

The Unitary Patent Package, the Court of Justice, Union Law & a further response to the academics

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Introduction

March 2015 a petition on the Unitary Patent Package signed by over 40 academics was published online and afterwards also in print.¹ It raised questions with regard to the legal acceptability of the Unitary Patent Package in view of European Union Law. I responded to it, and the academics replied to my response.² In the meantime the Court of Justice of the European Union has ruled on some of these issues and it is now time to draw the balance.

The Unitary Patent Package consists of the Unitary Patent Regulation (UPR),³ the Regulation on Translation Arrangements⁴ and the Unified Patent Court Agreement (UPCA).⁵ The whole package is based on a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection of 10 March 2011.⁶ The legality of the package has now been tested several times. The initial decision on enhanced cooperation was opposed by Italy and Spain in a procedure before the Court of Justice of the European Union (CJEU). These claims were rejected by the CJEU in its judgment of 16 April 2013.⁷ The two Regulations were adopted on 17 December 2012 and published shortly thereafter, whereas the UPC Agreement was signed on 19 February 2013. Spain filed appeals against the two Regulations, which appeals were rejected by the CJEU on 5 May 2015.⁸ Italy did not join in those appeals, but instead is currently reconsidering its position. On 13 May Deputy Secretary of The Ministry of

Economic Development Ms. Simona Vicari announced that Italy should join the Unitary Patent.⁹

Legal perfection versus political compromise

The Unitary Patent Package is the result of over 40 years of attempts to create a single patent for Europe. It is a mix of sound legal work and political compromise on different levels. The first area of compromise is the Unitary Patent Package law itself. Since there are differences in patent law throughout Europe, the authors of the package had the choice to either harmonize these, or leave blanks to be filled in later. The system itself is a mix of the legal cultures of the participating Member States, which obviously required a lot of choices. However, agreement could not always be reached. In many cases, the authors of the system therefore chose to leave it to the Unified Patent Court (UPC) to fill in the blanks. For instance, there are no rules on when a final injunction should be granted if a patent is found valid and infringed. The UPC should develop its own case law on this, but will of course have to apply the Enforcement Directive and the CJEU case law relating to the issue.¹⁰ A good example of a compromise is Article 33(3) UPCA, which provides the option to bifurcate proceedings when a counterclaim for revocation of the patent is submitted in an infringement case. Bifurcation is mandatory in Germany, Austria and Hungary, but does not exist in the other 22 Contracting Member States. Instead of making a choice, the Agreement provides both options and leaves the decision to the Court. However, in the eyes of the industry bifurcation has no advantages and most German judges have meanwhile declared that they will not do it when they are appointed to the UPC.

There is also a more fundamental area of compromise, needed to have the package adopted at all. The best example of this is that the provisions on infringement were moved from the Unitary Patent Regulation to the UPC Agreement at the last moment. At first, the Euro-

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1 The Union cannot be stripped of its powers by the Member States: the dangerous precedent of the patent package, published inter alia on the IPKat 13 March 2015, <http://ipkitten.blogspot.nl/2015/03/the-eu-patent-package-dangerous.html> and in Berichten industriële eigendom, May 2015, p. 103.

2 Also published on inter alia the IPKat and the EPLAW Patent Blog, and in the May issue of Berichten IE.

3 Regulation (EU) no 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, L 361/1.

4 Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, L 361/89.

5 Agreement of 19 February 2013, 2013/C 175/01.

6 2011/167/EU.

7 Joined proceedings C-274/11 and C-295/11, ECLI:EU:C:2013:240.

8 Cases C-146/13, ECLI:EU:C:2015:298 and C-147/13, ECLI:EU:C:2015:299.

9 See <http://www.sviluppoeconomico.gov.it/index.php/it/per-i-media/comunicati-stampa/2032701-vicari-adesione-a-brevetto-unitario-e-una-priorita-con-sede-in-italia-del-tribunale-unificato-maggiori-opportunita-e-facilitazioni> and <http://ipkitten.blogspot.com.es/2015/05/after-spain-loses-italy-falls-into-line.html>.

