

Ulrich Blumenröder, Julia Peto, Munich*

The First Decision on the Unitary Patent: the Court Dismissed the Actions of Spain and Italy

(Joined Cases Kingdom of Spain and Italian Republic ./. Council of the European Union, Court (Grand Chamber), Judgment of 16 April 2013, C-274/11 and C-295/11)

In this recent decision, the Court ruled upon the Council's decision to authorise the enhanced cooperation in the area of the Unitary Patent. The dismissal of two actions (with similar pleas) filed by Italy and Spain could have been a precedent on when and how EU Member States can make use of the tool of enhanced cooperation in general. However, the decision is brief and incorporates far less balancing and considerations than the Advocate General's opinion. Nevertheless, the decision is interesting in light of the two new actions filed by Spain this year. One action is directed against the Regulation on the creation of a Unitary Patent, the other against the Regulation on the translation arrangements.

(1) Facts and Procedure

On April 16, 2013, the Court of Justice of the European Union («ECJ») dismissed the Joined Cases, C-274/11 and C-295/11 Spain and Italy ./. Council. The Court had to rule upon two applications for annulment under Article 263 of the Treaty on the Functioning of the European Union («TFEU») of the Council's decision to authorise enhanced cooperation in the area of the creation of a Unitary Patent.

On 5 July 2000, the Commission had adopted a proposal for a Council Regulation on a Community Patent creating a new kind of patent with a uniform and EU-wide protection. With language issues being traditionally controversial in the European Union, there had been negotiations on the translation requirements for a new Community Patent. The languages involved were English, German and French. Finally, a compromise appeared to have been found and the Commission adopted a proposal on 30 June 2010 regarding a Council Regulation on the translation arrangement for the (by then) European Union Patent. Five months later however, on 10 November 2010, the Council had to record in its meeting that no unanimity was found for the proposed Regulation on the translation arrangements for the European Union Patent. Subsequently, the Council confirmed on 10 December 2010 that insurmountable difficulties were hampering unanimity at the time and for the foreseeable future. Italy and Spain considered that insufficient deference was given to their languages (although it appears nobody had expected their objections).

Confronted with this situation, twelve Member States requested in December 2010 that the Commission, pursuant to Article 329(1) TFEU establish an enhanced cooperation procedure between them in the area of the creation of a «Unitary Patent» and requiring submission of a proposal to the Council regarding this matter (the changes in substance and wording from Community Patent via European Union Patent to Unitary Patent are very interesting but of no concern in the case at hand). The Commission submitted to the requested proposal for enhanced cooperation to the Council almost immediately on 14 December 2010.ⁱ The political momentum was apparently large enough to induce a further 13 Member States to join the application of an enhanced cooperation.ⁱⁱ Also the EU Parliament was fast to give its consent as required under Article 329(1)(4) TFEU.

Given this, the Council issued decision 2011/167/EU on 10 March 2011, authorising the enhanced cooperation in the area of the creation of a Unitary Patent protection for the 25 applicant Member States (hereinafter «the contested decision»).

Spain and Italy submitted applications for annulment on 3 June and 10 June 2011 respectively.ⁱⁱⁱ With an annulment any Regulation enacted on the basis of the enhanced cooperation would have been automatically void. The entire «Unitary Patent Package» would have been consequently shot to pieces.

Both countries had been granted leave to intervene in the other's case by Orders of the President of the Court of 13 and 27 October 2011. Belgium, the Czech Republic, Germany, Ireland, France, Italy, Hungary, the Netherlands, Poland, Sweden and the UK intervened in support of the Council's applications for dismissal of the cases. The European Parliament and the Commission were granted leave to intervene in both cases.^{iv} The cases were joined for the purposes of the oral procedure and judgment by order of the President of the Court of 10 July 2012.^v

Spain and Italy based their actions on Article 236(2) TFEU claiming annulment of the decision of authorising enhanced cooperation of the Council. The Court is the competent institution for review of claims of Member States against legal acts of different European institutions concerning the **four grounds** determined in Article 263(1)(2) TFEU which are the lack of competence, infringement of an essential procedural requirement, infringement of the Treaties and misuse of powers.

