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THE NOTION OF 'UNDERMINING THE INTERNAL MARKET' AND ITS LEGAL MEANING

INTRODUCTION

It is undisputed that internal market constitutes the core of the European Union. It is also believed to represent the 'common good' of the Union and its unity. This observation became especially significant within framework of debate on the future dimensions of EU integration as well as the Brexit negotiations concerning the EU-UK trade relations. In all these debates internal market is described as the foundation of EU integration. Therefore, it is important to discuss the recent tendencies in applying methods of differentiated integration within that market. It is only after the Lisbon Treaty when one of those methods, namely enhanced cooperation, has been employed.

However, enhanced cooperation may be launched only as far as it does not undermine the internal market. The latter notion has been subject to the Court of Justice's (hereinafter: the Court) interpretation. Nevertheless, one may note how different to hitherto applied methods this interpretation was. It may even be wondered if any legal reasoning was undertaken in that regard.

At the same time, the prohibition related to the notion of 'undermining the internal market' seems just as crucial as the internal market itself. Consequently, it is worth looking at more closely, and in particular to the possibly new approach the Court might be taking towards methods of interpreting that notion. That may lead to a general observation on the methods of interpreting such open clauses as 'undermining the internal market'.

Following from the foregoing, this contribution aims at answering a number of specific questions concerning the outlined problem. Firstly, what needs to be examined, is the actual meaning of the notion of 'undermining the internal market' provided in Article 326 paragraph 2 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). Thus, to answer that question, we need to know first what a proper method of interpreting that notion is. Should that interpretation rely mainly on economic (or pragmatic) arguments, as the Court seems to suggest? Or should we rely on legal reasoning at least to some extent? Would those two methods contradict each other, or may they be combined in that field? Therefore, despite its general

wording (and perhaps constitutional meaning), in this contribution the notion of undermining internal market will be discussed as defined in Treaty provisions concerning enhanced cooperation and as a premise for (not) launching this procedure when adopting acts of EU law.

For better understanding of that problem, the case of European unitary patent is examined, which is introduced[1] within the internal market through enhanced cooperation. Due to its legal features, considerable doubts arise whether introduction of that instrument would not fall in the scope of the notion of 'undermining the internal market'. From the perspective of the present contribution, that system provides a perfect opportunity for a practical application of the postulates expressed in the first part of this article.

ENHANCED COOPERATION

General remarks

Enhanced cooperation enables a group of Member States to cooperate within a certain field of law on matters in which there is no unanimous will to introduce a particular EU legal act. It is established in Articles 20 TEU and 326-334 TFEU, which also constitute conditions for launching an enhanced cooperation procedure. These requirements are either of procedural or substantive character.[2]

Procedural conditions are clear and precise. At least nine Member States need to gather so as to be able to ask for launching enhanced cooperation that subsequently becomes subject to the Council's decision which may authorise the cooperation only as a last resort, i.e. when its objectives cannot be attained within a reasonable period by the Union as a whole.[3] Once enhanced cooperation is established, it shall be open to all Member States provided that they comply with participation requirements.[4] Member States as well as the Commission shall promote participation by as many Member States as possible.[5]

At the same time, the substantive requirements seem to be rather vague and difficult in interpretation. Cooperation shall be aimed at furthering the objectives of the European Union, protect its interests and reinforce the integration process[6] as well

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[1] Although, as to date of publication of this article (2019), the unitary patent is not yet applied, even though the respective Regulations were adopted in 2012.

[2] Koen Lenaerts, Piet Van Nuffel, *European Union Law* (Sweet & Maxwell 2011), 729, see also: Carlo Maria Cantore, *We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU*, 3:3 Perspectives on Federalism (2011) (access: http://on-federalism.eu/attachments/103_download.pdf on 23.04.2015)

[3] Art. 20(2) TEU.

[4] Art. 20(1), second para. TEU and art. 328(1) TFEU.

[5] Art. 328(1) second para. TFEU.

