have refused to even consider these issues, with the exception of the Green/EFA group of the European Parliament. It is time for the Commission, the Council and the European Parliament to address these concerns. Failing to do that would only demonstrate a disinterest to achieve a workable unitary patent for the EU, as Thomas Jaeger puts it clearly:

It is therefore time for the EU legislator to decide clearly for or against a pursuit of the EU patent within the framework of EU law.

**Policy objectives**

And to conclude our collection of quotes from academics, we suggest to read carefully what Jens Schovsbo, from the University of Copenhagen, writes about what should be done in order to build a more efficient and balanced European patent system. Moreover, Schovsbo’s paper puts forward some solutions that have been proposed by the European Parliament, through its committee on Scientific Technology Options Assessment (STOA). Any legislator that has to vote for the unitary patent should have in mind the policy objectives recalled below to do so:
An efficient patent system is one that achieves the overall goals set out for it and a balanced system is one that does so in a way which maximizes the overall societal interests. The notion of ?balance? implies that patents incur costs on society. The aim of the legislator, therefore, should be to balance the costs with the gains. Behind these points, is the general idea that issuing patents is not in itself the goal of the patent system. Instead, patents are the means for achieving certain overall societal goals.

In this way no ?EU patent system? - i.e. a system based on a unitary right and central enforcement - currently exists. This is obviously problematic both as seen from the point of view of the users of the system and from a policy point of view. From the users? perspective the problem is that the current system based on national validations and litigation is expensive and uncertain. From a policy perspective the problem is that the EPC-system is outside of (direct) EU-political and legal control even though an effective system for the protection of patents is seen as instrumental for the broader innovation policies of the EU.

With a further harmonisation and centralisation of the EU patent institutions more interest should be devoted to the role and function of these institutions. The first thing to recognize is that PTO?s are not neutral agents and passive gate keepers who simply administer the law. Drahos puts it in the following way: ?Patent offices are hybrid creatures, business bureaucracies which make their living from granting more rather than less patent registrations, from ensuring the repeat custom of their transnational clientele and from going on proselytising missions in those developing states or markets which are in the middle of acquiring patent systems?.

PTO?s should thus be perceived as important agents in the making and development of patent law. In the same vein Schneider points to the role of PTOs in having fuelled a pro patent bias which in turn has expanded the limits of patent eligibility. A centralization of EU?s patent law with a unitary right and a central court system will further solidify the position of the EPO and thus increase its power in developing EU?s patent law. As seen from a public policy perspective it, therefore, becomes a central challenge to make sure that the EPO will continue to administer the patent system in a way which is in conformity with the general public interest, i.e. in a way which is ?effective? (i.e. aims at achieving the overall goals of the system) and ?balanced? (does so in a way which maximizes the overall interests without favouring certain stake holders at the expense of others).

The development is already underway. In recent years EPO has been focusing on ?raising the bar? and since 2008 and 2009 the office has reported grant rates below 50 pct. (2009: 42 pct., 2008: 49 pct., and 2010: 43 pct). The initiative to ?raise the bar? would certainly seem to be well founded in meeting the innovation challenges discussed supra (?thickets?). It?s also, however, important to point out that it should not be an aim in itself for any patent system to reduce (or for that sake: increase) the number of patents. The goal should be to make sure that the patent system is working i.e. that it continues to contribute to the realizations of the goals of the system. To do so the PTOs should neither protect ?less? nor ?more? inventions. Instead they should protect the ?right? inventions, i.e. the inventions which are identified in the legislation. A broad perspective on ?quality? is therefore needed and this should include both the risk of over-protection and of under-protection and arguably, raising the bar involves a risk that the innovation losses from denying protection to certain ?small? inventions which have till now been protected diminishes the innovation gains from limiting the thickets generated by other small patents. My intention here is not to evaluate the effects of the initiative to raise the bar but merely to point out that the case illustrates the pivotal role of the PTOs in the functioning of the patent system and thus the important of integrating the offices in the broader superstructure of the national and EU innovation policies.

The traditional patent law positions are being challenged. It can no longer be taken for granted that exclusivity automatically translates into innovation and the perception of patent law as being ?neutral? and of the PTOs as passive administrators cannot be upheld.
The purpose of a mission statement \[54\] [75] in the EPC is to define more clearly the legal framework for the development of the law. This proposal in this way recognises that patent law to a large extend develops through the practices of PTO’s and national courts and not through changes in the written ?law? (statutes or conventions). This raises special difficulties in steering the development. A mission statement would ideally help to solve some of these problems and to provide clarity while at the same time allowing for a high degree of flexibility in the development of the law. The main effect would probably be seen in the ?hard- cases? and notably those which involve new subject matters or on setting the ?bar? for deciding on inventive step. Special care should be made to make it clear that the guiding principle should be the general interest in the patent system and not the interests of special interest groups. For the reasons set out by Drahos this is probably a difficult task to overcome as there would seem to be a cultural bias in the system in favour of the patent holder and of ?expanding? the system. In this way the preamble should be phrased to make it easier for PTO’s to refuse applications than to accept them.