Spain asserted that there had been a misuse of powers and failure to have due regard for the judicial system of the European Union. Moreover, Spain claimed breach of the conditions of Article 20 of the Treaty of the European Union («TEU») and Articles 326 and 327 TFEU regarding the non-exclusiveness of the competences with respect to enhanced cooperation and regarding the requirement of last resort of an enhanced cooperation and the prohibition of undermining the internal market.^{vi}

Italy likewise based its action on the misuse of powers on the failure to give reasons and on the breach of the requirements of Article 20(2) TEU concerning the condition of last resort. Moreover, Italy claimed various infringements of Article 20 TEU and Articles 118 and 326 TFEU.^{vii}

(2) Judgment

The Court summarised the different claims of both countries in five pleas, which were all dismissed following the Advocate General's opinion.^{viii}

(a) First Plea: Lack of competence of the Council to establish the enhanced cooperation

The first plea is based on the first ground for annulment according to Article 263(2) TFEU, the lack of competence.

Article 20 TEU provides the recourse on an enhanced cooperation in the context of **non-exclusive** competences of the Union. It was common ground that the creation of a Unitary Patent falls within the scope of Article 118 TFEU. Italy and Spain claimed that Article 118 TFEU relates to the **exclusive**

competences of the Union according to Article 3(1)(b) TFEU in the area of «the establishing of the competition rules necessary the functioning of the internal market». This would mean that enhanced cooperation in the field of Article 118 TFEU violates Article 20(1) TEU.^{ix}

According to the **Court**, Article 118 TFEU relates to the **non-exclusive competences** of Article 4(2)(a) TFEU in the area of the «internal market». Referring to the Opinion of Advocate General *Bot*, the Court states that rules on intellectual property are indeed essential for an undistorted competition on the internal market. However, such rules do not constitute «competition rules» as referred to in Article 3(1)(b) TFEU.^x The Court finds that the competition rules are determined in Part 3, Title VII, Chapter 1 of the TFEU in Articles 101 to 109 while Article 118 TFEU is positioned in Chapter 3 under the heading «Approximation of Laws». The Court therefore considers Article 118 TFEU not being part of these competition rules. Consequently, Article 118 TFEU does not fall within the scope of Article 3(1)(b) TFEU.^{xi}

Accordingly, the Court held that the competences of Article 118 TFEU on intellectual property are comprised in the **non-exclusive competences** (especially in the area of the internal market mentioned in Article 4(2) TFEU) and therefore cannot violate Article 20 TEU.^{xii}

(b) Second Plea: Misuse of Powers

Italy and Spain claimed that the purpose of the contested decision of the Council was the exclusion of the applicants and the termination of the negotiations concerning the European Union Patent and its language arrangements. Therefore, the contested decision was – in their view – intended to prevent them from exercising their right of the language arrangements according to Article 118(2) TFEU which provides that the Council shall find unanimously.^{xiii} This misuse of powers is another ground for annulment according to Article 263(2) TFEU. The notion of misuse of powers is deducted from the French notion «détournement de pouvoir» meaning the misuse of competency or power of public authorities, in contrast to the German understanding being the misuse of a margin of discretion of public authorities.^{xiv}

The **Court** defines misuse of powers as legal measures which «have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaty».^{xv} The Court held that unanimity as required in Article 329(2)4 TFEU (referred to in Article 20 TEU) does not prevent Member States from establishing an enhanced cooperation. On the contrary, Article 330(2) TFEU provides that only Member States being part of the enhanced cooperation have the right to vote. Consequently, **unanimity refers only to the Member States being part of the enhanced cooperation**.^{xvi}

Moreover, the Court states that an enhanced cooperation is possible if the objectives of the cooperation cannot be obtained «within a reasonable period of time by the Union as a whole», as is stated in Article 20(2) TEU. After declaration of the Council that the European Union Patent and its language arrangement cannot be established within reasonable time, Article 118(2) TFEU was not circumvented according to the Court^{xvii}. The Court also states (without giving further reasons) that the purpose of the contested decision was not to exclude any Member State and that the contested decision contributes to the integration process.