[6] Art. 20(1), second subpara. TEU.

as it must comply with the Treaties and European Union law.[7] Moreover, according to Article 326, second para. TFEU, it may not undermine the internal market or its economic, social and territorial cohesion. It must not constitute a barrier to or discrimination in trade between Member States as well as it must not distort competition between them. Article 327 TFEU stipulates that enhanced cooperation must respect the competences, rights and obligations of Member States not participating in it. Lastly, the content of cooperation may not fall within the framework of exclusive competences of the European Union.[8]

Article 326 TFEU seems to contain open clauses which at first sight lack the actual legal meaning. However, when interpreting the law, we need to assume that each provision has a normative value. Therefore, it needs to be considered that these requirements must be satisfied and analysed as carefully as the procedural ones. The same applies to interpreting the notion of 'undermining the internal market' which is the subject of this paper.[9]

Hitherto adoptions and case-law

Before examining the concept of 'undermining the internal market' and the Court's case-law on that matter, it is worth considering some earlier adoptions of enhanced cooperation within the EU law.

The procedure was first used in 2010 when the Council authorised enhanced cooperation in the area of the law applicable to divorce and legal separation.[10] That resulted in adopting the Council Regulation in that field two years later.[11] The Regulation is applied from 21 June 2011 in fourteen initially participating Member States. In November 2010 Lithuania decided to join that group.[12] However, this example does not deal with internal market directly. Therefore, the analysed condition was not tested in that regard. Moreover, neither the Council's Decision, nor the Regulation were challenged before the Court. Consequently, there is no judicial evaluation of that law at all.

Secondly, enhanced cooperation was adopted in the field of creation of the European patent with unitary effect. It deals directly with the internal market. The system of unitary patent protection is established by three legal acts. The first one is an international agreement establishing the Unified Patent Court. The other two are regu-

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[7] Art. 326, first para. TFEU.

[8] Art. 20(1) TEU.

[9] See also: Joanna Sapieżko-Samordak, *Wzmocniona współpraca w Unii Europejskiej*, Warszawa 2016, 75; 198; 258.

[10] Council Decision of 12 July 2010 (2010/405/EU), OJ L 189 from 22.07.2010, pp. 12-13.

[11] 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.

[12] Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation (2012/714/EU); OJ L 323 from 22.11.2012, pp. 18-19.

lations adopted within enhanced cooperation. One regulates the substantive aspects of the system,[13] and one deals with translational arrangements of unitary patents.[14] Although both regulations have entered into force, their application is still dependant on the entry of the mentioned Unified Patent Court Agreement.[15] They would be binding in all Union's Member States except Spain and Italy (which do not participate in enhanced cooperation) and those States that have not ratified the Agreement.

The authorising decision of the Council[16] was challenged before the Court by Spain and Italy (joined cases C-274/11 and C-295/11). The judgment was delivered on 16 April 2013[17] and followed the reasoning presented in Advocate General Bot's opinion of 11 December 2012.[18] After entry into force of the above mentioned regulations, Spain asked for their annulment (cases C-146/13[19] and C-147/13[20] in which the Court followed AG Bot's opinion delivered on 18 November 2014 and dismissed both actions).

These cases exemplify a judicial review concerning the notion of 'undermining the internal market' and in that regard are discussed below.

Thirdly, launching the procedure of enhanced cooperation was authorised by the Council on 22 January 2013 with regards the financial transactions tax.[21] Following the earlier suggestions that such legal act might be brought before the Court,[22] the United Kingdom asked for annulment of that decision.[23] However, the case was dismissed. The Courts's judgment is shortly discussed below, even though the Court hardly discusses the problem of undermining the internal market there. Albeit, so far, no substantive legal act has been adopted with respect to that tax.[24]

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[13] Regulation (EU) No 1257/2012 of the European Parliament and the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361 from 31.12.2012, pp. 1-8.

