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Enhanced Cooperation and Free Movement. Territorial Aspects of ‘Harmonisation’*

Introduction

‘As Community law stands at present, *and in the absence of Community standardization or harmonization of laws*, the determination of the conditions and procedures under which the protection of designs and models is granted is a matter for national rules’, the EU’s Court of Justice¹ has frequently concluded for many years.² This implies that certain forms in which proprietors executed their intellectual property rights³ were then evaluated from the point of view of conformity with the European Union’s primary law, and most often with the provisions on free movement or rules concerning competition.⁴ Clearly, there was a need to harmonise or unify intellectual property rights at the European Union level. This has been successfully completed in a number of fields. What remains to be done is work on those IPRs which have the biggest influence on market behaviours, namely patents.

The project of creating the ‘Community (or later: Union) patent’ dates back to the 1950s and overflows with examples of discord and lack of compromise.⁵ The bumpy road leading to patent unification directed the European Union to the advanced project of the European unitary patent. The European unitary patent is currently introduced by a procedure of enhanced cooperation. The application of that procedure within internal

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1 Hereinafter: the Court.

2 See, e.g., C-238/87 *Volvo v. Veng*, ECLI: EU: C: 1988: 477, § 7.

3 Hereinafter: IPRs.

4 I. Govaere, *The use and abuse of intellectual property rights in E.C. law. Including a case study of the E.C. spare parts debate*, Ann Arbor 1996, p. 190.

5 Th. Jaeger, *What’s in the Unitary Patent Package?*, “Max Planck Institute for Innovation & Competition Research Paper” no. 14-08, pp. 2–14.

markets opens a general and systemic question concerning the actual meaning of the concepts of ‘harmonisation’ or ‘unification’ of laws at the EU level.

Therefore, in this article we would like to examine whether the application of enhanced cooperation in the internal market redefines (or improves) the concept of harmonisation.⁶ So far, harmonisation has been defined only with respect to substantive issues. However, the case of the European unitary patent exposes further layers of the problem: when speaking about harmonisation, should we consider its actual territorial reach within the EU? And should the broader, international law context be taken into account when deciding if particular regulations provide for harmonisation or not?

These questions have both theoretical and practical significance. Answering them will not only help us to understand more deeply the concept of harmonisation and its importance within the internal market context. It will also allow us to determine if actions taken by the European unitary patent proprietor (or, more broadly, by any entity deriving its rights from the law introduced through enhanced cooperation) are to be evaluated solely from the point of view of the secondary legislation establishing these rights, or will evaluation from the primary law perspective still be possible? In other words, does the European unitary patent solve the problems of ‘the absence of EU standardisation or harmonisation of laws’, or maybe actions taken within its framework are still to be questioned in view of the Treaties?

We will limit our analysis to the relationship between harmonisation⁷ and the Treaty provisions on the free movement of goods.⁸ However, the conclusions formulated in this article are general and apply to other fields of substantive primary law, e.g. to the rules on competition.

The concept of ‘harmonisation’ in terms of the application of Article 34 TFEU

In the context of the interplay between secondary law and free movement provisions we will speak of ‘harmonisation’ in its functional sense.⁹ It should be understood as aiming

6 Some thoughts on the interplay between minimum harmonisation and closer cooperation (the predecessor of enhanced cooperation) may be found in: M. Dougan, *Minimum Harmonization and the Internal Market*, “Common Market Law Review” 2000, no. 37, pp. 853–885. Due to the nature of the unitary patent system, in this article we do not address the issue of minimal harmonisation or its influence on the application of free movement provisions.

7 This term will be understood broadly, encompassing both actual harmonisation, i.e. approximation of laws, and also unification (standardisation).

8 The free movement provisions determine the method of understanding the relationship between primary and secondary law in the internal market. At the same time, jurisprudence and doctrine are most elaborated on the free movement of goods in that aspect.

9 More on inconsistencies and ambiguities of ‘harmonisation’: E.J. Lohse, *The meaning of harmonisation in the context of European Union law – a process in need of definition*, in *Theory and Practice of Harmonisation*, ed. M. Andenas, C. Baasch Andersen, Cheltenham 2011, p. 284 *et seq.*

to advance market integration beyond the stage achieved by the application of the primary rules on free movement.¹⁰ In these terms, harmonisation establishes a level playing field for commercial activity in the Union by replacing the diverse national rules which might obstruct intra-Union trade.¹¹

Consequently, in this article we will discuss harmonisation as a broad and general term, regardless of the nature of the harmonising legal act: Directive (actual harmonisation, or approximation of laws) or Regulation (in this case one would most often speak of the unification or standardisation of laws).¹² In both of these cases, as long as secondary law concerns the internal market and effectively goes beyond the objectives of free movement provisions, in the context of the discussed problem it should be defined as harmonisation in a broad sense. It is worth stressing that generally ‘harmonisation’ and ‘unification’ are different and nuanced concepts, however.¹³ Sometimes the method of ‘full harmonisation’ by means of a Directive might influence the national legal order more than introducing EU law by a Regulation;¹⁴ one also should be aware of differences in the application of Article 34 TFEU in respect of minimum and maximum harmonisation¹⁵. However, these specific questions are not the subject of this article.

