

# “Unitary patent“ and court system – Advocate General’s Statements of Position: Superseded by reality

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*This article reflects the personal opinion of the author.*

**On 18 November 2014, Advocate General Yves Bot’s Statements of Position in the Spanish nullity proceedings against the two Regulations on the “unitary patent” were published, his recommendations to the Court being a rejection of the actions. Once again, the legal issues are subordinated to the political interest in the implementation of the “patent package”, however, based on a widely not very convincing argumentation. Especially the Statement in case C-146/13 largely tries to avoid any contextual debate of the critical aspects raised, e. g. in relation to the adequacy of legal protection at the European Patent Office, while contradictions and misunderstandings occur repeatedly. Not least in view of the recent events at the European Patent Office, culminating in the suspension of a Boards of Appeal member by the President, the question arises to what extent the Statements of Position can form a suitable basis for the Court’s decision at all.**

## **A. Still no English version of the Statements of Position**

First of all, it is surprising that the Statements of Position (afterwards “Opinions”), which were originally prepared in French language, are currently still (status: 15 January 2015) not available in English, despite their publication already on 18 November 2014. Notwithstanding the fact that the language of the proceedings is Spanish, one should have expected that a version in English, as the world’s most widely spoken language, is made available promptly after the Opinions’ publication.

According to information provided by the English Translation Unit of the Court in December 2014, “the work necessary for publication” had to be interrupted due to illness of the respective employee, so that an availability of the English versions could therefore no longer be expected in 2014, but rather at the beginning of 2015. When asked about the reason for the delay in the provision of the Opinions’ probably most important language version after the Spanish language of the proceedings, it was explained that the English Translation Unit had to prioritize, so that cases with English as language of the proceedings, also those at the General Court. Therefore, documents from cases were English in not the language of proceedings would have to be processed in the remaining time and with the limited resources available.

The fact that the Opinions are still not available in English language almost two months after their publication is highly unsatisfying. Already in the interest of a comprehensive and timely information of the public, it should be ensured

that Opinions from the Advocate General in proceedings before the Court of Justice are also available in English, even if English is not the language of the proceedings.

Due to the missing English version of the Opinions, the citations used in this article are translations of the respective sections in the German language version. Once the English version has been made available, this paper might be updated with its text.

## **B. The Opinions and their assessment**

As is well known, Spain’s nullity action in matter C-146/13 is directed against the Regulation on the creation of the “unitary patent” (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; afterwards “Reg 1257/12”), while subject of the one in case C-147/13 is the Regulation on the respective translation regime (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; afterwards “Reg 1260/12”), their nullification being requested.

### **I. Proceedings C-146/13**

This article will focus on proceedings C-146/13, while a number of issues raised there are also the subject of matter C-147/13.

#### **1. German language version lacks quality**

While above, the absence of an English language version was criticized, the German version of the Opinion in matter C-146/13 demonstrates that the availability of a language version alone is not enough, if its quality is sometimes so poor that it hinders understanding the argumentation.

In the German version, there are a number of linguistic inaccuracies and flaws like, for instance, “*Schutz der Grundrechte im Rahmen des EPA*“ (“*protection of fundamental rights in the framework of the EPO*”) or “*durch die deutsche Verfassung garantierte Schutzrechte*“ (“*protective rights guaranteed by the German constitution*”, para. 33), “*nach dem in Art. 4 Abs. 3 AEUV der angefochtenen Verordnung genannten Grundsatz der loyalen Zusammenarbeit*“ (“*with regard to the principle of sincere cooperation set out in Art. 4 (3) TFEU of the contested Regulation*”, !, para. 94) or “*das UPC-Übereinkommen, das vom Königreich Spanien im Rahmen seiner Klage auf Nichtigerklärung der angefochtenen Verordnung geltend ge-*

*macht wird*“ (“the UPC agreement which is asserted by the Kingdom of Spain in its nullity action against the contested Regulation”, para. 159).

The question arises whether the Translation Unit has something like quality assurance and how it is possible that such document is released for publication in a form raising doubts as to its credibility already due to formal deficiencies.