Hence, the Court denied that there was any misuse of power.

It is worth mentioning that Italy and Spain put forward that the contested decision violated Article 142 of the European Patent Convention («EPC»). Although the Court does not seem to have jurisdiction, it nevertheless dismissed this argumentation concerning Article 142 EPC, holding that every Member State of the European Union was also a contracting Member State of the EPC so that a Unitary Patent might be established by a special agreement.^{xviii}

(c) Third Plea: Breach of the «Last Resort» Condition of Article 20(2) TEU

This plea refers to the ground determined in Article 263(2) TFEU of violation of the Treaties. The plea constitutes a catchall element comprising any breach of European law whether primary or secondary law, written or unwritten law.^{xix}

Italy and Spain claimed that the **negotiations** among all Member States **on the language arrangements had not failed** at the time of the proposal for enhanced cooperation of the Commission. Accordingly, the contested decision, they alleged, was not adopted as a last resort breaching Article 20(2) TEU.^{xx}

The **Court** interpreted Article 20(2) TEU in light of Article 20(1)2 TEU, determining that the aim of the enhanced cooperation was «to further the objectives of the Union, protect its interests and reinforce its integration process». Accordingly, the Court held that **not every fruitless negotiation could lead to an enhanced cooperation**. Referring to the Opinion of the Advocate General, paras. 108 and 111, the Court was of the view that the «last resort»-condition includes **only situations «in which it is impossible to adopt such legislation in the foreseeable future»**.^{xxi} However, the Court held that the Council is the institution that can best evaluate the willingness of the Member States to compromise and if they will submit proposals leading to the adoption of legislation for the Union as a whole in the foreseeable future.^{xxii} As a result, the Court only reviewed whether the Council decided deliberately and impartially with respect to the aspects relevant to this point and whether adequate grounds have been given for the conclusion reached by the Council.^{xxiii} It becomes clear, however, that the Court itself shares the Council's position on the merits as well. The Court referred to the fact that various language arrangements has been discussed between the Member States and that none of these arrangements has found the required support.

The «last resort»-condition is not breached.

(d) Fourth Plea: Violation of Article 20(1) TEU, Articles 118, 326 and 327 TFEU

The alleged violation of these Articles concerns primary European Law. Therefore, all these alleged breaches again are based on an infringement of the Treaties. The Court only briefly comments on these alleged violations.

(aa) Infringement of Article 20(1) TEU: Reinforcement of the Integration Process

Italy and Spain had claimed that Article 20(1) TEU provides that an enhanced cooperation must be meant «to reinforce the integration process». They put forward that the **Unitary Patent** was **detrimental to the achieved integration process**, since no uniform protection is achieved.^{xxiv}

The **Court** held that, (even) according to the EPC, European patents do not provide uniform protection in the contracting states. Rather, the protection is limited to the territory of each contracting state. This disadvantage will be cleared by the Unitary Patent at least for the participating states. When comparing these two situations, the **Unitary Patent** contributes to the integration process and **provides more unanimity, in the territory of the participating states** than it is achieved currently.

(bb) Infringement of Article 118 TFEU – «throughout the Union»-condition

The **Court** also has to deal with the argument that the Unitary Patent will not provide protection «throughout the Union» as provided in Article 118 TFEU. The Court states that it is **inherent to enhanced cooperation** that the Unitary Patent will be in force, not throughout the whole Union, but only in the territory of the participating Member States.^{xxv} This consequence follows necessarily from Article 20(4) TEU, providing binding force of acts adopted in the framework of enhanced cooperation only for participating Member States.

Indeed with considering Article 118 TFEU for being part of non-exclusive jurisdiction, the Court could not find differently in this respect.

(cc) Infringement of Article 326(2) TFEU – no undermining of «the internal market, or economic, social or territorial cohesion»

Italy and Spain put forward that enhanced cooperation undermined the principles and aims listed in Article 326(2) TFEU such as the internal market and economic, social and territorial cohesion. The **Court** dismissed this plea based on its grounds given in para. 68 of the Judgment regarding Article 118 TFEU. The Court held that it is inherent to the enhanced cooperation that an economic, social and territorial cohesion only takes place in the participating states. Again, the Court could not find differently here considering its decision concerning the infringement of Article 118 TFEU above, para. 68 of the Judgment.