The broad understanding of this concept conforms to the Court’s conclusion that if national rules influence the movement of goods which is subject to full harmonisation, then these rules are evaluated from the perspective of harmonising legislation¹⁶ and preclude application of Article 34 TFEU. The same applies to justification of breaching the basic prohibition set out in Article 34 TFEU on the basis of Article 36 TFEU. Likewise, if protection of a certain value is harmonised fully at the level of the EU, then Member

10 S. Weatherill, *Union Legislation Relating to the Free Movement of Goods*, in *Oliver on Free Movement of Goods in the European Union*, ed. P. Oliver, Portland 2010, p. 427.

11 *Ibidem*. V. also: I. Maletić, *The Law and Policy of Harmonisation in Europe’s Internal Market*, Cheltenham 2013, pp. 6–27.

12 Likewise: A. Ohly, *Concluding Remarks: Postmodernism and Beyond*, in *The Europeanization of Intellectual Property Law. Towards a European Methodology*, ed. A. Ohly, J. Pila, Oxford 2013, p. 260.

13 W. van Gerven, *Harmonization of Private Law: Do we need it?*, “Common Market Law Review” 2004, no. 41, pp. 505–507; B. Kurcz, *Harmonisation by means of Directives – never-ending story?*, “European Business Law Review” 2001, no. 11–12, p. 288.

14 Ch. Timmermans, *Community Directives Revisited*, “Yearbook of European Law” 1997, no. 17, p. 5; J. Karsten, A. R. Sinai, *The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law*, “Journal of Consumer Policy” 2003, no. 26, p. 165.

15 S. Weatherill, *Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market*, in *From Single Market to Economic Union. Essays in Memory of John Usber*, ed. N. Nic Shuibhne, L. Gormley, Oxford 2012, p. 176.

16 Cf. C-37/92 *Vanacker and Lesage*, ECLI:EU:C:1993:836, § 9; C-324/99 *Daimler Chrysler*, ECLI:EU:C:2001:682, § 32; C-322/01 *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, § 64; C-309/02 *Radlberger Getränkegesellschaft and Spitz*, ECLI:EU:C:2004:799, § 53; C-470/03 *A.G.M.-COS.MET*, ECLI:EU:C:2007:213, § 53.

States may not rely on Article 36 TFEU¹⁷ (or the doctrine of mandatory requirements) in order to justify the infringement of the free movement of goods.

When giving ‘harmonisation’ a broader meaning, we aim to examine whether it is not more nuanced in other aspects. While it is indisputable that harmonisation is a means for further integration, the question of how the new methods of ‘diverse integration’ modify the existing understanding of what harmonisation is needs to be answered. The recently witnessed methods of that integration in the internal market are: enhanced cooperation and including international agreements as an inherent part of the legal scheme introduced by EU law. Both methods have been employed in the case of the unitary patent protection system.

Enhanced cooperation

Before discussing the issues outlined above in detail, it is worth recalling the basic features of the enhanced cooperation procedure. It allows a group of Member States to introduce a European Union legal act with respect only to those states. Enhanced cooperation is regulated by Article 20 TEU and Articles 326–334 TFEU. It is not the aim of this article to discuss that procedure in any detail. For the purposes of our contribution, it is sufficient to conclude that when adopted successfully, enhanced cooperation results in introducing an act of EU law which is effective only with regard to the participating Member States, but not applicable in other ones. However, enhanced cooperation should remain open for non-participating Member States as long as they fulfil the same conditions that the cooperating Member States initially had to satisfy.

In the European Union, the method of enhanced cooperation has been implemented three times so far. Benefitting from this procedure before the Lisbon Treaty came into force was hardly possible for any group of Member States, due to the barrier conditions for implementation. The first time the procedure was applied was in the area of law applicable to divorce and legal separation, in the so-called Rome III Regulation, which has been applied from 21 June 2011.¹⁸ The second time its implementation directly interfaced the internal market was by the creation of the European patent with unitary effect. The

17 Although, one needs to keep in mind that Article 36 TFEU might be basis for maintaining some national provisions even after harmonization – see Article 114(4)–(5) TFEU; more on that issue: I. Maletić, *Theory and practice of harmonization in the European internal market*, in *Theory and Practice of Harmonisation*, ed. M. Andenas, C. Baasch Andersen, Cheltenham 2011, p. 316 *et seq.*

18 Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343 from 29.12.2010, pp. 10–16.

structure of the unitary patent protection system will be discussed below.¹⁹ The third time was when enhanced cooperation was implemented with regard to the financial transactions tax,²⁰ albeit in this case no substantive act has been adopted yet.