[14] 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, OJ L 361 from 31.12.2012, pp. 89-92.

[15] See Articles 18(2) and 7(2) of the Regulations respectively.

[16] Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU), OJ L 76 from 22.03.2011, pp. 53-55.

[17] Not yet published; ECLI:EU:C:2013:240.

[18] ECLI:EU:C:2012:782.

[19] ECLI:EU:C:2015:298.

[20] ECLI:EU:C:2015:299.

[21] Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU), OJ L 22 from 25.1.2013, p. 11-12. For further discussion: Tomasz Kubin, *Wzmocniona współpraca w Unii Europejskiej po raz trzeci. Postępujące zróżnicowanie integracji oraz rozwój wzmocnionej współpracy i jej znaczenie dla funkcjonowania UE*, 9 Rocznik Integracji Europejskiej (2015), 57-75.

[22] *Cf.* point 2.16 *in fine* of the document of 26.03.2013 by the UK Parliament's European Scrutiny Committee: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86-xxxvii/8604.htm.

[23] Case C-209/13, not yet published (ECLI:EU:C:2014:283).

[24] More about the substantive aspects of FTT, see: Joachim Englisch et al., *The Financial Transaction Tax Proposal Under The Enhanced Cooperation Procedure: Legal and Practical Considerations*, British Tax Review (2013), 223.

Further examples[25] of launching enhanced cooperation include the areas of property regimes of spouses and partners[26] and establishment of the European Public Prosecutor's Office[27] (which however has less direct impact on interpreting the discussed premise of "undermining internal market").

THE NOTION OF 'UNDERMINING THE INTERNAL MARKET' IN THE COURT'S CASE-LAW

European patent with unitary effect – the authorising decision

As mentioned above, the notion of 'undermining the internal market' was subject to the Court's interpretation in the judgment delivered in the joined cases C-274/11 and C-295/11 Italy and Spain v Council.[28] The Court followed the opinion delivered by Advocate General Yves Bot. The judgment as well as the opinion are discussed below.

Spain and Italy submitted in one of their claims that the Council's authorising decision infringed Article 326 TFEU by, among others, undermining the internal market. The claimants maintained that the enhanced cooperation authorised by the contested decision would favour the absorption of the economic and commercial activity relating to innovative products to the detriment of the non-participating Member States. Moreover, they took the view that that enhanced cooperation undermined the internal market, free competition and the free movement of goods since unitary patents produce effects on only a part of the territory of the Union.[29] Moreover, due to the translational arrangements,[30] Spain and Italy claimed that the decision would discriminate undertakings within the Union, since commercial trade in innovative products would

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[25] One can find however more suggestions for employing enhanced cooperation in the literature, see: Michael Schwarz, *A Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation* 51:2 Common Market Law Review (2014) 389–423.

[26] See Council Regulations: 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. Further comments on those Regulations: Lucia Valentová, *Property Regimes of Spouses and Partners in New EU Regulations – Jurisdiction, Prorogation and Choice of Law*, 16:2 International and Comparative Law Review (2016), s. 221-240.

[27] Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[28] Also discussed by: Constanta Matusescu, *Enhanced Cooperation as a Solution to the Deepening of Integration after the Lisbon Treaty*, 26 Revue Européenne du Droit Social (2015), s. 42.

[29] Advocate General Bot's opinion, para. 128.

[30] According to which, once unitary patent is granted in English, German or French, no further translations are required. Which is contrary to the hitherto European patent system, in which each patent needs to be translated, as a part of the validation procedure.

be favoured for undertakings working in German, English or French, while the trade of undertakings not using those languages would be limited.[31]

On the other hand, the Council, supported by the Commission and some Member States, argued that enhanced cooperation would not lead to fragmentation of the market[32]. At the same time, the Commission raised an argument which occurred to be crucial. It was the authorising decision that was challenged in that case, and not the substantive regulations. Therefore, according to the Commission, the decision should not be evaluated from the viewpoint of the subsequent regulations which were yet to enter into force. In the view of the Commission, the contested decision was a purely procedural decision, which defined the scope and objectives of enhanced cooperation. The latter had yet to assume an ultimate form. The adverse effect, if any, on the internal market would have arisen solely from the substantive provisions which had not yet been approved.[33]