(dd) Infringement of Article 327 TFEU – no respect of «the competences, rights and obligations» of non-participating Member States

According to the Court, the contested decision does not harm any competence, right or obligation of the applicants. The **Member States participating in the enhanced cooperation** are **free to prescribe rules**, which were **contested by the non-participating states**, not taking part in the enhanced cooperation.^{xxvi} The Court emphasised that the contested language arrangement was not adopted by the contested decision but was only envisaged and that the non-participating Member States still have the possibility to join in. The Court seems to displace this issue to the next stage of enhanced cooperation, the adoption of specific provisions which can still be contested by the non-participating Member States.

(e) Fifth Plea: Disregard for the Judicial System of the Union

Italy and Spain alleged the disregard of the completed judicial system of the European Union guaranteeing the control of the legality of the acts of European Institutions. By authorising enhanced cooperation without specifying the envisaged judicial system of legal protection the contested decision had violated the existing judicial system of the Union.^{xxvii} Like the previous two pleas also the fifth plea was based on the ground of infringement of the Treaties, according to Article 263(2) TFEU regarding the judicial system set out above all in Part XI, Title 1, Chapter 1, Section 5 TFEU, entitled «The Court of Justice of the European Union».

The Court dismissed this last argument, denying an obligation of the Council to determine a possible content of a judicial system to be adopted by the participants in the enhanced cooperation.^{xxviii} This is, so the Court stated, the task of the participants in the enhanced cooperation in a second step and only following the establishment of that enhanced cooperation. This establishment was the only purpose of the contested decision of the Council.

(3) Comment

This decision was the first judicial examination in the area of the establishment of the Unitary Patent. The decision therefore marks a first positioning of the Court concerning the Unitary Patent and consequently, the decision was awaited impatiently. However, following the Opinion of Advocate General on 11 December 2012, it was no longer a surprise that the two actions would be dismissed. It is well known that the Court often follows the opinion of the Advocate General. The decision is neither surprising regarding the political dimension of this matter. The establishment of a Unitary Patent system is a big task tackled by the Member States of the European Union. It is a long and slow process, which after long discussions has finally generated two Regulations as well as the adoption and finally the signature of the Unified Patent Court Agreement. An annulment of the contested decision would have been a massive backlash for the establishment of the Unitary Patent. In this regard, the decision of the Court is good news for the further development of the Unitary Patent. However, various shortcomings of the decision have already been uncovered and criticised.^{xxix} It is true that the reasoning of the Court is even shorter than the reasoning of the Advocate General.

One of the criticised shortcomings of the decision relates to the lack of competence. It is justifiably criticised that this argument was dismissed by the Court based on a strict formal and systematic interpretation of the TFEU.^{xxx} The Court held that the internal market mentioned in Article 4(2)(a) TFEU comprises the establishment and functioning of the internal market as mentioned in Article 118 TFEU. Therefore, Article 118 TFEU is not a competition rule according to Article 3 (1)(b) TFEU. The Court affirmed this argument with the systematic argument that competition rules are provided in Articles 101 to 109 TFEU. As a result, Article 118 TFEU is understood as a shared competence according to Article 4(2) (b) TFEU. According to Article 2(2) TFEU shared competences means that both the Union and every Member State may adopt legally binding acts. In case of the Unitary Patent this means that a Member State can legally establish a patent with Union-wide protection on its own - which is obviously impossible. This conflict^{xxxi} has been ignored and left open by the Court. Given that there is no further recourse, however, the matter is settled.

Another shortcoming put forward is that the grounds concerning the unanimity requirement of Article 118(2) TFEU do not comment on the alleged «essential question». This alleged «essential question» concerns the impact of the unanimity requirement on a possible exclusion of non participating Member States to participate at a later point with respect to the language arrangement.^{xxxii} Precluding certain languages of Member States may hamper the language interests as part of the cultural interests of these Member States. It may also choke off incentives, prospects or to a later cooperation and participation of these Member States in the area of Unitary Patent. This may be true, yet it is not a shortcoming of the findings of the Court but, if anything, of Article 118 TFEU. Criticising the Court for the political intent of the Member States when drafting Article 118 TFEU is not justified.