To sum up, after the Lisbon Treaty came into force, Member States have been able to take full advantage of enhanced cooperation. As can be seen from the above examples, adoptions of the procedure concern not only the sensitive moral questions, but also matters connected to the internal market. Therefore, by analysing the example of the European unitary patent, we can examine how enhanced cooperation may influence the understanding of harmonisation within the internal market.

Harmonisation and unification of intellectual property rights from the perspective of the Free Movement of Goods

Without any doubt, IPRs interfere with the principle of free movement. If there is no harmonisation of IPRs, Member States may introduce rules protecting intellectual property into their legislation. Those rights are, however, subject to the principle of territoriality: the protection derived from an IPR begins and ends on the borders of that state. Such a situation creates inevitable tension between the principle of free movement and the protection of exclusive rights which are limited to the Member State's territory.²¹

Indeed, when an IPR holder executes their right by preventing a third party from using their invention (or another item protected by IPRs), this situation may fall within the scope of prohibition set out in Article 34 TFEU. In other words, exercising IPRs in certain circumstances might be considered as a measure having an equivalent effect to import restrictions. At the same time, it should be stressed that it is the Member State that is breaching Article 34 TFEU in such a situation and not the individual IPR proprietor.²² However, this conclusion has severe consequences for that right holder too, since execution of the very essence of IPRs paradoxically turns out to be unlawful. Such an infringement of the provision for the free movement of goods may, in turn, be justified on the basis of Article 36 TFEU.²³

19 See a comprehensive elaboration of that issue: H. Ullrich, *Enhanced cooperation in the area of unitary patent protection and European integration*, "ERA Forum" 2013, no. 13, pp. 589–610.

20 Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU), OJ L 22 from 25.01.2013, pp. 11–12.

21 D.T. Keeling, *Intellectual Property Rights in EU Law*, vol. I: *Free Movement and Competition Law*, Oxford 2003 (reprinted 2011), p. 22. On that tension see also: C. Seville, *EU Intellectual Property Law and Policy*, Cheltenham 2009, pp. 310–403.

22 D.T. Keeling, *op. cit.*, p. 23.

23 For elaborate discussion of that problem: Ch. Stothers, *Article 36 TFEU: Intellectual Property*, in *Oliver on Free Movement of Goods in the European Union*, ed. P. Oliver, Portland 2010, p. 313 *et seq.*

Harmonisation (understood as both the harmonisation and creation of unitary IPRs) is a possible solution to the conflict between the free movement of goods and intellectual property rights. In that sense, the use of the broad meaning of that term is justified.²⁴ By either establishing a level playing field or creating a union-wide IPR, it helps to abandon the principle of territoriality of these rights. In consequence, the IPR proprietor will no longer be able to prevent goods (or services) from being used and circulated from one Member State to another. Harmonisation leverages the problem of the potential infringement of an IPR to the European Union level, because it is not possible any more to obtain a different scope of protection only with respect to some Member States and not the entire EU. Therefore, the barriers to trade that result from national IPR protection are eliminated.

So far, the picture of EU harmonisation in the field of IPRs has been complex. Unitary rights were created through Regulations with respect to trademarks, designs and plant varieties. Other Regulations introduced unified rules with respect to supplementary protection certificates (regarding patent protection of pharmaceuticals). Apart from that, there is some sectoral harmonisation (by means of directives) relating to biotech inventions, trademarks, designs and, partly, copyrights.

Given that background, it is clear that the method chosen with respect to the European unitary patent is unique and thus will be discussed shortly below.

The European patent with unitary effect

It cannot be said that there was a unanimous will to introduce the European patent with unitary effect into the European Union legal order.²⁵ At the same time, the Lisbon Treaty introduced some changes, not only with respect to conditions for employing enhanced cooperation. It also contained Article 118 TFEU (introduced in the same chapter as Article 114 TFEU, the usual legal basis for harmonisation). This provision provides for competence to create European intellectual property rights that would provide uniform protection of IPRs throughout the entire EU. This competence shall be executed ‘in the context of the establishment and functioning of the internal market’.