10 This is subject of the CJEU case C-170, 13, *Huawei vs ZTE*, in which the Advocate-General issued his opinion on 20 November 2014, ECLI:EU:C:2014:2391.

pean Parliament was quite upset by this proposal, but in the end it found a solution; the reference in Article 5(3) UPR to national law is understood to be an indirect reference to the provisions on infringement in the UPC Agreement.¹¹ Another example is the language regime for Unitary Patents. Earlier proposals for a European solution failed inter alia because there was a demand for an important role of all EU languages. Industry would have preferred to have only English. The compromise is that the European Patent Convention is decisive and in the long run no translations for Unitary Patents will be required, but there is a specific Regulation that provides for a transitional regime during the first 12 years, where more languages can play a role. The language regime at the UPC is even more complicated and not even finalized today.

The implementation of the Unitary Patent Regulation requires additional rules, which are established by a Select Committee of the Administrative Council of the European Patent Office (EPO) on the basis of Articles 142 and 143 of the European Patent Convention and Article 9 UPR. The most recent draft for these Unitary Patent Rules of 9 December 2014 shows that they are mainly of a technical and administrative nature that causes little controversy, with one exception: the level of renewal fees. These renewal fees are another important area of compromise. In order to stimulate innovation and to create as much of a level playing field with the United States as possible, these fees should be rather low. On the other hand, the balance in the budget of the EPO should be maintained when the Unitary Patent is introduced. An initial proposal for renewal fees was established on 6 March 2015 and an adjusted version on 7 May 2015. There will certainly be more debate on this before it is finalized.

The UPC Agreement also requires additional rules to be set, as Article 41 provides that the Rules of Procedure, which shall be adopted by the Administrative Committee, shall lay down the details of the proceedings before the Court. Over the past years several drafts have been prepared by a group of experts, consisting of experienced patent judges and patent litigators. Meanwhile the work has been taken over by the legal group of the Preparatory Committee,¹² with the support of these experts. The latest version of the Rules of Procedure, the 17th draft, was published on 31 October 2014 and a final oral hearing on these rules was held in Trier on 26 November 2014. The final version of the Rules of Procedure should be adopted by the Preparatory Com-

mittee in its meeting of July 2015. The Rules of Procedure are in fact a completely new, comprehensive and autonomous code of procedure for the UPC, which contains elements of both the civil law and the common law traditions that cooperate within the framework of the UPC. Obviously, it is close to 370 rules with many subsections contain a lot of compromise. They also provide for a lot of flexibility, which will allow the Court to develop best practices. Nevertheless, they do provide a sound and very innovative legal system of great quality.

Of course, from a scientific perspective, it is good to strive for legal perfection. However, the law has to function in society and laws are made by politicians. So, next to a compromise of differing legal views, there is always also a level of political compromise. In the case of the Unitary Patent Package, which as demonstrated above has a large amount of compromise at different levels, this has led to criticism from academics, who argue that from a purely legal perspective, there is a tension between European Union law and the Unitary Patent Package. That of course was also the basis for the Spanish appeals. Recent examples of such criticism are the petition published by over 40 academics in *Berichten IE* and on the *IPKat* blog and the book *The Unitary EU Patent System*, edited by Justine Pila and Christopher Wadlow.¹³ In this article I will focus on the criticism by the 40 academics.

Without making this explicit, the critics seem to imply that Union Law itself is a completely rational and consistent legal system. That seems doubtful. Actually, Union Law was built on political compromise and is constantly developing on the basis of further compromise. For instance, in 2004 an Enforcement Directive was enacted, according to recital 10 “to ensure a high, equivalent and homogeneous level of protection in the Internal Market”.¹⁴ One would expect this to be the final word on enforcement, but when the Commission presented its proposal for a Trade Secret Directive in 2013,¹⁵ this Directive contained its own set of provisions on enforcement, different from the Enforcement Directive. From a legal perspective this was rather awkward, especially since trade secrets (know-how) are often at stake in patent litigation, but it was necessary for the Commission to reach a political compromise in order to have the necessary support from the Member States. In the meantime, the Council published a new version, which mentions in its introduction: “Following the deliberation on the Working Party of 10 April 2014 and the written comments sent by delegations, the Presidency revised the compromise text of the

11 See for the complete history Dr Ingve Björn Stjerna, *The Parliamentary History of the European “Unitary Patent”*, http://www.stjerna.de/index_htm_files/140615%20Wortprotokoll_EN.pdf.

12 The Preparatory Committee is the predecessor of the Administrative Committee, based on clause 3 of the Declaration of the Contracting Member States concerning the preparations for the coming into operation of the Unified Patent Court, which is an annex to the Minutes of the signing of the Agreement on a Unified Patent Court of 19 February 2013, 6572/13 PI 28 COUR 12. Clause 6 mentions the experts that will assist the Preparatory Committee in drafting the Rules of Procedures.