## 2. Pleas in law

Spain’s action against Reg 1257/12 is based on seven arguments (Opinion C-146/13, para. 20 ff.; subsequent references to paragraphs without citing the source are such from Opinion C-146/13):

(1) A violation of the Rule of Law principle through the involvement of the European Patent Office (EPO) in granting and administration of the “unitary patent”,

(2) the lack of a legal basis after the former Articles 6 to 8 were replaced by a reference to the law of the Member States in Article 5 (3) Reg 1257/12,

(3) a misuse of powers by applying the “enhanced procedure” for purposes beyond those specified in Article 20 (1) TEU,

(4) a violation of Article 291 TFEU respectively the “Meroni” case law by fixing the annual fees for the “unitary patent” by a Select Committee and (5) by conferring the administrative tasks mentioned in Article 9 Reg 1257/12 on the EPO,

(6) a violation of the autonomy of Union law by tying the entry of the Regulation on the “unitary patent” to that of the Agreement on a Unified Patent Court (afterwards “UPCA”), and

(7) the fact that legal protection for the patent is governed in this Agreement instead of in the Regulation.

In this article, the Advocate General’s explanations on pleas (1), (2) and (6) respectively (7) will be examined in more detail, these should also be amongst the strongest arguments for nullifying the Regulation. Since the parties’ submissions are not publicly accessible, the statements on their positions are based on the respective information given in the Opinion itself.

### a) Violation of the Rule of Law by involving the European Patent Office

A very topical issue is Spain’s argument that the EPO’s involvement in granting and administration of the “unitary patent” violates the Rule of Law principle for a lack of adequate legal protection being available in relation to its activities. This is highly important, not least with regard to the most recent developments at the EPO, especially press reports on plans for establishing an institutional independence of the Boards of Appeal and the imposition of a house ban against a member of the Boards of Appeal by President *Benoît Battistelli* on 3 December 2014. These events happened at the beginning of December and there-

fore at a time approximately two weeks after the publication of the Opinions which allows testing the Advocate General’s position against the current realities.

### aa) Spain’s position

Spain argues that the procedure for granting a European patent is not subject to any judicial review guaranteeing a correct and uniform application of Union law as well as the protection of fundamental rights, therefore being incompatible with the constitutional requirements set out in Article 2 TEU. The judicial bodies of the EPO were not independent and their decisions not subject to legal review by a court, so that it could not be allowed to integrate the EPO into the Union’s legal order through Reg 1257/12 and its competences in relation to the “unitary patent” set out therein (para. 28 f.).

### bb) Position of the Advocate General

According to Advocate General *Bot*, Spain’s argument cannot affect the legality of Reg 1257/12, as the Union legislator’s decision to rely on the provisions for the grant of a European patent also for the “unitary patent” had been made even before the adoption of contested Reg 1257/12 and also “*in a very specific context*”, furthermore the Regulation’s subject matter was “*defined exactly*” (para. 40).

This “adoption” would need to be seen in the context of the enhanced procedure in which both Regulations on the “unitary patent” were deliberated, as well as “*in the conscious decision of the Union legislator*” (para. 41). When legislating in areas where “*political, economic and social decisions have to be made and complex assessments be carried out*”, the CJEU had always given the Union legislator wide discretion, this would also apply to the “*field of patents*” (para. 41 f.).

From the beginning, the Union legislator had intended to create the “unitary patent” based on the European Patent Convention (EPC) and the existing European patent, as this system was implemented already, having proven its functionality as well as a high degree of professional competence and quality (para. 44 f.). Apart from that, the EU Member States, which were also Contracting States of the EPC, “*have never regarded the possible impacts of EPO decisions on the grant of patents as a violation of their constitutional principles*” (para. 45).

The Regulation’s recourse to the EPO and the mechanisms of the EPC could not constitute a violation of the Rule of Law “*already in terms of the subject of the contested Regulation*”, because the EPC system was simply not part of the Regulation (para. 47 f.). Although the Union legislator had intended to rely on the EPO and the granting procedure for the European patent, this had not included making this system part of the Regulation (para. 50). According to its sixth recital, Reg 1257/12 was a “special agreement” in the sense of Article 142 EPC and would just not cover “*the requirements for the grant and validity of the European patent*”, but would only serve the purpose of attributing unitary effect to a European patent granted already under the EPC (paras. 49 f., 52). Therefore, the

Regulation would merely equip European patents with an additional property, the unitary effect, however, without affecting “*the procedure set out in the EPC*” (para. 58).

Advocate General *Bot* concludes his explanations recommending the rejection of the argument, since the legality of Reg 1257/12 could not depend on whether “*the EPO’s decisions on the grant of European patents are compatible with Union law*” (para. 61).