The wording of Article 118 TFEU resulted in the adoption of two Regulations that established the European unitary patent: one on the creation of unitary patent protec-

24 J. Smits, W. Bull, *The Europeanization of Patent Law: Towards a Comparative Model*, in A. Ohly, J. Pila, *op. cit.*, p. 40 *et seq.* For more nuanced differentiation, cf. Judge Briss QC, *Unitary rights and judicial respect in the EU – Bringing cool back*, “Queen Mary Journal of Intellectual Property” 2013, vol. 3, no. 1, p. 196.

25 A more detailed description of the unitary patent system may be found in: M. Malaga, *The European Patent with Unitary Effect: Incentive to Dominate? A Look from the EU Competition Law Viewpoint*, “IIC – International Review of Intellectual Property and Competition Law” 2014, vol. 45, no. 6, pp. 623–630.

tion (the UPP Regulation)²⁶ and the second on translation arrangements concerning the unitary patent (the translations Regulation).²⁷ Those two Regulations were adopted within the procedure of enhanced cooperation. Only two Member States, i.e. Spain and Italy, did not join the system at that stage.

The two Regulations have already come into force, but their application has not yet commenced. It is contingent upon the a third legal act coming into force which, together with the remaining Regulations, constitutes a so-called unitary patent package. This third element does not belong to the European Union legal order: it is an international agreement which is expected to be concluded by the Member States that participate in enhanced cooperation. The agreement establishes the Unified Patent Court (UPC Agreement) and is largely composed of unified patent litigation rules.

The ratification process of the UPC Agreement is still in progress. Before it comes into force, Article 89 of the Agreement requires ratification of thirteen Member States, including Germany, United Kingdom and France (“the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place”). So far, some Member States have announced that they would not ratify the Agreement (e.g. Spain and Poland²⁸).

The Unified Patent Court will hold exclusive competence in hearing cases concerning the European unitary patent. However, the UPC Agreement regulates a few more aspects than just the jurisdiction and organisation of that court. One of those aspects is crucial from the point of view of the interplay between IPRs and free movement provisions.

Articles 25–26 of the UPC Agreement establish the right of the unitary patent proprietor to prevent third parties from both direct and indirect use of the protected invention:

Article 25

Right to prevent the direct use of the invention

A patent shall confer on its proprietor the right to prevent any third party not having the proprietor’s consent from the following:

26 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.

27 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.

28 However, in the case of a Member State that participates in enhanced cooperation (like Poland), Advocate General Bot suggests that the principle of sincere cooperation requires such Member State to ratify the UPC Agreement as well (paragraph 94 of the opinion submitted in the case C-146/13 Kingdom of Spain v. European Parliament and the Council, ECLI:EU:C:2014:2380).

- (a) making, offering, placing on the market or using a product which is the subject matter of the patent, or importing or storing the product for those purposes;
- (b) using a process which is the subject matter of the patent or, where the third party knows, or should have known, that the use of the process is prohibited without the consent of the patent proprietor, offering the process for use within the territory of the Contracting Member States in which that patent has effect;
- (c) offering, placing on the market, using, or importing or storing for those purposes a product obtained directly by a process which is the subject matter of the patent.

Article 26

Right to prevent the indirect use of the invention

(1) A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from supplying or offering to supply, within the territory of the Contracting Member States in which that patent has effect, any person other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.

(2) Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to perform any of the acts prohibited by Article 25.

(3) Persons performing the acts referred to in Article 27(a) to (e) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

It is noteworthy that these provisions were originally put in the UPP Regulation (the then Articles 6-7) and only afterwards transferred to the Agreement.²⁹ Consequently, in order to infer the actual substantive scope of the patent, one will need to read the UPP Regulation and the UPC Agreement together.³⁰

What is crucial from the context of the present article is the twofold territorial non-uniformity of the system. The first layer of the problem results from adopting enhanced cooperation. Despite the name of the patent, there still will remain Member States in the European Union in which the entire system will not be effective. Therefore, when

²⁹ More on this intervention: Ch. Wadlow, *Hamlet without the prince: Can the Unitary Patent Regulation strut its stuff without Articles 6–8?*, "Journal of Intellectual Property Law & Practice" 2013, no. 8, pp. 207–212.

³⁰ More on the European unitary patent's and the UPC's structure: A. Nowicka, *Patent europejski o jednolitym skutku – konstrukcja prawna i treść*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, no. 4, pp. 19–35; eadem, *Jednolity Sąd Patentowy – z perspektywy Polski*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2014, no. 1, pp. 13–28.

goods will be circulating from the participating Member State to the non-participating one, the question arises of whether a patent proprietor invoking his rights deriving from the unitary patent protection system might be breaching Article 34 TFEU. In other words, we need to determine whether the concept of “harmonisation” embraces only “substantive harmonisation” or whether other aspects as well, such as territorial ones, are necessary to exclude application of free movement provisions. To put it briefly, the question is whether enhanced cooperation employed in the internal market implies that we can speak of harmonisation with respect to the entire EU, or with regard to the participating Member States only. More interestingly, the question of what happens when these two orders of participating and non-participating Member States collide needs to be answered.