13 Oxford and Portland, Oregon, Hart Publishing 2015.

14 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004, L 195/16.

15 Proposal for a Directive of the European Parliament and of the Council on the Protection of Undisclosed Know-how and Business Information (Trade Secrets) against their unlawful acquisition, use and disclosure of 28-11-2013, COM(2013) 813 final 2013/0402 (COD).

proposal as set out in the Annex to this document”.¹⁶ Thus, political compromise is a key characteristic of Union law making.

Indeed, this means that from a strictly legal perspective, the law as enacted by the European Union and its Member States doesn’t always provide the best possible solutions. However, as long as there aren’t any serious contradictions in the law, the Courts will normally be able to sort this out. In fact, the Court of Justice of the European Union has proven to be able to reach sensible solutions for constitutional issues of Union law. The UPC can be expected to do the same, and will of course refer questions to the CJEU where appropriate.¹⁷

The academics argued in their reply that the very heart of the protection attaching to European patents, both Unitary Patents and traditional European patents, as envisaged by the Unitary Patent Package is detached from Union law, which the EU should not accept and which might amount to a violation of Article 118 TFEU, which governs the “creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union” and thus attributes the creation of such rights to the European Union. Therefore, the Member States could not reclaim the power to create such uniform rights. Enhanced cooperation could provide a solution for the existing stalemate, but the way this was achieved in the Unitary Patent Package violates Union law in the opinion of the academics, inter alia because it does not itself contain the necessary substantive provisions, but for that purpose refers to national law and to the UPCA. The CJEU judgments of 5 May addressed and resolved a number of the constitutional issues with regard to the Unitary Patent Package and thereby also the major issues raised by the academics. However, it also evaded some of the issues that were raised by Spain and discussed by scholars in the abovementioned publications.

Court of Justice judgment on the Unitary Patent Regulation

The judgment on the Unitary Patent Regulation mentions, next to the Regulation itself, the European Patent Convention (EPC), the UPCA, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and deals with the relationship between all these legal instruments.

In paragraph 66 of its judgment on the enhanced cooperation of 16 April 2013, the CJEU had ruled that such enhanced cooperation must be consistent with Article 118 TFEU, which provides “*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 centralised Union-wide authorisation, coordination and supervision arrangements”. Note that Article 118 does not say that the Parliament and the Council shall establish uniform protection, but that they shall establish “*measures for*” uniform protection. The academics had pointed out that Article 118 TFEU is key, as it would mean that the EU Member States have attributed the full power to enact unitary intellectual property rights to the Union, which power they could therefore not take back in order to create such a right on another legal basis, such as Article 142 EPC. However, in its judgment of 5 May 2015, the CJEU does not initially focus on Article 118 TFEU, but rather on Article 142(1) EPC, which provides “*Any group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States*”.

The first ground for the Spanish appeal was that the Regulation disregards the rule of law of Article 2 TEU, since the procedures of the EPO are not subject to judicial review for conformity with Union law. The Court points out that the Regulation itself states in Article 1 that it constitutes a special agreement within the meaning of Article 142 EPC. However, the Regulation itself simply adds unitary effect to a patent which is granted according to the rules of the EPC. It therefore does not incorporate the procedure for the grant of European patents into Union law. It merely establishes the conditions under which a European patent, as granted according to the rules of the EPC, may benefit from unitary effect. Objections with regard to the procedure for the grant of European patents therefore do not affect the lawfulness of the Unitary Patent Regulation.

The second ground was that Article 118 TFEU is not a sufficient legal basis for the UPR, since the Regulation lacks substantial content and there are insufficient measures to guarantee unitary effect throughout the Union. It does not contain the provisions on infringement and instead refers to national law and the UPCA for this. If I understand correctly, this was also the main issue for the academics. The Court, referring to its earlier ruling on enhanced cooperation, states that under Article 118 “*uniform protection given by it must be in force, not in the Union in its entirety, but only in the territory of the participating Member States*”. It should therefore be assessed whether the Regulation provides measures for uniform protection for just that territory and whether it was validly based on Article 118 TFEU, which is cited as a legal basis for it in the preamble. The definitions in Article 1 and the provisions of Article 3, 5 and 7 are aimed at creating such uniform protection.

In dealing with this ground for the Spanish appeal, the most important paragraphs in this judgment are para-

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16 Council proposal of 19 May 2014, 2013/0402 (COD) PI 67 CODEC 1295. In the meantime, on 26 March 2015 the European Parliament proposed a set of amendments to the Commission proposal, which marked the start of the so-called dialogue phase.