The shortcomings (perceived or actual) are important from a scientific point of view. Far more interesting, however, is the impact of the findings of the Court on the two new actions for annulment pending before the Court brought by Spain.^{xxxiii} With these actions, Spain attacks the two Regulations adopted on 17 December 2012, that is Regulation (EU) No. 1257/2012 on the creation of Unitary Patent protection and Council Regulation No. 1260/2012 on the translation arrangements. The question is whether any predictions can be made in respect to the outcome of the two new annulment actions of Spain based on the decision of the Court concerning the enhanced cooperation.

This question is answered in the following on the basis of the pleas put forward in the two new actions of annulment. Unfortunately, only a brief summary of the pleas is published on the website of the Court.

(a) Annulment Action against Regulation (EU) No. 1257/2012

In Case C-146/13, Spain bases its action on **six different pleas**.

(aa) With the **first plea**, Spain claims a «breach of values of the rule of law insofar as a Regulation has been established on the basis of the right granted by the European Patent Office, whose acts are not subject to judicial review».^{xxxiv} This plea refers to the fact that the European Patent Office («EPO») is the authority which grants European patents, which can benefit from unitary effect by virtue of this Regulation upon request of the patent proprietor.^{xxxv} The EPO, as a non-European Union organisation, grants and administers the new Unitary Patent according to the Regulation. Yet, decisions of the EPO are not open to review. Hence, Spain asserts Regulation (EU) No. 1257/2012 shall be void for violation of the principle of rule of law mentioned in Article 2(1) TEU. In the action against enhanced cooperation, there was no room for such plea. The plea is linked directly to the provisions of the Regulation that was not subject to the decision of the Court. A reliable prediction of a decision of the Court in this regard is therefore difficult.

The Court has already been confronted with this argument as it was claimed that the decision on enhanced cooperation should include provisions regarding judicial review. The Court has dismissed this argument regarding enhanced cooperation by stating that the issue of judicial review can be addressed in a second step.

It is noteworthy that at the time of the decision the Court already knew the draft of the Regulation (EU) No. 1257/2012. Nonetheless, no comment was made in *obiter*. One can assume that the Court will take the position that the Regulation (EU) No. 1257/2012 provides for instruction of the EPO to grant Unitary Patents and that the participating states are free to provide for judicial review by other means. Such review is provided in the Unitary Patent Court Agreement («UPCA») as far as the grant of a patent, including a Unitary Patent, is concerned. One might contest that this is not Union law. Yet, the Court has already consented to the structure of the UPCA if it provides for review by the Court via Article 267 TFEU in its opinion of 8 March 2011, C-1/09, on «the draft agreement – creation of a unified patent litigation system – European and Community Patents Court – compatibility of the draft agreement with the Treaties».^{xxxvi} What is left is the fact that there is no judicial review for decisions of the EPO **not granting** a patent. This has been a problem since the foundation of the EPO. However, it should not be a problem in the situation at hand. Regulation (EU) No. 1257/2012 provides for unitary protection only once a patent has been granted. If the Court upholds its formal approach it should disregard this long existing problem. Needless to say that the political dimension mentioned above might be to the disadvantage of the applicants.