Secondly, we need to take into the account the above-mentioned transfer of substantive provisions from the UPP Regulation to the UPC Agreement. As has already been mentioned, the transferred provisions contain the essence of the problem relating to the interplay between free movement and intellectual property rights, i.e. the right to prevent the use of the protected invention. In consequence, one may doubt if that aspect of the system is in any way harmonised at the EU level. This question therefore is if an international agreement that forms part of the system established within the European Union and concluded by its Member States may be considered as a means of harmonisation even though it is not a source of European Union law itself. More specifically: will a unitary patent holder’s actions be evaluated from the viewpoint of unitary patent package legislation only, or will Articles 34-36 TFEU still be applicable?

How much harmonisation is there in the unitary patent?

As we have outlined the two layers of non-uniformity of the system, we need to observe that those layers do not exclude each other and in fact might be intertwined. Therefore, four different scenarios can be distinguished when it comes to Member States’ engagement in the system. Spain is expected to participate neither in enhanced cooperation, nor in the UPC Agreement. At the same time, the majority of Member States intend to participate in both enhanced cooperation and the UPC Agreement. In that group we can for instance identify France, which has already signed and ratified the Agreement. There are also less obvious scenarios. Firstly, Italy has not joined enhanced cooperation yet, but has signed the UPC Agreement. Secondly, if we ignore the suggestion that the principle of sincere cooperation implies an obligation to ratify the UPC Agreement once a Member State participates in enhanced cooperation, we can speak of the Polish scenario. Poland has joined enhanced cooperation, yet does not wish to sign and ratify the UPC Agreement.

Enhanced cooperation

The question of the extent to which the unitary patent legislation can be perceived as a means of harmonisation is even more interesting when we take into account the dynamic analysis of the problem. Effectively, the problem of the interplay between free movement and IPRs (which harmonisation aims to solve) arises in the event of trade between states that have different scopes of protection of the same matter. If we only consider the first layer of non-uniformity (i.e. enhanced cooperation), it seems that the unitary patent is indeed unitary when it comes to trade relations between participating Member States. For instance, obstacles to trade resulting from different patent protection systems would indeed be abandoned between France and Belgium once the UPC Agreement enters into force.

The situation becomes less clear in the event of trade with a non-participating Member State. By creating the unitary right and introducing it by means of Regulation, the EU legislator has definitely chosen the most radical form of harmonisation (or, unification) which was available. Therefore, in the case of the unitary patent one can definitely speak of “full harmonisation” that excludes application of Article 34 TFEU to a patent holder’s activities. As harmonisation is indeed “full” in substantive terms, we cannot say the same when it comes to the territorial issue. Therefore, in the event of trade in patented goods between Spain and France, the question is if the principle of the free movement of goods may be invoked by a party to such relationship.

When we analyse the relationship between a participating Member State and a non-participating one, it seems that it would be pointless to conclude that there is definitely no harmonisation in that regard. It should be stated that unitary patent rights are harmonised at least with respect to the participating Member State (in our example: France), for it is a party to enhanced cooperation. Such a conclusion leads however to two alternative implications for a non-participating partner (e.g. Spain).

The first possible implication is that we consider the unitary patent as harmonised in France, but not in Spain. This conclusion leads to serious doubt: who could invoke the free movement of goods defence, and against whom? Would it be possible for a Spanish defendant (patent infringer) against a French patent proprietor? Or the other way round?³¹ What would then be the point of the patent for its holders? Moreover, how would it be possible to justify the fundamental inequality in the relationships between entities from participating and non-participating Member States? These doubts lead definitely to the conclusion that it is impossible to consider unitary patent legislation

31 We need to remember that entities from non-participating Member States will be able to obtain unitary patent protection for their inventions. It is only in the territory of those states that the unitary patent gives no effect.

as a means of harmonisation with respect to one party, without stating the same when regarding the other. The extent of actual harmonisation must be the same for all parties of a legal relationship at one time.

If we maintain the assumption that unitary patent acts constitute harmonisation with respect to France, then the other possible implication for the Spanish partner remains. Namely, that despite its non-participation, in the event of a trade relation with a participating Member State, harmonisation “extends” to the Spanish territory. That would have been the actual meaning of the conclusion that Article 34 TFEU may not be invoked either by the French, or by the Spanish party. However, such a statement would violate the non-participating Member State’s sovereignty, and would also be contrary to European Union law. Article 20 § 4 TEU stipulates that “acts adopted in the framework of enhanced cooperation shall bind only participating Member States”. Moreover, according to Article 327 TFEU, “enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it.” Consequently, we should conclude that EU law excludes the possibility of any “extension” of the implications of enhanced cooperation into non-participating Member States. Therefore, the latter analysed solution cannot be accepted, either.