17 As provided by Article 21 UPCA and Article 267 TFEU.

graphs 46 – 48, which basically read: “*In that regard, the designation of the national law of a single Member State, which is applicable in the territory of all the participating Member States, and the substantive provisions of which define the acts against which an EPUE provides protection and the characteristics of that EPUE as an object of property, helps to ensure the uniformity of the protection conferred by that patent. (...) the uniformity of the protection conferred by the EPUE stems from the application of Article 5(3) and Article 7 of the contested regulation, which guarantee that the designated national law will be applied in the territory of all the participating Member States in which that patent has unitary effect*”.¹⁸ In just requiring measures for uniform protection, Article 118 “*does not necessarily require the EU legislature to harmonise completely and exhaustively all aspects of intellectual property law*”. Indeed, the Regulation does not itself contain the provisions on infringement, but for each Unitary Patent it points to a specific national law, determined by Article 7, which governs the scope of protection for all participating Member States, which scope therefore in the CJEU’s view is uniform. In paragraph 50 the Court in addition refers to recital 9, which provides that, where the Regulation itself does not contain the substance, “*the provisions of the EPC, the Agreement on a Unified Patent Court, including its provisions defining the scope of that right and its limitations, and national law, including rules of private international law, should apply*”, which would add to the uniform protection. Thus, Article 118 TFEU provides an adequate legal basis for the Regulation according to the CJEU.

This part of the judgment seems not only to resolve the core of the Spanish appeal, but also provides an initial answer to a question that has been bothering many, namely in how far despite of the fact that the provisions on infringement have been moved from the Unitary Patent Regulation to the UPC Agreement, Article 5 UPR would nevertheless enable the CJEU to demand that questions on the scope of protection of a Unitary Patent should be referred to it. It could be envisaged that the CJEU could at least demand that where infringement was not covered by the UPC Agreement, it had a right to rule on the scope of protection. It seems however that the CJEU is satisfied that uniform protection is sufficiently guaranteed by Articles 5 and 7 UPR, which in the Court’s view provide that the scope of protection of any given Unitary Patent is always governed by the law of a single Member State, for the whole area of all participating Member States, even though the applicable law may thus vary per patent.

However, I think the reference to recital 9 in paragraph 50 does not completely resolve the issue and it seems there is something missing from the Court’s reasoning.¹⁹ Paragraph 50 of the judgment and recital 9 of

the Regulation refer to “the scope and limitations of the right”, but do not define under which national law this should be assessed. Recital 9 even refers to private international law. For those issues not substantially covered by the UPC Agreement or other international instruments, national law applies. But is that indeed the law identified by Article 7, which strictly speaking only refers to the patent as an object of property? The wording of Article 9(1) UPR is almost identical to the wording of Article 16(1) Community Trademark Regulation and Article 27(1) Community Design Right Regulation and those two provisions are certainly not intended to govern the scope of protection, which is exhaustively handled by other provisions of those Regulations. For the law that applies to infringement, private international law of the EU Member States normally refers to the *lex loci protectionis*, not to the law of the domicile of the patent owner. Or did the CJEU intend to say that in this specific case, due to Article 118 TFEU and Article 5 UPR, the national law applying to the scope of protection is always the national law identified by Article 7, so Article 7 is a rule of private international law in each participating Member State, not only for property issues, but also for infringement issues, setting aside the normal rules on infringement of private international law? That indeed does seem to be the intention, but it would have been better if the Court had said so specifically in paragraph 50, especially since it is certainly not a result one would expect.

Even then, there is an area where there is no uniform protection, namely prior use. Article 28 UPCA specifically states that prior use rights are assessed for each patent under national law on a country-by-country basis. However, this was not part of the Unitary Patent Regulation prior to the mid 2012 decision to move the scope of protection from the Regulation to the Agreement anyway, but was already in the UPC Agreement, so it is not a consequence of that move.²⁰ It could of course be argued that a prior use right does not affect the uniform protection of the right as such, but only creates an exhaustion type defence for an individual third party. However, the effect is not only that such defence is limited to the country or countries where that prior use took place, but is also subject to the national laws of those countries and not to a uniform law applying to the patent. Even then, one might argue that, but for this minor difference, sufficient measures to guarantee uniform protection under Article 118 TFEU have been taken and the Court after all has held that Article 118 does not require complete uniformity.