## cc) Assessment

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These explanations are not convincing.

### (1) Separating the Regulation from the granting procedure

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The clinical separation of the granting history of a European patent and the procedural framework governing it from the examination of the Regulation’s legality as conducted by the Advocate General appears arbitrary. If the Regulation means to create an independent “unitary patent” – which is the legislator’s intent (cf. e. g. recitals 7 and 14 and Article 3 (2) Reg 1257/12 and is not denied even by the Advocate General (cf. his statements in para. 60) –, its legal assessment cannot take place separated from the underlying European patent and the respective procedures as, ultimately, they continue to form a part of the protective right.

Union law builds on this protective right and, through the Regulation, attributes to it certain legal effects. If the values specified in Article 2 TEU, the compliance to which Spain demands in its suit, are taken seriously, the procedural backgrounds of the European patent cannot be ignored and the circumstances of its creation accepted as it stands, indifferently attributing to it legal effect for the Union. Instead, it should be ensured that this patent originates from a procedure fulfilling the requirements of Union law as laid down in, for instance, Article 2 TEU.

### (2) Ratification of the EPC as proof for its compatibility with fundamental rights?

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Remarkable is also the Advocate General’s statement according to which the Member States “*have never regarded the possible impacts of EPO decisions on the grant of patents as a violation of their constitutional principles*” (para. 45). It can certainly be doubted that this is the meaning of the separation of powers; as always, trust is a good thing, but control is a better one.

This position of the Advocate General seems to be based on respective assertions from the defendants, the European Parliament and the Council, which are no less remarkable.

Parliament claimed that level of legal protection provided for in the EPC had been deemed acceptable by the EU Member States, all of them also being Contracting States of the EPC (para. 31), seemingly implying that otherwise, they would not have signed and ratified it. However, what this means for whether the adopted was also legal, especially compatible with fundamental rights, remains unclear.

Council likewise declared the system created by the EPC compatible with “*the fundamental right of access to a court*” (para. 32). The immunity from jurisdiction and enforcement enjoyed by the European Patent Organisation (EPOrg) could also be lifted, apart from the fact that it was possible for the EPOrg to enter into Supplementary Agreements on the implementation of the immunity provisions with Contracting States. It was also possible for the EPOrg to stipulate by way of an international Agreement that “*its decisions are subject to review by a judicial body*” (para. 32).

Does this mean that the apparent deficiencies as to legal protection are meant to be irrelevant, because these could theoretically be removed or mitigated by entering into further Agreements? Does a legal situation involving the violation of fundamental rights really become irrelevant by the mere fact that these violations could be stopped, if only that was intended? If this was not about legal positions protected by fundamental rights and the situation for the affected persons was not so serious, one could be tempted to think that this is a bad joke.

### (3) The most recent developments at the EPO

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These statements by the Advocate General, by the European Parliament and by the Council form the background for the recent events at the EPO, which, once again, disclose serious legal deficits, confirming Spain’s position.

#### (a) Plans for strengthening Boards of Appeal independence

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On 4 December 2014, the legal magazine „JUVE Rechtsmarkt“ reported (accessible [here](#) [German language]) that the Administrative Council of the EPO currently assessed different measures for strengthening the independence of the Boards of Appeal. As is known, such plans exist at the EPO since the late 1990ies. For instance, on the EPO’s website, section “legislative initiatives”, the project “Organisational autonomy of the Boards of Appeal” is described, in which a draft for a respective revision of the EPC was developed (document CA/46/04 of 28 May 2004, accessible [here](#)), its aims being (ibid., cipher 2.):

*“The envisaged revision of the EPC aims at establishing the Boards of Appeal, together with their registries and the other support services in the present DG 3, as the third organ of the European Patent Organisation alongside the Administrative Council and the Office. This new organ of the Organisation would be designated the “European Court of Patent Appeals” and fulfil the judicial functions provided for in the EPC.*

*The Organisation would then have the three-way separation of powers typical of a state bound by the rule of law, into legislature, executive and judiciary, the latter being the new judicial body.”*

This proposal was mentioned already in the well-known intermediate decision R 19/12, in which the Enlarged Board of Appeal declared justified a challenge of its Chairman *Wim van der Eijk* for suspicion of partiality due

to the insufficient separation of the executive and judiciary at the EPO (cf. R 19/12, accessible [here](#) [German language], para. 21).