- (bb) The **second plea** is based on the argument of the non-existence of an act of the European Union, or alternatively, on the lack of a legal basis for the attacked Regulation with respect to the provided unitary protection in Article 118 TFEU.^{xxxvii} Article 118(1) TFEU was examined in the decision of the Court concerning enhanced cooperation. There, the Court held that the unitary protection of a European intellectual property right created by enhanced cooperation of only a part of EU Member States is inherently only provided in the territory of the participating Member States. The Court gave rather short reasoning on this point. Nonetheless, the Court took a clear position confirming that European measures established by enhanced cooperation may be subsumed as being «Union-wide» according to Article 118(1) TFEU. Given this clear position, one must assume that the Court will not change its position in the new annulment action and will therefore dismiss the second plea.
- (cc) The same should apply for the **third plea** concerning the «misuse of power through the use of enhanced cooperation for purposes other than those provided for in the treaty».^{xxxviii} The argument on the misuse of powers had already been put forward and dismissed in the decision of the Court concerning enhanced cooperation. One cannot expect the Court to reverse its opinion in its second decision concerning the area of Unitary Patent.
- (dd) The **fourth** and **fifth pleas** concerning the breach of Article 291(2) TFEU and the breach of the *Meroni* case law^{xxxix} are new arguments. The *Meroni* case law determines that European institutions may delegate their powers conferred by European primary law to institutions outside the European Treaties only under limited conditions.^{xl} Powers may only be delegated if they are clearly defined and supervised by the delegating authority. Hence, the delegated authority is not allowed to have a broad margin of discretion. The pleas refer to the fact that the attacked Regulation delegates certain administrative tasks to the EPO.

With respect to the Regulation at hand one can argue from a formal point of view that the Regulation meets the requirements of the *Meroni* case law. The Regulation does not delegate the decision to grant a patent to the EPO which would be the delegation of a decision with a broad margin of discretion. The decision of grant is already transferred to the EPO by the EPC. The Regulation refers only to the «patent granted», according to Articles 2(b), 3(1) and 18(6) of the Regulation (EU) No. 1257/2012. Thus, the delegation of power is both limited and well defined. To take such formal position is justifiable in light of the Judgment concerning the Council's decision on enhanced cooperation. Here, the Court also took a rather formal standpoint concerning Article 118 TFEU and the resulting lack of competence.

Thus, the new action will likely not be successful arguing *Meroni* case law.

- (ee) The **sixth plea** concerns the breach of the principles of autonomy and uniformity in the application of European Union law, as regards the laws governing the entry into force» of the attacked Regulation.^{xii} The entry into force of the Regulation is linked to the entry into force of the UPCA as provided by Article 18(2) of the challenged Regulation. European law shall be self-governing and not dependent on national or international law.

At first glance, the link to Article 18(2) of the Regulation may conflict with the principle of autonomy of the European law. Yet, regarding Article 142 EPC (see 2 lit. b above) the Court emphasised that it cannot find for a violation since all states making use of Article 142 EPC are also members of the European Union. This formal approach may be applied here as well. All states having to ratify the UPCA are also Member States of the European Union. It is true that with only 13 states ratifying the UPCA^{xiii} the Regulation becomes operative by a group of Member States being different from these having taken care of the Regulation. Yet, nonetheless, the limit of the group of Member States is not breached.

- (b) Annulment Action against Council Regulation No. 1260/2012

The second annulment action, Case C-147/13, concerns Council Regulation No. 1260/2012 on translation arrangements and is based on five different pleas.

- (aa) In the **first plea**, the Spain claims a breach «of the principle of non-**discrimination** by introducing a scheme to the detriment of persons whose mother-tongue is not English, French or German, the scheme being disproportionate to the objective pursuit».^{xiii} This principle has already been mentioned in the decision of the Court concerning enhanced cooperation with respect to the alleged infringement of Article 326(2) TFEU. At the time of the decision on enhanced cooperation, the Court knew about the Regulation No. 1260/2012. Nonetheless, the Court noted that the envisaged language arrangement cannot be reviewed within the scope of the action in question. The Court also refrained from giving any *obiter dictum* in this respect. This issue is therefore displaced to the new action against the Regulation No. 1260/2012.

However, in respect of the alleged infringement of Article 327 TFEU the Court held that the participants in the enhanced cooperation were free to adopt regulations with which the non-participating states of enhanced cooperation would not agree if they took part in it.^{xiv} Moreover, such provisions would not

«render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation».^{xlv}

From these statements, a certain tendency might be deducted for the decision in the new annulment action. It seems that the Court does not see disproportionate or discriminatory actions of the Member States participating in the enhanced cooperation. One of the permissible measures according to the Court is the adoption of a Regulation such as the impugned one. While these statements in the first decision only refer to regulations of the participants in the enhanced cooperation *in general* and while in the new action the Court will have to decide whether a specific Regulation meets the requirements of the principle of non-discrimination. One can assume that the Court will decide in favour of the language arrangement of the attacked Regulation. The Court confirmed the Council's decision based on the language arrangement while the draft of this Regulation was already published. It was obvious that the concept of language arrangement on which the Council's decision was based would be in the upcoming Regulation. Nonetheless, the Court did not provide any indication in its Judgment that it doubts the legality of this language arrangement. Accordingly, the Court cannot possibly justify a change of opinion in the new action.