By rejecting the second ground for the Spanish appeal in this way, the CJEU has discarded many constitutional arguments against the validity of the Unitary Patent Regulation and the judgement thereby goes well beyond the scope of the actual Spanish appeal. However,

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18 EPUE = European Patent with Unitary Effect, the official name of the Unitary Patent.

19 This is not a translation error in the English version of the judgment; the Spanish, French and Dutch versions of paragraph 50 are the same.

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20 See for instance the 23 June 2011 draft of the Regulation, 2011/0093 (COD), 2011/0094 (CNS), PI 67 CODEC 995 and the 11 November 2011 draft of the Agreement, 16741/11, PI 155 COUR 64, Article 14i.

the Court has also created confusion with regard to the meaning of Article 7(1) UPR.

Spain further argued that assigning the decision on the level of the renewal fees and their distribution to the EPO Select Committee – and thus to the Member States – and the assignment of certain administrative tasks mentioned in Article 9 UPR to the EPO is a violation of Article 291 TFEU and the *Meroni* case law.²¹ According to Spain, such powers should have been conferred on the Commission or the Council, because the implementation requires uniform conditions. The CJEU held that these tasks follow from the provision on enhanced cooperation in Article 142 EPC and the further provisions on the implementation of such cooperation in the EPC. Article 9 UPR provides that the Member States shall give such tasks to the EPO. According to the CJEU, “those tasks are intrinsically linked to the implementation of the unitary patent protection introduced by the contested regulation” and therefore constitute the implementation of a legally binding Union act, which implementation is the task of the Member States. According to the CJEU, Spain has not explained why uniform conditions for such implementation would need to be set, so there is no violation of Article 291(2) TFEU. The CJEU even held that “there is nothing in that regulation stating that the amount of those renewal fees should be uniform for all the participating Member States”. This is very strange. Indeed, the Regulation does not specifically state that just a single renewal fee is due for the Unitary Patent, but that follows from its unitary nature and is very obvious, so in that sense it indeed is uniform for all participating Member States.

The CJEU further held that the Unitary Patent Regulation is a special agreement within the meaning of Article 142 EPC. Since the Union is not an EPC member, the implementation is for the Member States to decide, within the framework of the EPC. So, the implementation of Article 9 is the implementation of a legally binding Union act, which *cannot* be performed by the Commission or the Council, but does that mean that it therefore does not *need* to be performed by them? It seems the CJEU clearly wanted to find that Article 291 is not violated, but there are flaws in its reasoning. However, its ruling is binding and there is no further recourse. The CJEU further held that the *Meroni* case law simply does not apply to this situation, probably because it deals with the delegation of powers to a private entity, which the EPO is not.

Spain also argued that the UPCA is not compatible with Union law and the Member States would disregard their Union law obligations by ratifying it. This was rejected by the CJEU since in an action under Article 263 TFEU it cannot rule on the lawfulness of an international agreement, but only of Union acts. The fact that the entry into effect of the Regulation depends on the ratification of the UPCA by the Member States is

also not a violation of Union law, since it follows from Article 18(2) UPR itself, which is allowed under CJEU case law.²²

Spain had also argued that Article 18(2) UPR gives the Member States the power to decide whether the Regulation applies to them, by deciding whether to ratify the UPCA. This would be contrary to the principles of autonomy and uniform application of Union law. The Advocate-General had stated in paragraph 94 of his opinion that the Member States have to ratify the UPCA in order to comply with the principle of sincere cooperation referred to in Article 4(3) TEU, which by the way would obviously only apply to those Member States that had requested the decision on enhanced cooperation (and thus seemed mainly aimed at Poland), but the Court does not go that far. Quite to the contrary, the Court says that Article 18(2) does allow the Member States to decide whether by ratifying the UPCA a Unitary Patent will cover their territory, so it seems there is no such obligation. In addition, according to the Court such decision would only affect the applicability of Articles 3(1), 3(2) and 4(1) UPR (the effect of the Unitary Patent in the participating Member States), whereas all other provisions of the Regulation would still apply. However, that last argument seems rather artificial. The academics had argued that it is important – and actually required by Article 6 ECRM – that the Member States would be free to decide on the ratification of the UPCA, as that would be necessary for democratic control over the UPCA. Such democratic control indeed seems to be enabled by the CJEU ruling. It also means that Poland (and all other Member States) after all are free to decide whether they want to join. Whether from an economic perspective they can afford not to, is a different issue.

