

Annex 1 - letter by [REDACTED] of the commission legal services

Dear Mrs. Wikström,

Please find below the arguments which are at the basis of my intervention on the Art. 6-8 of the UPP Regulation.

With many regards,
[REDACTED]

"Article 118(1) TFEU is the legal basis for "measures for the creation of European Union intellectual property rights to provide uniform protection of intellectual property rights throughout the Union".

Without Articles 6-8 of the UPP Regulation Proposal the UPP Regulation would not establish an intellectual property right providing uniform protection as it would be entirely left to the Member States to determine the rights of a proprietor of a European patent with unitary effect: Any question of what a patent proprietor could do with the patent would need to be determined by national law.

As the Court has held in C-350/92, a new IP right created by the Union, such as the Community Trade Mark, is "superimposed on national rights" and not a mere harmonization of national laws. In the absence of Articles 6-8, no right would be superimposed on national rights (nor would anything be harmonized for that matter).

Moreover, according to the case law of the Court, when the Union has regulated a subject matter the Member States have lost the power to regulate on the same subject matter unless to supplement the Union Regulation on subordinate points or to executed it. As said before, the matters regulated in Articles 6-8 of the UPP Regulation constitute the core of the patent protection and therefore cannot be regarded as subordinate matters. Thus, the Member States are no longer competent to regulate. Indeed, if Member States would have the power to determine the extent of the patent protection, the unitary effect of that protection could be endangered as each Member States could give a different content to that protection. When Member States cannot regulate individually, it is established case law that they cannot do so together outside the Union framework either.

The exclusive and uniform character of a Union regulation constitutes the essence of the Union legal order."