The STOA Report suggests to ?enhance governance within the European patent system?. The need to enhance governance is due partly to the position of the EPO outside of the EU institutional and legal set up and partly to the general developments in patent law including the expansion of protection to new and controversial areas. In this way the call for enhanced governance is at the same time a call for more political accountability of the EPO-system and a broader call for ?democratizing? [76] of EU-patent law to legitimize the decisions making which takes place in the EPO.

\[77\] See Legal basis of the unitary patent: do not play with fire!: https://www.unitary-patent.eu/content/legal-basis-unitary-patent-do-not-play-fire [78].


\[90\] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=BLqg8kgcsK2 [91].

\[92\] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=6DBrhvAb6TA [93].

\[94\] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=sjZI4tQ9Yff [95].


\[98\] Ibid.

\[99\] Galloux, op. cit.

\[100\] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=dhv5C3iss0 [101].

\[102\] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=AzMvxyPPIAg [103], https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=PvrFBTmFkg [104] and https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=LBNJ5YjU6S
See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=L6QiT66NwxQ [109], https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=h0NMJwFiX26 [110] and https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=DADJdgKlcrh [111].


[108] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=q2wvHAvEyCG [117].

[111] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=IRfja8txDmu [120].

[112] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=JrC84muv8j8 [110].


[114] Ullrich, op. cit.

[115] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=IRfja8txDmu [120].

[116] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=DADJdgKlcrh [111].

[117] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=IRfja8txDmu [120].

[118] See https://www.unitary-patent.eu/content/amendments-unitary-patent?comment_id_key=IRfja8txDmu [120].


[111] See The EU Patent Package, Politics vs. Quality and the New Practice of Secret Legislation in Brussels, by Dr. Jochen Pagenberg, former president of the European Patent Lawyer Association (EPLAW) and former member of the EU Commission's Committee of Experts for Patents: [130].

[112] See for instance, the conclusion of the United-Kingdom European Scrutiny Committee, The Unified Patent Court: help or hindrance?: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/1799/179902.htm stating that ?There is, however, in our opinion an inevitability to their inclusion. Whilst the arguments of Professors Kraßer and Jacob strike us as right as a matter of patent law, the counter-arguments of the Commission on what is required to implement Article 118 TFEU seem to reflect the firm views of the EU institutions, including the Court of Justice, as a matter of EU law. This calls into question whether incorporating a unitary patent regime within the EU will ever be practicable.? [128].


[114] Ullrich, op. cit.

[115] See Legal basis of the unitary patent: do not play with fire!, op. cit.


[117] See Legal basis of the unitary patent: do not play with fire!, op. cit.

[118] Lamping, op. cit.

[119] Ullrich, op. cit.

[119] Ibid.


[127] See our comment to amendments tabled by Swedish liberal Member of the Parliament, Cecilia Wikström: https://www.unitary-patent.eu/content/amendments-juri-committee?comment_id_key=aKBYXQiNBIR [125].


[131] See for instance, the conclusion of the United-Kingdom European Scrutiny Committee, The Unified Patent Court: help or hindrance?: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/1799/179902.htm stating that ?There is, however, in our opinion an inevitability to their inclusion. Whilst the arguments of Professors Kraßer and Jacob strike us as right as a matter of patent law, the counter-arguments of the Commission on what is required to implement Article 118 TFEU seem to reflect the firm views of the EU institutions, including the Court of Justice, as a matter of EU law. This calls into question whether incorporating a unitary patent regime within the EU will ever be practicable.? [128].


[133] See Legal basis of the unitary patent: do not play with fire!, op. cit.

[134] Lamping, op. cit.


[136] See Legal basis of the unitary patent: do not play with fire!, op. cit.

[137] See Legal basis of the unitary patent: do not play with fire!, op. cit.

[138] Lamping, op. cit.

[139] Ullrich, op. cit.

[140] Ibid.

Jaeger, op. cit., this is the whole point of Jaeger's article.


Lamping, op. cit., this is the whole point of Lamping's article.

Ibid.


Lamping, op. cit.

Jaeger, op. cit.


I. Schneider, *Governing the patent system in Europe: the EPO’s supranational autonomy and its need for a regulatory perspective*, Science and Public Policy, 36(8), October 2009, (pointing out that democratisation would include attention to three dimensions: ?Accountability? (meaning that the EPO takes responsibility for the public good rather than its ?clients?), ?transparency? (access not just to files and records but also to decisions-making), and ?democratic control? (the EPO and the EU must be regarded as elements within a broader European governance framework)).