The judgment of the Court of Justice thus contains many well founded reasonings, but also some arguments that seem to be incomplete or artificial. It seems that the Court too is not always striving for legal perfection, but sometimes also has to work on the basis of compromise. As such, that is not a grave problem and anyway, the judgment is binding and concludes the debate. The only thing I regret is that the Court has not been more clear on whether the determination of the law that applies to a Unitary Patent under Article 7 UPR indeed also applies to all infringement issues, thereby setting aside the normal private international law rule that points to the *lex loci protectionis*, the law of the country where protection is sought.

Court of Justice judgment on the Regulation on Translation Arrangements

The second judgment deals with the issue that blocked the creation of a Unitary Patent for so long, the language regime. The Regulation on Translation Arrangements

21 ECJ 13-6-1958, C 9-56, ECLI:EU:C:1958:7, *Meroni vs High Authority*.

22 ECJ 30-11-1978, 31/78, ECLI:EU:C:1978:217, *Bussone*, paragraph 32 and CJEU 14-06-2012, C-606/10, ECLI:EU:C:2012:348 *Anafe*, paragraph 72.

basically provides that during a transitional period any Unitary Patent that was granted in German or French should be translated into English, whereas any Unitary Patent that was granted in English should be translated into one other official EU language. Spain argued that this is a violation of the principle of non-discrimination of Article 2 TEU. It favours those who have sufficient command of the official EPO languages English, German and French. The Court takes as a starting point that there is no absolute right that all official documents should be available in all EU languages. The aim of the arrangement is to facilitate access to patent protection, especially for SME's, which is a legitimate aim and the means to achieve it are appropriate. It also does not go beyond what is necessary to achieve the legitimate objective pursued; it was essential for the translation arrangements to be cost-effective, whereas instruments have been introduced to guarantee access to translations. Alleged infringers will at their request be provided with full translations and under Article 4(4) of the Regulation the UPC will be able to take into account whether they acted in good faith prior to receiving such translation. The measures of the Regulation thus meet the requirement of proportionality. Spain also raised a *Meroni* argumentation in this appeal, which was also rejected. The Court ruled that the tasks delegated to the EPO are a consequence of the introduction of the Unitary Patent and moreover the Council did not delegate any powers which are exclusively its own.

Spain further argued that Article 118(2) TFEU provides no basis for Article 4 of the Regulation, since that provision does not concern the language arrangement for the Unitary Patent, apparently since it only provides language arrangements in case of a dispute. The Court held that Article 3, which provides that except for disputes and transitional arrangements no further translations are required, does provide a language arrangement for the Unitary Patent and doing so by reference to the EPO system is allowed. Article 4 clearly forms part of that arrangement.

Spain also claimed that the system does not provide legal certainty. The Court held that the principle of legal certainty requires that “*rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law*”.²³ However, according to the CJEU the two Regulations, read in connection with the EPC, do provide clear and precise rules. With regard to the costs ceiling or method of establishing the compensation scheme the CJEU points to the fact that the Member States are to ensure the governance and monitoring of the activities related to the tasks referred to in Article 9(1) UPR and , to that end, are to set up a select committee, so these are matters which fall to the participating Member States through such

a select committee, hence there is no violation of legal certainty. This is an interesting thought. The academics have said that there is an absence of independent democratic control over the UPC Preparatory and Administrative Committees. I argued that the Member States do have democratic control over the positions which their representatives are taking in these committees. The same of course applies to the EPO Administrative Council and Select Committee. Although the issue the CJEU had to resolve is slightly different, as it focuses on legal certainty instead of democratic control, it does come quite close. This is especially so since the CJEU time and again states that powers have lawfully been attributed to the Member States, meaning that it is their responsibility to ensure that the various committees which they have formed reach the proper decisions. That indeed is subject to democratic control within those Member States themselves.

By the way, the academics also argued that, since Article 41 UPCA delegates the decision on the Rules of Procedure to the UPC Administrative Committee, the basic rules of judicial procedure would therefore not be subject to sufficient democratic control. However, the basics for these rules are in the UPC Agreement and the Statute of the Unified Patent Court, which is attached to the Agreement. It is not uncommon that delegated rules of procedure are set by the judiciary itself, in which case they are subject to less democratic control than the UPC Rules of Procedure. Nevertheless, the solution indeed is not perfect from a constitutional perspective, but it is another example of necessary compromise. In view of the amount of effort it took to arrive at the UPC Agreement, it would have been impossible to arrive at the comprehensive book of procedural law that constitutes the Rules of Procedure within a reasonable amount of time. For practical purposes, this enormous task required an expert drafting committee. However, the result was subject to a considerable amount of public consultation and a lengthy decision making process within the Preparatory Committee, with ample opportunities for the Member States to take position. In practice, there is an amazing amount of consensus on these rules among all stakeholders, with just a very limited amount of issues that are subject to further political debate.