This conclusion constitutes Advocate General Bot's point of departure in his assessment. The authorising decision sets the procedural framework for introducing substantive law and should be reviewed only from the viewpoint of accordance with Article 20 TEU and 326 TFEU et seq.[34]

Having said that, Advocate General continued that the Court's review must be limited to examining whether the Council manifestly made an error of assessment. He further claimed that it had to be ascertained whether the establishment of enhanced cooperation patent was manifestly inappropriate because that cooperation would undermine the internal market.[35] This conclusion was based on the assumption that the context of enhanced cooperation procedure implied that the institutions assessed the effects of the enhanced cooperation and weighed up the various interests at stake so as to make political choices on matters within their own area of responsibility. Therefore, it was the Council that was best placed to evaluate the potential effects of employing enhanced cooperation.[36]

In this context, Advocate General Bot pointed out that the authorising decision was followed by an impact assessment document prepared by the Commission.[37] That paper indeed contains a short chapter concerning 'fragmentation of the Single Market'. However, it rather generally refers to business opportunities being harmed by the

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[31] Advocate General Bot's opinion, para. 129.

[32] The argument is based on the assumption that the current situation in which there are only European and national patents is the actual reason for fragmentation of the internal market. At the same time, the unitary patent would constitute an 'optional' instrument, which as such would be unable to lead to market fragmentation.

[33] Advocate General Bot's opinion, para. 136.

[34] Advocate General Bot's opinion, paras. 137-139.

[35] Advocate General Bot's opinion, para. 142.

[36] Advocate General Bot's opinion, paras. 27-29.

[37] Advocate General invokes the Commission working document, accompanying document to the proposal for a Council regulation on the translation arrangements for the European Union patent, 30 June 2010 (SEC(2010) 796), even though by the time of preparing his opinion a new version of that document was available – dating for 13.4.2011, document no. SEC(2011)482 final.

lack of harmonisation of patents in the European Union. It does not discuss the structure of the unitary patent package, nor its potential influence on the internal market. No proper economic analysis was presented in that document. In one of its sections, entitled 'Impact on the internal market and on stakeholders (other than patentees)', the analysis is also rather short. Thus, it boils down to the conclusion that the expected lower costs of obtaining the unitary patent will positively influence not only the patent holders, but also the consumers. However, no deeper argumentation is provided to support this claim.

Even though the impact assessment document did not contain any analysis concerning the notion of 'undermining the internal market', when applying the criteria provided in Article 326 TFEU, the Advocate General concluded that the Council did not err manifestly when it adopted the authorising decision. Consequently, the plea should be rejected.[38]

To sum up, Advocate General Bot seems to have interpreted Article 326 second para TFEU generally, and from the economic and political perspective. He did not interpret each notion contained in that provision individually. The conditions set out in Article 326 TFUE were satisfied, once the authorising decision is followed by an impact assessment.

When addressing this issue, the Court followed Advocate General's reasoning. In its short argumentation,[39] the Court limited itself to the evaluation of the unitary patent protection system from the perspective of language requirements. At no point was interpretation of the notion of 'undermining the internal market' provided.

European patent with unitary effect – the substantive regulations

In the above discussed judgment, the Court limited itself to evaluation of the authorising decision only, without scrutinising the potential effects that might be brought by the substantive regulations introduced within the framework of the enhanced cooperation procedure. This invited Spain to ask for annulment of those regulations after they entered into force.[40] In both Advocate General Bot has delivered his opinions,[41] which brought the Court to pretty much the same conclusions.[42]

As a preliminary point, it should be noted that these actions are 'regular' actions for annulment, based on Article 263 TFEU. Therefore, the conditions for employing enhanced cooperation (including Article 326 second para TFEU) do not apply in that event anymore. At the same time, 'undermining the internal market' is not a condition for annulment based on Article 263 TFEU. Consequently, one may conclude that when hearing the case for annulment of the authorising decision, it was too early

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[38] Advocate General Bot's opinion, paras. 147, 153.