(bb) The **second plea** concerns once more Article 118(2) TFEU. This time, however, the action is not focused on unanimity according to the second sentence of Article 118(2) TFEU but on the lack of direct effect of the language arrangements as set out in the first sentence of this Article. Spain claims that Article 4 of the Regulation does not fall within the scope of Article 118(2)1 TFEU as the language arrangement of the European intellectual property right are not directly concerned and therefore lacks legal basis.^{xlvi} Article 4 of the attacked Regulation provides an obligation to translation of the patent in case of a dispute. Article 118(2)1 TFEU refers to «language arrangements for the intellectual property rights». This phrasing is to be interpreted in a broad way including language arrangements in case of a dispute. Nothing in the wording limits the interpretation to language arrangements with respect to the validity or grant of the intellectual property right. Thus, language arrangements concerning the case of a dispute fall within the scope of Article 118(2)1 TFEU.

Even if the Court decides in favour of Spain, the Regulation may not be declared void on the whole. Article 264 TFEU provides that in case of a well founded action the act in question will be declared void. Even though the wording itself is not clear in this respect, according to the settled case law of the Court this includes the possibility of partial annulment of the act under review.^{xlvii} Conditions for a partial annulment is that the clauses «the annulment of which is sought may be severed from the remainder of the act».^{xlviii} This condition is not met if the partial annulment «would cause the substance of the act to be altered» while the determination must be based on an objective criterion.^{xlix} Following the argument of Spain, Article 4 of the Regulation does not affect the language arrangement directly. Thus, Article 4 may be deleted without altering the substance of the Regulation and a partial annulment will be possible.

(cc) The **third plea** claims a breach of the principle of legal certainty. The exact claim has not yet been published. The plea appears to refer to the fact that Spanish is not provided in the language

arrangement of the Regulation and that as a consequence people who do not speak English, German or French will not be able to determine the scope of protection of a patent with sufficient legal certainty.

The principle of legal certainty is not mentioned in the decision concerning enhanced cooperation. However, the Court dealt with the language arrangements, having in mind that these arrangements were leaving aside the Italian and Spanish languages, in the second and fourth plea concerning misuse of powers and the violation of Article 327 TFEU. The language arrangement has not been changed in the Regulation. Therefore, the Court will likely dismiss the plea in the new action as well. Besides this, legal certainty is not only met if a translation in the respective native language is provided. All languages have notions and technical terms with a determined meaning. The Regulation ensures that the patents are written for instance in German or English. These languages have their determined technical terms. The meaning may be determined for other European countries like Spain with help of translations or native speaking patent attorneys. As a result, there is no legal uncertainty for Spain identifiable if Unitary Patents are translated into English or German but not into Spanish.

(dd) **Pleas 4 and 5** concern again the *Meroni* case law and an infringement of the principle of the autonomy of European Union law by making the application of the Regulation dependent on the entry into force of the agreement on a Unified Patent Court and were not subject to the decision of the Court concerning enhanced cooperation. Referring to the above outlined argumentation these new arguments, however, will most likely not be successful in either of the new actions.

Against this background, the decision of the Court concerning the enhanced cooperation is one step forward to a Unitary Patent. It is neither the last step nor the last hurdle to jump for the Unified Patent. With such arguments put forward by Spain concerning several legal principles the two new actions of annulment leave the Court room to tipping over the project of creating a Unitary Patent. It is very likely, however, that it will not tip over the Unitary Patent project. The political decision to continue with the project irrespective of when the ECJ will decide on the Spanish cases is appropriate.

* Dr. Ulrich Blumenröder, LL.M., Julia Peto, LL.M., Grünecker München.