Article 4(4) according to the CJEU enables the UPC to “*undertake a case-by-case basis analysis by examining, inter alia, whether the alleged patent infringer is a small or medium-sized enterprise operating only at local level and taking into account the language of the proceedings before the EPO and, during the transitional period, the translation submitted together with the request for unitary effect*” in order to establish whether such alleged infringer acted in good faith. This according to the CJEU provides legal certainty, even though the Regulation does not provide the specific consequences. This is another example of a ruling that seems to indicate that the CJEU is not too eager to take control over substantive patent law issues. If this is an area for case-by-case decisions, there will be little need for the UPC to refer questions

²³ CJEU 8-12-2011, C-81/10, EU:C:2011:811, *France Telecom*, paragraph 100 and CJEU 31-1-2013, C-643/11, EU:C:2013:55, *LVK*.

on the interpretation of Article 4 of the Regulation to the CJEU.

Finally Spain again argued that the Regulation violated the autonomy of EU law because the Member States were given the power to decide when the Regulation would enter into force. This was rejected on grounds already provided in the other appeal.

The most important aspect of this judgment of course is that the language and translation arrangements of the Unitary Patent are appropriate and proportionate under Union law. That is quite an accomplishment, as it has been the main stumbling block for the creation of a Community Patent for so many years.

Remaining outstanding issues

With these two judgments, the possible Union law hurdles for the introduction of the Unitary Patent Package have been removed. Both Regulations are in conformity with Union law, also with regard to their provisions on implementation by the Member States. The role of the EPO Select Committee is in conformity with Union law too. The lawfulness of international agreements, such as the EPC and the UPCA, is outside the CJEU's jurisdiction, at least in an action based on Article 263 TFEU.

Does this mean that all of the concerns expressed by the academics, especially in their reply, are no longer valid? No, that is not the case. Indeed, even though the scope of the CJEU's reasoning was of course limited by the grounds for the appeals as filed by Spain, it seems that all the relevant issues of Union law with regard to the two Regulations were addressed in the judgments. Of course, the judgments themselves will be open to academic criticism, but that will not change the legal situation for the Unitary Patent Package. Let's however take a closer look at some of issues tabled by the academics.

The fact that the UPC system is held to be in conformity with Union law, opens up new possibilities. In my opinion, the UPC system is better than the current system for the enforcement of Community Trademarks, Community Design Rights and Community Plant Breeders Rights. Enforcement of such rights through the national courts in my view is problematic, since these courts all have different approaches, different levels of experience and different time schedules for concluding litigation. Besides, even though they handle substantive Union law, there is no central appeal to a Union Court; referring questions on the interpretation of the various Regulations is not the same as an appeal. The CJEU is not in a position to set best practices for all relevant issues in the same way the UPC Court of Appeal can. It would be much better to give exclusive jurisdiction to a single – but two-tier – supranational court that can build thorough experience in handling such cases. In practice, parallel litigation in various countries on the same right – or rights that form part

of the same bundle – is much more common in patent law than in trademark or design right law, which may explain the greater sense of urgency on the part of the patent industry to develop a single jurisdiction with a single court, but basically this is equally important for all unitary intellectual property rights. And by the way, a training program consisting of classroom courses, though necessary, cannot in itself replace experience. The UPC training will include internships at experienced courts and maybe even more important, less experienced judges will sit in UPC panels with very experienced judges, which will provide for a more consistent approach. That can never be achieved in an enforcement system that relies on the national courts throughout the EU.