[39] Paras. 75-78 of the judgment.

[40] Cases C-146/13 Spain v European Parliament and the Council, C-147/13 Spain v the Council.

[41] In the Court's quotation format respectively: ECLI:EU:C:2014:2380 and ECLI:EU:C:2014:2381.

[42] Judgments of 5th May 2015, respectively ECLI:EU:C:2015:298 and ECLI:EU:C:2015:299.

for the Court to examine the implications of substantive provisions adopted in the framework of that decision in light of Article 326 second para TFEU. At the same time, it was far too late for the Court to do it while hearing the case for annulment of substantive regulations. The basic reason for this is the fact that those conditions do not apply in 'general' situations anymore. Such an approach seems to create a legal and interpretative vacuum, where – among others – the notion of 'undermining the internal market' is placed.

Indeed, in neither of two above mentioned cases did Spain build a claim based on the argument of 'undermining the internal market'. Therefore, there is no need of analysing the either Advocate General Bot's opinions or the Court's judgments on that point.

Financial transactions tax

As it was outlined above, the Court also had an opportunity to interpret conditions for employing enhanced cooperation in the case C-209/13 United Kingdom v the Council, in which it dealt with an action for annulment of decision authorising enhanced cooperation in the area of financial transaction tax. Noteworthy, no Advocate General's opinion was delivered in that case.

None of the pleas were based on Article 326 second para TFEU. Therefore, the Court did not have to explain the meaning of the 'undermining the internal market' concept.

What is important from the viewpoint of the present analysis is the fact that the Court confirmed its earlier observations on the scope of action for annulment of the authorising decision. In paragraph 34 it can be read that '[t]hat review [of the authorising decision] should not be confused with the review which may be undertaken, in the context of a subsequent action for annulment, of a measure adopted for the purposes of the implementation of the authorised enhanced cooperation'.

This remark seems to confirm the above conclusion that the scope of application of the notion of 'undermining the internal market' (or its actual legal value) remains significantly limited. This is due to the fact that it is very difficult to give an example of circumstances in which a merely procedural act, abstracted from its broader legal context, is as such capable of undermining the internal market.

To conclude, case-law concerning the notion of 'undermining the internal market' is at this stage rather meagre. However, two conclusions can already be drawn. One is that the review of the Court, when hearing the case challenging enhanced cooperation, is limited to the Council's authorising decision and does not embrace the substantive legal acts adopted within framework established by that decision. Consequently, the same scope of limitation applies to the application of Article 326 second para TFEU. In view of the present author, this approach puts Article 326 second para TFEU in a sort of a vacuum, making it a 'sleeping provision'. Therefore, such a method cannot be accepted: the review of the Court should also take into account the effects of adopting the authorising decision, i.e. the effects of employing enhanced cooperation.

Secondly, the Court did not interpret the analysed notion individually, but rather in combination with other open clauses contained in Article 326 second para TFEU (i.e. undermining economic, social and territorial cohesion, constituting a barrier to or discrimination in trade between Member States, distorting competition between Member States).

Further, the Court seems to sympathise with a method of interpretation relying on the impact assessment document prepared in the course of works on substantive law to be adopted through enhanced cooperation. Accepting this approach, the Court refrains from providing actual legal interpretation of the analysed notion. On the contrary, it rather favours taking an 'economic' (or pragmatic) approach which is, at the same time, very far from the economic analysis of law methodology.

SUGGESTED METHOD OF INTERPRETATION

In the view of the present author, the notion 'undermining the internal market' should be interpreted more fairly and individually, since the internal market as such is the foundation of integration within European Union. It is also defined in Article 26(2) TFEU which provides that: '[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.