Even if details of the discussed plans are not yet publicly known, their existence in itself proves that, despite any denials and trivializations, problems of such fundamental nature are recognized that structural alterations are deemed inevitable. This already is confirmation for all those regarding the present structures inadequate with regard to the Rule of Law, as for example Spain does in its nullity actions.

### **(b) Suspension of a Boards of Appeal member by the President**

The extent of legal deficits at the EPO was impressively confirmed by its President *Benoît Battistelli* and his actions against a member of the Boards of Appeal. On 3 December 2014, he imposed a „house ban“ on this member, for an alleged dissemination of defamatory material against someone at the EPO management level. Said member was apparently escorted from the EPO premises, its office computer confiscated. In short: The President has suspended said member of the Boards of Appeal. The circumstances of this event are described in a letter signed by 35 members of the Enlarged Board of Appeal to the delegates of the Administrative Council, dating 8 December 2014, wherein the incident has been evaluated critically (accessible [here](#)). In its meeting on 10 and 11 December 2014, the Administrative Council confirmed the suspension for the *“alleged misconduct”* *“on a proposal from the President”* and, by an unanimous vote, releasing said member from active duty on full salary until 31 March 2015 (cf. the Communiqué of the Administrative Council of 12 December 2014, accessible [here](#)).

The incident is remarkable in several respects.

First of all, the President is not allowed to suspend members of the Boards of Appeal. According to Article 23 (1) EPC, they can be removed from office only in case of serious grounds and if the Administrative Council, on a proposal from the Enlarged Board of Appeal, takes a respective decision. Now the enacted suspension does not mean a removal from office, however, the President is nonetheless not empowered accordingly. Pursuant to Article 11 (4) EPC disciplinary authority over the Boards of Appeal members rests with the Administrative Council, according to Article 10 (2) lit. h) EPC, the President can only suggest to it that respective disciplinary measures be taken. A legal basis for the direct enactment of such measures by the President does not exist.

The fact that this measure was subsequently confirmed by the Administrative Council on a *“proposal by the President”* does not change this. The same applies to the President’s attempt to sell his unauthorized actions in retrospect as a *“precautionary and provisional measure”* (cf. his post on the EPA Blog dating 19 December 2014, accessible [here](#)). Such statements are possibly meant to pave the way for trying to justify his actions with an alleged urgency not allowing any delaying of the measure until a deci-

sion of the Administrative Council, the meeting of which was to take place shortly thereafter anyhow.

Regardless of the seriousness of the alleged offense of the suspended Boards of Appeal member, one thing is clear: The President, as a member of the EPO executive, has directly suspended a member of the EPO judicial bodies from its active duties, thereby interfering with the Office’s *“judiciary”*. The aspect that also this member’s office computer was confiscated, so that possibly insight can be taken into circumstances from pending proceedings which are protected by the secrecy of deliberations is further exacerbating the situation. The *“discovery”* of the allegedly defamatory material moreover raises questions in relation to data protection law. The deficits of the EPO structures with regard to the Rule of Law, especially the lack of independence of the Boards of Appeal, could hardly be demonstrated to the public in a much clearer manner!

It is no surprise that, immediately after this incident became public, above all, various renowned patent judges from different countries of the EPOrg protested against the measure, referring to its serious implications for the Boards of Appeal’s independence (cf. the letter from Lord Justice *Christopher Floyd* and the Advocate General of the Supreme Court of the Netherlands *Robert van Peursem* of 9 December 2014, accessible [here](#), afterwards agreed by six further judges, or the letter of the Intellectual Property Judges Association (IPJA) of 5 January 2015, accessible [here](#)). As an example for the concerns raised, the following statement from the IPJA shall be reproduced here:

*“The present events seriously threaten the judicial independence of the Boards of Appeal and by doing that call in question the guarantee of an independent and impartial review of the European Office’s decisions by a judicial body.”*

Little attention has so far been given to a further interesting aspect of the suspension incident. According to a report by „JUVE Rechtsmarkt“ of 9 December 2014 (accessible [here](#) [German language]), the suspended person is supposed to be a member of Board of Appeal 3.5.05. If this should be correct, it would push the significance of the incident even further, since the Chairman of this Board is one of the three judges who handed down the mentioned intermediate decision R 19/12, in which an insufficient separation of executive and judiciary at the EPO was conceded. According to reports, President *Battistelli* does not fully agree with the result of that decision. Since its publication, two of the three judges involved have retired. Should Board 3.5.05 really be affected by the suspension – an indication for which could also be the fact that its Chairman has not signed the mentioned letter from members of the Enlarged Board of Appeal –, this could also be interpreted as an attempt to set an example with regard to the last remaining judge from the context R 19/12 and to emphasize that anybody being prepared to render courageous decisions like R 19/12 will have to pay a high price for this – which, of course, would be further evidence for a lack of independence of the Boards of Appeal. However,

as long as no further details are known, this remains speculation.