Will such a supranational specialist court develop a tunnel vision, focusing only on intellectual property law? It is clear that this should not happen. Articles 20 and 24 UPCA provide that Union law shall apply in its entirety and shall enjoy primacy. Article 24 UPCA also refers to other international agreements and to national law, as do recital 9 and Article 7 UPR, so this should all be taken into account by the UPC. Article 32 UPCA provides that the UPC has jurisdiction for patent based claims, but also for all related defences. Are the future UPC judges likely to ignore this? In my view not. Although their names are of course still unknown, a pretty good educated guess can be made as to who the initial judges will be. With regard to the experienced patent judges, they have a track record of paying sufficient attention to competition law and general civil law concepts. They are also aware of the increasing role of fundamental rights, including for instance the recent CJEU case law on Article 16 of the Charter of Fundamental Rights of the European Union, the freedom to conduct a business (which is not in the ECRM, but has played an important role in recent developments with regard to copyrights and media). Some of the judges who will likely be appointed to the Court of Appeal currently hold positions in the highest national courts and their case load is certainly not limited to intellectual property litigation; they do have a general legal background. At least initially this will be maintained, as the UPC will have part-time judges, who will also remain to be judges in their national courts of origin. I have been teaching a course on relevant Union law instruments in Budapest to the future UPC judges who are less experienced in patent law and met with a highly motivated group of candidates with a keen interest in law in general. Actually, the mere fact that they are inexperienced in patent litigation means that their experience is in other fields of law. Nevertheless, it is of course important to keep emphasizing that any field of law cannot develop in isolation and any judge – and for that matter, litigator – should keep looking beyond the boundaries of his specialism, but I don't see this as an actual serious risk that is specific for the UPC.

By the way, I haven't said that a breach of fundamental rights in the enforcement of a patent is a rather theoretical situation, as the academics seem to have under-

stood. I have said that it is rather theoretical that the Rules of Procedure themselves violate fundamental rights. That is based on my assessment of the current 17th draft of those rules which in my view do not violate any fundamental rights and the unlikelihood that future changes will be enacted so frivolously that they will violate such fundamental rights. However, if they in fact are, the UPC and especially its Court of Appeal should then set them aside and there is no indication that it is not willing to do that. Besides, such case could then indeed be brought before the European Court of Human Rights. Substantive patent law applied by the UPC is not isolated from the demands resulting from fundamental rights, as these fundamental rights are contained in legal instruments which are recognized by Articles 20 and 24 UPCA.

The academics acknowledge that the Union can still enact substantive patent law, but it would be more intuitive and easier to follow the procedures for revision of the EPC and UPCA, which would therefore be outside of Union law. This could be got around by EU regulations and Directives, but those would also have an impact on national patent laws and according to the academics it would be questionable whether the Member States would consent to such changes. However, it is hard to understand why, if the Union decided that a substantive issue needs to be decided at Union level, this would be different for unitary rights and national rights. In fact, the Union's practice is that both are treated equally, as demonstrated by the parallels between the Community Trademark Regulation and the Trademark Directive, as well as between the Community Design Right Regulation and the Design Right Directive. The Biotech Directive currently effects national law, but will of course equally affect the Unitary Patent. If the Union decides that an issue needs to be harmonized through a Union act, that would normally apply both to unitary rights and to national rights and moreover Article 20 UPCA supports this. Whether consensus on a substantive provision can be reached at Union level is a different issue that does not depend on the legal structure of the Unitary Patent Package.

Finally, the academics have raised some criticism of the characteristics of the Unitary Patent Package itself, such as the option for bifurcation – which will probably be next to non-existent –, the short time intervals for filing submissions, etc. These arguments are more of a political than of a legal nature and go beyond the scope of this article. Besides, there has been ample room for this type of discussion in the consultations. I fail to see why the choices made so far with regard to these issues would violate Union law or even fundamental rights. Actually, SME's might have a much harder time in the present system, where they can be attacked in various countries simultaneously.

Conclusion

Legal perfection unfortunately does not exist in practice. Compromise at different levels is inevitable. In fact, this is a common feature of democracy, which will not allow itself to be overruled by technocratic arguments. Compromise is not only applied by legislators, but also by courts and as I have shown, the Court of Justice certainly is not exempt from that. However, in the two Spanish appeals, just as in the earlier appeal against the enhanced cooperation itself, the Court of Justice has carefully examined all the constitutional issues that were raised and has found no violation of Union law. In doing so, it also offered a glimpse of its possible future approach.

The Unitary Patent Package now clearly is a valid solution that might even be broadened to other unitary intellectual property rights. In my view, this approach has many advantages over keeping these issues at the national court level. It does help in creating a level playing field for the industry compared to for instance the US, and thereby may become an important incentive for innovation.

An intriguing issue that may require a further referral to the Court of Justice is whether we now indeed have a new, Union-wide private international law rule on the law that governs infringement, maybe not only for Unitary Patents, but also for Community trademarks and Community design rights. Surely, there are interesting times ahead.

Den Haag, juni 2015