The above arguments lead to the conclusion that in the event of trade relations between parties originating from participating and non-participating Member States, we cannot speak of any harmonisation at all. This means that when trading with a non-participating Member State, the participating one is deprived of the benefits of harmonisation in that regard. Consequently, the free movement provisions would still apply to such situations. These conclusions remain appropriate with respect to the scenario of trade between two non-participating Member States (e.g. Italy and Spain) as well. Therefore, we need to reject the assumption that unitary patent legislation may be regarded as harmonisation in the entire European Union. That conclusion results from the nature of enhanced cooperation when the latter is employed in the field of internal markets.

At the same time, nothing precludes the conclusion that the unitary patent Regulations can be treated as harmonisation in participating Member States as well as in relationships between those states. There is no discriminatory treatment in that regard that would go beyond the nature of enhanced cooperation.

These conclusions seem to conform the Court’s appraisal concerning the method of harmonisation adopted in the case of the European unitary patent. When challenging the UPP Regulation before the Court, Spain argued that – among other things – Article 118 TFEU is not an appropriate legal basis for introducing that act in the EU legal order. According to the Spanish government, the UPP Regulation “is devoid of substantial content and its adoption has not been accompanied by measures providing uniform protection of intellectual property rights throughout the Union; nor does it bring about

an approximation of the laws of the Member States for that purpose.³² In response to that argument, the Court followed the conclusion submitted by Advocate General Bot in his opinion and stated that “Article 118 TFEU, which forms part of Chapter 3 (‘Approximation of laws’) of Title VII of the FEU Treaty, does *not necessarily require the EU legislature to harmonise completely* [emphasis added] and exhaustively all aspects of intellectual property law.³³”

It must be borne in mind that the quoted case concerned the substantive Regulation and did not deal with enhanced cooperation as such. Therefore, it should not be treated as a judicial interpretation of the harmonisation concept analysed within the framework of enhanced cooperation. However, the Court at least recognises the fact that there is no complete harmonisation when enhanced cooperation is adopted within the internal market. In consequence, the conclusion that there is no harmonisation in Member States not engaged in enhanced cooperation – even if they enter into relationships with participating Member States – seems to be fully justified. In turn, this leads to the final conclusion that adoption of EU legal measures by means of enhanced cooperation does not preclude application of Articles 34–36 TFEU in the evaluation of activities undertaken pursuant to those measures.

International agreements – the case of UPC agreement

In the foregoing section we concluded that in the case of enhanced cooperation there is no harmonisation in non-participating Member States or in relationships between them and participating Member States. However, one may still speak of harmonisation with regard to the group of Member States engaged in the system. And yet the European unitary patent system reveals a more nuanced problem. The quoted plea of the Spanish government concerned more specifically the fact that “the contested regulation refers to the UPC Agreement, which is an international public law agreement concluded by the Member States participating in enhanced cooperation (with the exception of the Republic of Poland) and the Italian Republic”. According to Spain, it “is contrary to the principle of the autonomy of the legal order of the European Union”, but also – and more importantly from the perspective of the present article – “that regulation has been rendered devoid of content, since *the ‘approximation of laws’ has been transferred to the UPC Agreement*”³⁴ [emphasis added].

As has already been mentioned, the Court responded that Article 118 TFEU does not necessarily require complete harmonisation. However, when we adopt the perspective of

³² C-146/13 *Spain v. Parliament and Council*, ECLI:EU:C:2015:298, § 33.

³³ *Ibidem*, § 48.

³⁴ *Ibidem*, § 35.

free movement, the question goes further. The Court recognises the fact that part of the harmonising provisions do not belong to the EU legal order, as it is formed by an international agreement. Among those provisions there are the patent proprietor's rights: the crucial element from the perspective of free movement. Therefore, one might ask about the status of those provisions in terms of harmonisation.

On the one hand, the unitary patent package may be looked at as a system. There is no doubt that the creation of the European unitary patent was fully inspired by the EU. This is also true about the unified patent litigation procedure and the Unified Patent Court. Thus, even despite the varied nature of the ingredients of the system, it should be treated with due regard to its coherence, integrity and autonomy. Therefore, from the functional viewpoint of applying the free movement provisions to the actions of a patent's proprietor, it is of less significance whether these actions are derived from the actual EU legal act or from any other part of the unitary patent system. Supporters of this position could argue that any other method of interpretation of this situation might lead us *ad absurdum*. Accordingly, if the majority of substantive aspects of the patent is harmonised by means of Regulations, it would be far too burdensome and impractical to decode the status of the harmonisation in each individual situation. In consequence, the patent proprietor as well as the infringer would lack legal certainty as to their status and right to invoke Article 34 TFEU in their dispute. It is more reasonable to consider the entire unitary patent protection system as a means of harmonisation, even if some of its parts do not belong to the EU legal order (and, in consequence, to the jurisdiction of the Court). This interpretation would result effectively in the conclusion that free movement provisions may not be applied to actions derived from the unitary patent.