Following from the foregoing, we can derive a simple understanding of what 'undermining the internal market' is. This notion would encompass measures hindering the internal market in any way through (1) restoring internal frontiers and, more specifically, (2) hindering the four freedoms. Therefore, both the authorising decision as well as substantive acts adopted in the framework of enhanced cooperation should be examined from that perspective. This guarantees effectiveness of Article 326 second paragraph where it deals with the notion of 'undermining the internal market' and ensure that the discussed condition is not narrowed to the prohibition of discrimination.[43]

The suggested method seems to be the simplest in application.[44] In such interpretation we only add negation to the legal definition provided in the Treaty. This allows to duly respect this definition and include the specific provision of Article 326 TFEU in the EU's primary law understood as a coherent and logical system. Moreover, the general concepts of barriers to trade or free movement of goods, persons, services and capital are well-settled in the European Union law.

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[43] Monika Szwarc-Kuczer, *Komentarz do Art. 326, Traktat o funkcjonowaniu Unii Europejskiej. Komentarz.* Tom III (art. 223-358), ed. Dagmara Kornobis-Romanowska, Justyna Łacny, Andrzej Wróbel, Warszawa 2012, LEX.

[44] It also reflects the position that the discussed condition constitutes both *ex ante* and *ex post* caveat, i.e. needs to be complied with when law is provided, but also after it enters into force; see: Federico Fabbrini, *The Enhanced Cooperation Procedure: A Study in Multispeed Integration*, Centro Studi sul Federalismo (2012), s. 8-9, dostęp: http://nuovo.csfederalismo.it/attachments/article/835/CSF-RP_Fabbrini_ENHANCED%20COOPERATION_October2012.pdf.

It also needs to be stressed that the sole fact of issuing an impact assessment document or the fact of economic legitimacy of a measure should not prejudge its legality.[45] The opposite conclusion questions the legal foundations of the European Union and the observance of Treaties at their very essence.

THE CASE OF THE EUROPEAN UNITARY PATENT

After providing a suggestion for the method of interpretation of the notion 'undermining the internal market', it needs to be applied to the case of employing enhanced cooperation. This exercise allows to examine whether such an interpretation is practically exercisable.

Legal structure and legal basis of the unitary patent

Before answering the question if the unitary patent protection system may undermine the internal market, we need to present the main features of that system.[46]

The Lisbon Treaty introduced the legal basis for launching the EU patent, which is Article 118 TFEU. Its wording resulted in a double-track follow-up of the works: with regard to substantive aspects and translations arrangements separately. That is the reason for introducing the core of the unitary patent system *via* two regulations, which have entered into force already. However, they will be applied only when the Unified Patent Court Agreement enters into force. The latter is an international agreement concluded by the participating Member States in order to establish the litigation system. It will enter into force 'on the first day of the fourth month after the 13th deposit, provided that the Contracting Member States that will have deposited their instruments of ratification or accession include the three States in which the highest number of European patents was in force in the year preceding the year in which the signature of the Agreement takes place[47]'. In other words, the Agreement needs to be ratified by 13 Member States, including Germany, the United Kingdom and France.

To put it briefly, in the field of the European unitary patent we deal with the following legislative package:

1. Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU) (hereinafter: authorising decision);

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[45] Matthias Lamping, *Enhanced Cooperation. A proper approach to market integration in the field of Unitary Patent Protection?*, 28:8 International Review of Intellectual Property and Competition Law (2011).

[46] On that matter see also: Miłosz Malaga, *The European Patent with Unitary Effect: Incentive to Dominate?*, 45:6 IIC – International Review of Intellectual Property and Competition Law (2014) 621-647.

[47] Article 89 of the Agreement.

2. 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 (hereinafter: UPP Regulation);
3. 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 (hereinafter: Translations Regulation);
4. Agreement on a Unified Patent Court and Statute (hereinafter: UPC Agreement).