#### **(4) The existing case law on the compatibility of EPO and EPC with fundamental rights**

In this context, a further aspect deserves to be mentioned which has not been addressed by the Advocate General in his assessment, but which was submitted by the Council.

With regard to the legal position of the EPO, the Council argued that the compatibility of the immunity of international organisations with “*the right of access to a court*” had been assessed and confirmed “*at national and international level*” (para. 33). Above all, already the former European Commission of Human Rights had confirmed the independence and the judicial character of the EPO’s Boards of Appeal in the matter *Lenzing AG vs Germany* (case no. 39025/97, accessible [here](#)) (para. 33).

Here, it is worth looking into the *Lenzing* decision. Against the background that a transfer of sovereign rights to international organisations is considered admissible with regard to the European Convention on Human Rights (ECHR) if said organisation provides for an equivalent protection of fundamental rights, the Chamber, in said decision from September 1998, accepted such equivalence for the proceedings at the EPO based on the following considerations (ibid., p. 5 bottom; emphasis added):

*“Article 21 provides for an appeals procedure which includes the Board of Appeal and an Enlarged Board of Appeal. The members of these Boards are independent of the parties and of the decision of the division appealed from, have tenure and there must always be one legally qualified member of the Board. The Boards have powers to obtain sworn evidence and must give written decisions containing reasons. Further, the members of the Boards are not subject to any instructions from the President or anyone else in their work (Article 23). These procedures set up a form of “equivalent protection” within the meaning of the Convention case-law (see No. 13258/87 and No. 21090/92, both cited above, and No. 38817/97, Dec. 9.9.98).*

*The Commission considers that, given the procedural guarantees available before the EPO, any transfer of powers to the EPO which led to the German courts’ refusal to deal with the matter, cannot be said to be incompatible with the applicant company’s rights under the Convention.”*

Also under German constitutional law, the transfer of sovereign rights to international organisations requires that an equivalent protection of fundamental rights is guaranteed (cf. e. g. Federal Constitutional Court [BVerfG], decision of 22 October 1986, 2 BvR 197/83 – “*Solange II*”, cipher B.II.1.b):

*“Insofar and to the extent that an intergovernmental institution in the sense of Art. 24 (1) GG [Grundgesetz, the German Constitution] is attributed sovereign rights which is in a position to affect the very sub-*

*stance [Wesensgehalt] of the fundamental rights recognized by the Grundgesetz, if this is meant to remove the legal protection provided for by the Grundgesetz, a level of protection by fundamental rights must be guaranteed which, as to contents and effectivity, substantially equals that being inevitable under the Grundgesetz. In general, this will require legal protection for the individual by independent courts, having sufficient jurisdiction, especially examination and decision-making powers in terms of factual and legal questions being appropriate with regard to the request for legal protection, which decide on the basis of orderly proceedings which include the right to be heard, measures of attack and defense being adequate in relation to the matter in dispute and freely chosen competent counsel and the decisions of which appropriately and efficiently sanction violations of fundamental rights, as the case may be.”*

In the past, the BVerfG held that the EPO fulfilled this standard (cf. e. g. BVerfG, 2 BvR 2368/99, decision of 4 April 2001, accessible [here](#) [German language]), for the following reasons (ibid., cipher III.4.; emphasis added):

*“The requirements set out in the case law of the BVerfG are, at present, generally maintained at the level of the EPO. The complainant does not explain, nor is it otherwise apparent that this is obviously not the case here.*

*a) The system of legal protection of the European Patent Convention substantially corresponds to that of the Grundgesetz and therefore that of Art. 24 I GG (...). The members of the Boards of Appeal are materially, Art. 23 EPC, and personally, Art. 21 EPC, independent.”*

Currently, can it really be assumed, especially with in view of the events of 3 December 2014, that the procedural standards at the EPO as described by the former European Commission of Human Rights as well as by the BVerfG are still maintained and that a level of protection equivalent to that of the ECHR and the Grundgesetz is guaranteed? It appears that this can be questioned with good arguments.