The present authors do not agree with such a statement. However broadly and functionally the concept of harmonisation could be defined, one fundamental condition must absolutely be satisfied, namely that approximation (unification) is made by means of European Union law. Circumventing this requirement would be equal to widening the EU's competences, going beyond those been undertaken and performed by this organisation. It would also be contrary to the will of Member States who decided to regulate particular matters outside the European Union legal framework. In other words, if we recognise that, functionally, the UPC Agreement *is* harmonisation, then we actually extend the scope of the EU law into spheres into which it has not been introduced.

Moreover, the practical argument is rather incorrect. At least from the perspective of free movement, all relevant provisions are introduced in the UPC Agreement. Therefore, there is practically no threat of undertaking burdensome and detailed analysis of whether a particular aspect has been harmonised or not. If we conclude that under no circumstances can an international agreement be treated as a means of harmonisation, then all and any actions of a unitary patent proprietor fall out the scope of that concept, and may therefore be evaluated in their compliance with Articles 34–36 TFEU.

It follows from the foregoing that even if an international agreement constitutes an inherent element of the unitary patent protection system, this agreement should not be considered as a means of harmonisation. Nor should this feature be extended from Regulations on that agreement. The fact that originally one of the goals of the entire system was to eliminate obstacles to trade deriving from different national regulations on patents should remain irrelevant to this conclusion.

To conclude this section, the present authors claim that one may speak of harmonisation only when the law is adopted within the European Union legal framework. This concept should not be extended to any other source of law, even if it forms – together with EU legislation – a coherent system. Nor should it be extended territorially: in the event of enhanced cooperation, only territories of fully engaged Member States are covered by harmonisation. Even though this conclusion is hardly revolutionary, it has significant implications for the unitary patent proprietors and, possibly, for any future beneficiaries of acts adopted in an analogous manner.

Even if the normative concept of an internal market calls for intellectual property rights to be harmonised for the reasons described above, in the case of the unitary patent this calling is not satisfied. Even if it seems difficult to accept at first sight, we claim that, in the present shape of the system, Article 34 TFEU will be applicable to the exercise of the unitary patent. Although some obstacles to trade will have been abolished, paradoxically the patent's multi-layered non-uniformity creates new, conceptually difficult barriers. Time will show how those barriers function in practice and if any significant practical aspects of that problem will arise.

In that context it is worth mentioning that by creating new barriers to trade between Member States, the unitary patent may to a certain extent undermine the internal market. Prohibition of the latter is expressed in Article 326 TFEU, which is one of the provisions regulating the enhanced cooperation procedure. This was one of the arguments raised by Spain and Italy in their action for annulment of the Council's decision authorising enhanced cooperation in the field of the unitary patent. Responding briefly to this argument³⁵, the Court concluded that at the stage of deciding on the legality of authorising a decision it was too early to determine if the internal market might be undermined. However, this argument could have been raised only on the basis of Article 326 TFEU. Therefore, when Spain challenged the substantive Regulations in cases C-146/13 and C-147/13, it could not rely on this plea anymore. Consequently, first (when challenging the enhanced cooperation decision) it was too early and in the next step (when asking for annulment of the substantive regulations) it was too late to invoke this

³⁵ Joined cases C-274/11 and C-295/11 *Spain and Italy v. Council*, ECLI:EU:C:2013:240, §§ 75–78.

problem as infringing EU law³⁶. The interesting issue of the possibility of challenging acts introduced through enhanced cooperation deserves further elaboration³⁷ but this goes beyond the scope of this article. However, the roots of the problem are nevertheless described in the present text³⁸.

Suggested improvements in understanding the concept of harmonisation

Departing from the specific case of the European unitary patent protection system, we learn novel things about the concept of harmonisation and its significance for applying free movement provisions. Even if we use that concept to broadly describe all the faces of the Europeanisation of intellectual property rights,³⁹ it still has its limits.