ⁱ Judgment, para 43.

ⁱⁱ Judgment, para 2.

ⁱⁱⁱ OJ 2011/C 219/16; OJ 2011/C 232/34.

^{iv} Judgment, para(s) 3, 4.

^v Judgment, para 5.

^{vi} Judgment, para 7.

^{vii} Judgment, para 8.

^{viii} Judgment, para(s) 22, 50, 55, 94.

^{ix} Judgment, para(s) 10, 11.

^x Judgment, para 22.

- xi Judgment, para 24.
- xii Judgment, para 25.
- xiii Judgment, para 27.
- xiv *Dörr* in: *Grabitz/Hilf/Nettesheim*, Das Recht der Europäischen Union, 2012, Article 263 TFEU, para.178.
- xv Judgment, para 33.
- xvi Judgment, para 35.
- xvii Judgment, para 37.
- xviii Judgment, para(s) 38-40.
- xix *Dörr* in: *Grabitz/Hilf/Nettesheim*, Das Recht der Europäischen Union, 2012, Article 263 TFEU, para.174.
- xx Judgment, para(s) 42-44.
- xxi Judgment, para 50.
- xxii Judgment, para 53.
- xxiii Judgment, para 54.
- xxiv Judgment, para 60.
- xxv Judgment, para 35.
- xxvi Judgment, para 82.
- xxvii Judgment, para 87.
- xxviii Judgment, para 92.
- xxix <http://ipkitten.blogspot.de/2013/04/one-down-two-three-or-more-to-go-closer.html>.
- xxx <http://ipkitten.blogspot.de/2013/04/one-down-two-three-or-more-to-go-closer.html>.
- xxxi See also <http://ipkitten.blogspot.de/2013/04/one-down-two-three-or-more-to-go-closer.html>.
- xxxii <http://ipkitten.blogspot.de/2013/04/one-down-two-three-or-more-to-go-closer.html>.
- xxxiii Action of 31 May 2013, C-146/13 *Kingdom of Spain ./. European Parliament and Council of the European Union*; Action of 31 May 2013, C-147/13 *Kingdom of Spain ./. Council of the European Union*.
- xxxiv Action brought on 22 March 2013, Case C-146/13, *Kingdom of Spain ./. European Parliament and Council of the European Union*.
- xxxv Regulation (EU) No. 1257/2012 Article 2(a).
- xxxvi Opinion of the ECJ [2011] ECR I-01137, para(s) 80 ff.
- xxxvii Action brought on 22 March 2013, Case C-146/13, *Kingdom of Spain ./. European Parliament and Council of the European Union*.
- xxxviii Action brought on 22 March 2013, Case C-146/13, *Kingdom of Spain ./. European Parliament and Council of the European Union*.
- xxxix Action brought on 22 March 2013, Case C-146/13, *Kingdom of Spain ./. European Parliament and Council of the European Union*.
- xl ECJ [1958] ECR 133 *Meroni & Co., Industrie Metallurgiche SpA ./. High Authority*, p.152.

^{xli} Action brought on 22 March 2013, Case C-146/13, *Kingdom of Spain ./. European Parliament and Council of the European Union*.

^{xlii} Article 89(1) UPCA.

^{xliii} Action brought on 22 March 2013, Case C-147/13, *Kingdom of Spain ./. Council of the European Union*.

^{xliv} Judgment, para. 82.

^{xlv} Judgment, para. 83.

^{xlvi} Action brought on 22 March 2013, Case C-147/13, *Kingdom of Spain ./. Council of the European Union*.

^{xlvii} ECJ [1996] ECR I-04733 *Germany ./. Commission*, para. 143; ECJ [2008] ECR I-09363 *Commission ./. Département du Loiret*, para. 105 ; ECJ of 6 December 2012, C-441/11 P *Commission ./. Verhuizingen Coppens NV*, para. 38.

^{xlviii} ECJ [2008] ECR I-09363 *Commission ./. Département du Loiret*, para. 105.

^{xlix} ECJ of 6 December 2012, C-441/11 P *Commission ./. Verhuizingen Coppens NV*, para. 38.