The incident of 3 December 2014 shows that the situation at the EPO has very serious deficiencies with regard to the Rule of Law, as they were clearly addressed already in the Statement of Position in proceedings 1/09 by the Advocate General in charge there (cf. [here](#), paras. 71 ff.). The reticent and evasive comments of the Advocate General on this argument have been superseded by reality. For its judgment, the CJEU will need to consider whether this topic can really be ignored as irrelevant as expressed in the Opinion.

#### **b) Lack of a legal basis**

The second argument brought forward by Spain is that of a lack of a legal basis.

### aa) Spain's position

According to Spain, Article 118(1) TFEU is an unsuitable legal basis for Reg 1257/12 as the latter would not define the acts against which the "unitary patent" provides protection. The reference to the law of the Member States in Article 5 (3) Reg 1257/12 would not ensure uniform protection throughout the Union, so that the Regulation could not achieve a legal harmonisation (para. 64).

### bb) Position of the Advocate General

First, the Advocate General points out that pursuant to its Article 3 (2), Reg 1257/12 intended to provide uniform protection in all participating Member States (para. 71 f.). As regards uniformity and integration, such protection was advantageous over the previous situation, in which the protection of a European patent was defined by the respective national law of the Contracting States (para. 73).

Spain's position, according to which Reg 1257/12 is only an "empty shell" due to a lacking specification of the contents and limitations of the "unitary patent" therein would not be correct, if *"the provisions provided in it are sufficient and if it is taken into account that the Union legislator exerts a competence which is shared between him and the member States"* (para. 76). Afterwards, the Advocate General describes the contents of Articles 3 (1), 4 und 5 (1) und (2) of the Regulation (paras. 77 to 81), before explaining the concept of shared competences in Article 4 (2) TFEU, to which a legal title created under Article 118 TFEU belonged (paras. 82 to 84). Furthermore, it would have to be noted that *"the powers assigned by Art. 118 TFEU"* – whether Article 118 TFEU presently assigns any powers at all is actually the subject of the assessment –

*„are exercised in the present case in the implementation of an enhanced procedure and that the Union legislator has decided within the scope of his wide discretion, to base this implementation on various legal instruments, coming from international law, from Union law and from national law, (...)"* (para. 85)

After these rather general statements, the following conclusion by the Advocate General is even more surprising, namely that the Union legislator was allowed to refer to the national law in terms of contents and limitations of the rights from the "unitary patent" (para. 86). Article 118 TFEU would not necessarily require the legislator to completely harmonize all aspects of *"the intellectual property right"*, *"by establishing an exhausting overall regulation on its functioning and its content"* (para. 89). Instead, its wording would not exclude the legal instrument creating the legal title, presently Reg 1257/12, from referring to the national law, provided that this legal instrument ensures that the title has uniform protection in the participating Member States (para. 90). This protection as envisaged by Article 118 TFEU would not be hindered by a reference to provisions from the national law of the Member States (para. 92), because:

*"93. It can be seen from Art. 5 (3) in conjunction with Art. 7 and the ninth recital of the contested Regulation, that the acts against which the EPUE provides protection, are determined according to one national law. In other words, each EPUE is subject to the national law of one single Member State and these provisions apply throughout the territory of the participating Member States.*

*94. Thus, by referring to the national law applicable in the individual case, the contested Regulation guarantees uniform protection, insofar as this reference also includes any international Agreements to which the Member States have acceded, including the UPC Agreement which the Member States have to ratify with regard to the principle of sincere cooperation set out in Art. 4 (3) TFEU of the contested Regulation(32)."*

According to the Advocate General also this argument fails and he recommends its rejection (para. 95).

### cc) Assessment

The Advocate General's considerations are a peculiar "mixture" of general thoughts and conclusions derived from them, a systematic and logical reasoning for the recommendation to the Court is missing here as well.

Insofar as Advocate General *Bot* again emphasizes a *„wide discretion of the legislator“* and the aspect that the legislative proceedings were conducted in the scope of an enhanced procedure, the relevance of this for the question of the correct legal basis is not really clear. A prerequisite for activities by the legislator is – usually – the existence of a respective legal basis, empowering him accordingly. Discretion might be given in respect of the execution of competences provided by an existing and applicable legal basis, however, not with regard to its choice.