Firstly, if a legal measure is introduced by means of enhanced cooperation, we can speak of harmonisation only with respect to participating Member States. What is more, when we adopt a more dynamic perspective and take into account the relationships between participating and non-participating Member States, no harmonisation in such relationships should be recognised. Any extension of approximating or unifying provisions beyond the group of engaged Member States would breach EU law and the will of non-participating Member States. In other words, the term ‘harmonisation’ in its territorial aspect should be interpreted strictly and narrowly.

Secondly, when defining ‘harmonisation,’ one should consider only the legal acts of the European Union. We have been witnessing recently a tendency to employ traditional public international law instruments to regulate EU affairs. However, this phenomenon should not be followed by extending the discussed concept into acts that were adopted without the involvement of EU institutions and without the legal basis spelled out in the Treaties, namely Article 114 TFEU *et seq.* To put it briefly, the concept of harmonisation needs to be understood strictly and precisely with regard to the legal nature and origin of harmonising measures.

The suggested approach results in the possibility of applying the free movement provisions to actions originating from such – to use the Court’s words – *incomplete* harmo-

36 Cf. M. Lamping, *Enhanced Cooperation in the Area of Unitary Patent Protection – Testing the Boundaries of the Rule of Law*, “Maastricht Journal of European and Comparative Law” 2013, no. 20, p. 601.

37 The problem of undermining the internal market by the unitary patent through raising barriers to trade was signalled e.g. by: F. Hartmann-Vareilles, *Intellectual property law and the Single Market: the way ahead*, “ERA Forum” 2014, no. 15, p. 162.

38 At the same time, one should remember about the Court’s Opinion 1/09 (ECLI:EU:C:2011:123), which was followed by substantial changes in the UPC Agreement that is now believed to be in conformity with EU law.

39 Cf. A. Ohly, *op. cit.*, p. 260.

nisation. It is particularly significant that fundamental freedoms remain applicable safeguards to the preservation and development of the internal market. The new methods of legal integration are an inherent and natural part of the political reality in the EU. Moreover, the practice of the European unitary patent might prove that in fact no real barriers to trade were raised or invoked. However, when the impact of those measures remains unclear, it is reasonable to adopt some precautionary approach and not to deprive the internal market of its well-developed system of checks and balances, i.e. the fundamental freedoms. The suggested method of 'harmonisation' seems to satisfy this postulate.

Conclusions

To conclude, we have examined here the specific problem of the relationship between harmonisation (understood here broadly as both the approximation and unification of laws) and new methods of integration within the EU. These methods constitute enhanced cooperation and involvement of public international law instruments instead of EU sources of law. Both are observed in the case of the European unitary patent package which forms a legally and territorially complex set of legal acts of different scope and nature. It is also the first case of employing enhanced cooperation in the internal market of the European Union.

The problem-oriented analysis of the particular unitary patent example leads to general conclusions concerning the understanding of 'harmonisation.' The present authors suggest interpreting this concept narrowly with regard to its territorial scope and legal nature. One may thus conclude that the discussed term indeed needs 'geographical' and 'legal' improvements. We have also outlined the potential threats resulting from adopting the opposite approach.

The suggested interpretation implies that the fundamental freedoms, with the main focus on the free movement of goods, remain applicable to acts that *prima facie* seem to constitute harmonisation, but do not satisfy the conditions spelled out above. At first sight it might be surprising or even disappointing: one of the aims of creating unitary rights is to move further with integration in the internal market and to desist from applying free movement provisions to activities regulated by that secondary legislation. Indeed, it must be agreed that from the perspective of the suggested interpretation, this aim of the European unitary patent has not been achieved. At the same time, such a deduction should not change the general conclusion that there is no harmonisation beyond the core of enhanced cooperation and where an international agreement is concluded. Moreover, it follows from a more detailed analysis that fundamental freedoms in such cases remain indispensable safeguards to the functioning of the internal market, which otherwise could have been undermined.

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SUMMARY

**Enhanced Cooperation and Free Movement.
Territorial Aspects of ‘Harmonisation’**

In this article we examine the notion of ‘harmonisation’ in its interplay with the application of provisions on the free movement of goods. Due to the introduction of the European unitary patent protection system, we are witnessing the first cases of adopting enhanced cooperation in the internal market. This fact raises new, systemic questions concerning the concept of ‘harmonisation’ in European Union law. Are only legal, substantive aspects covered by its definition or should the territorial range of a legal act be taken into account? If yes – to what extent? Since the adoption of enhanced cooperation covers the field of intellectual property rights, the above questions concern the relationship between exercising those rights on the one hand and the principle of free movement on the other. A closer look at this matter leads to the conclusion that the unitary patent might not provide the solution to one of the problems that created for. More generally, in this article we conclude that when defining the concept of ‘harmonisation’, one should take its territorial scope into account narrowly, so as not to infringe the principles of EU law.

Keywords: EU law, harmonisation, unitary patent

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