Also the Advocate General's reference to recital 9, that allegedly allowed an interpretation of Article 5 (3) Reg 1257/12 in this sense (para. 87), does not help. Whether this recital "allows" such interpretation of Article 5 (3) or not is not decisive. Instead, the crucial factor rather is which conclusions can be drawn from it with regard to the question whether the chosen legal basis is correct, apart from the circumstance that it is not explained which interpretation recital 9 is seen to "allow". The aim of these statements of the Advocate General becomes completely obscure when recalling that the issue of the legal basis to be examined here does not relate to *"matters not covered by this Regulation"* as referred to by the Advocate General, but to the contents of the protective right created in the Regulation – also from his perspective (cf. para. 60) – and the aspect of whether its contents are sufficiently defined as to base the Regulation on Article 118(1) TFEU.

Also his remark Article 118 TFEU would not exclude such "reference solution" as long as uniform protection in the Member States was guaranteed (para. 90), is not convincing. In any event, it should be admissible to expect

from the Advocate General that positive reasons for his opinion are provided that Article 118 TFEU allows the chosen reference solution, instead of limiting himself to merely declaring that this was not excluded. Such "negative solution" rather indicates that positive arguments are missing.

The explanations culminate in the Advocate General's statement that, through the reference, uniform protection would be ensured insofar as the contents of each "unitary patent" in the participating Member States were determined based on the national law of only one of these Member States (para. 93 f.). Accordingly, such uniform protection does not require that each "unitary patent" is always subjected to one identical legal regime in all participating Member States. Instead it is apparently deemed sufficient that, in the individual case, one uniform national law is applicable, even if each "unitary patent" is subject to a different national law. This is a remarkable understanding. Independent of the fact that it can be questioned – as Spain does – that such solution can cause a Union-wide harmonisation, it is doubtful how this is meant to achieve the simplification and cost reductions allegedly intended by the legislator with the "unitary patent package" (cf. e. g. recital 4 of Reg 1257/12).

Therefore, also the Advocate General's position on the argument of a missing legal basis is not convincing.

### **c) Violation of autonomy and uniformity of Union law**

As its seventh and final argument, Spain objects a violation of the autonomy and uniformity of Union law.

#### **aa) Spain's position**

Spain argues that Article 18 (2) Reg 1257/12 allowed the Member States to decide by themselves whether the Regulation shall become valid for them or not. Should a Member State decide not to ratify the UPCA, the Regulation would not become valid for it and the Unified Patent Court would not obtain exclusive jurisdiction for deciding about the "unitary patent" there. The latter would therefore lack unitary effect in this State, violating the principles of autonomy and uniformity of Union law (para. 145).

#### **bb) Position of the Advocate General**

At the beginning, the Advocate General observes that tying the entry into force of the Regulation to that of the UPCA would serve the orderly functioning of the "unitary patent". It would be disadvantageous to that aim if the Regulation was applicable prior to the creation of the Unified Patent Court (para. 177). He also denies that the Member States could decide freely about the entry into force of Reg 1257/12 and explains:

*"179. In my opinion, according to the principle of sincere cooperation in Art. 4 (3) TEU, the participating Member States have to take all measures to allow the implementation of the enhanced cooperation, including the ratification of the UPC Agreement as it is a necessary precondition for said implementation.*

*Because pursuant to said provision, the Member States have to take any appropriate measures of a general or particular nature to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

*180. Those of the participating Member States not ratifying the UPC Agreement, would violate the principle of sincere cooperation as they would put the realisation of the aims of a harmonisation and unification of the Union(60)."*

According to the Advocate General, there is such a close relation between Reg 1257/12 and the UPCA that it would be logical to make the entry into force of the Regulation dependent on that of the UPCA, even if this happened at the expense of legal certainty (para. 184). For these reasons, he suggests to reject his argument as well.

### **dd) Assessment**

In different passages of the Opinion, the Advocate General emphasizes that the Member States were obliged to ratify the UPCA in order not to violate European law (cf. paras. 88, 94 and 179 f.). This seems to be one of his core issues.

However, the existence of the alleged legal obligation for a ratification of the UPCA is doubtful, especially since it is, as such, not Union law, but intergovernmental legislation. As it is said in recital 25 of Reg 1257/12, on which the Attorney General relies himself, the ratification of the UPCA takes place in accordance with the national constitutional and parliamentary procedures of the Member States. This is also set out in the UPCA (Article 84 (2) UPCA).

At least in Germany, part of this constitutional procedure is the possibility of holders of potentially affected fundamental rights to request the assessment of a ratification statute for an international Agreement by the Federal Constitutional Court (BVerfG) for its compatibility with fundamental rights, this option generally also being available to legal persons, also those established under foreign law (cf. *Stjerna*, "Unitary patent" and court system – Compatible with Constitutional Law?, accessible in German and English at [www.stjerna.de](http://www.stjerna.de)). Therefore, at least with regard to Germany, the Advocate General's remark is irrelevant, since, regardless of the activities by the government and the Parliament, the entry into force of the ratification statute can still be subjected to a respective examination by the Constitutional Court.

Or should the Advocate General need to be understood in a way that a judicial assessment of the UPCA for its compatibility with fundamental rights is subordinate to said alleged obligation from European law? This would mean deeming a national Constitutional Court obliged, despite its constitutional powers and obligations, not to hinder the entry into force of an international Agreement even if it violates fundamental rights.

For Germany, such understanding would seem to be hardly possible. The BVerfG has repeatedly decided that the transfer of sovereign rights to international organisations

must not lead to a situation in which “the identity of the current constitutional order of the Federal Republic of Germany is given up as a result of an invasion of its basic elements, its constituting structures”, the fundamental rights being an indispensable part of these basic elements (BVerfG, 2 BvR 197/83, cipher B.II.1.b)). The BVerfG has repeatedly emphasized that it reserves respective investigation competences and that it does not regard this as a violation of said principle of sincere cooperation from Article 4(3) TEU (BVerfG, judgment of 30 June 2009, 2 BvE 2/08 and others, accessible [here](#), para. 240):

*“If legal protection cannot be obtained at the Union level, the Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (...) whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 Lisbon TEU). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law [Grundgesetz] pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law’s openness towards European Law [Europarechtsfreundlichkeit], and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area. The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.”*

Therefore, at least in Germany, the ratification of the UPCA can, of course, be subjected to an assessment by the BVerfG for its compatibility with the constitutional standards, there is no obligation to exercise a “blindly obedient ratification”. Should the holder of a potentially affected fundamental right request the BVerfG to examine the ratification statute for the UPCA, the court will be allowed to accept its entry into force only if it is compatible with the constitutional standards. That the BVerfG would deem these standards fulfilled can be doubted, especially after the most recent events at the EPO.

Hence, also the Advocate General’s reasoning for his recommendation to reject the seventh argument is not persuasive.

After all this, the pleas (1), (2) und (7) can at least not be rejected with the arguments given by the Advocate General. To the contrary, there are reasons which are just as good to regard these pleas justified and therefore for a nullification of Reg 1257/12.

## **II. Proceedings C-147/13**

Some of the arguments presented in proceedings C-146/13 are also put forward in Spain’s nullity action against Reg 1260/12 on the translation regime for the “unitary patent”. The central argument, rejected by the Advocate General, seems to be the alleged violation of the principle of non-discrimination on grounds of language by the limitation to the trilingual system established in Reg 1260/12. As indicated, the Opinion in case C-147/13 will not be addressed here due to a lack of space.

## **C. Outlook**

The presented Opinions are not convincing.

When comparing them to the Opinion from proceedings 1/09, which addressed the existing problems in all their clarity, they rather seem to endeavor avoiding any confrontation with the controversial issues and to seek to easiest way to come to a rejection of the complaints. The impression arises that it is sought to achieve a predefined result, without having well-founded arguments supporting it. This may imply that a serious discussion of subject matter is possibly not wanted, because all the institutions involved anyhow wish to nod the package through.

One decisive aspect will be whether, despite the neglect in dealing with this issue in the Opinion, the CJEU will be prepared to tackle the situation at the EPO. Should they avoid this or not deal with it exhaustively, the focus will shift to the national Constitutional Courts for this examination, especially to the German BVerfG due to its mentioned powers to review ratification statutes. Since ratification by Germany is obligatory for the UPCA to enter into force, a veto by the BVerfG would stop the whole project. Already for this reason, it will be interesting to see how the CJEU will deal with Spain’s actions. Its judgments should be given in spring 2015.

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