The substantive aspects of the system are provided in the two above mentioned Regulations, whereas the UPC Agreement establishes a unified litigation system within the patent framework. However, there is one significant exception. During the legislative works, the substantive core of the patent (rights of the proprietor to prevent the direct and indirect use of the patent-protected goods) was transferred from the UPP Regulation (to that moment: Articles 6-8) to the UPC Agreement (now Articles 25-27). Consequently, this part is not harmonised by EU law, but regulated with an international agreement concluded between participating Member States.

The crucial feature of the European unitary patent from the perspective of the analysed notion is the territorial non-uniformity of the system, resulting from enhanced cooperation. However, one has to bear in mind that it is not the only aspect of territorial non-uniformity that can be observed. Another layer of this problem derives from the fact that two substantive Regulations have entered into force already, albeit commencement of their application depends on ratification of the UPC Agreement by participating Member States.

It is therefore possible that one of four different scenarios may occur. Firstly, as in the case of Spain, a Member State may refrain from participation in both, enhanced cooperation and the UPC system. Secondly, a Member State might be not participating in enhanced cooperation, although it could ratify the UPC Agreement at the same time. This is a likely scenario for Italy. Thirdly, as is expected in the case of Poland and still possible in a few other ones, a Member State may be participating in enhanced cooperation, but without ratifying the UPC Agreement.[48] It will mean that both substantive Regulations will enter into force with respect to that State, but will not be applied in its territory. Finally, a Member State could participate in enhanced cooperation as well as the UPC Agreement. This implies further questions about the degree to which the unitary patent is effective in each of those scenarios. Whatever the answer, we can definitely conclude that the multi-layer territorial non-uniformity of the patent will result in different degrees of its effectiveness and applicability in those Member States.

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[48] Although, in that case, as suggested by AG Bot in the case C-146/13 Spain v European Parliament and the Council, it may be interpreted from Article 4(3) TEU (principles of sincere cooperation) that a Member State which participates in enhanced cooperation is obliged to ratify the UPC Agreement (para 94).

Implications for the internal market

It needs to be remembered that entrepreneurs from non-participating Member States would still be able to obtain unitary patent protection for their products in the territories of the participating States. The only effect produced by non-participation is that the patent is not effective in the territories of non-participants. This leads to gaining advantages by businesses from non-participating Member States without incurring any costs. Inventors and businesses benefit from the patent outside, whereas they are protected by the national systems they are used to in their own countries. This is hardly attractive to the external (non-national) market participants, who – when willing to obtain patent protection in those States – would need to apply for it according to the rules set out either by national laws or by European Patent Convention. Such a situation would give no arguments to the non-participants for joining the system. Such different treatment of businesses from other Member States may lead to disparities in trade and may consequently restore (or enhance) the barriers to trade within the European Union.

The European unitary patent can be examined more specifically from the perspective of free movement of goods (since case-law on the interplay between this freedom and exercise of intellectual property rights is well developed).

It is worth reminding here that Article 34 TFEU establishes one of the fundamental principles of the European Union law: the prohibition of introducing quantitative import restrictions or measures having equivalent effect. At the same time, Article 36 TFEU contains a catalogue of exceptions to that prohibition. The existence of industrial property rights is one of those exceptions. Even though the mere existence of those rights is not scrutinised from the Article 34 TFEU perspective, it is the exercise of those rights by patent proprietors which might occur contrary to the free movement of goods.[49] It also must be borne in mind that intellectual property rights enjoy the principle of territoriality, according to which they begin as well as end up at the borders of a particular Member State.[50]

Harmonisation of intellectual property rights and (or) granting them an EU-wide unitary effect is said to be a solution to the problem of violating the free movement of goods by executing the national patents.[51] It results in 'abandoning' the principle of territoriality by the unitary effect. The very objective of such harmonisation is therefore to unify the internal market by reducing the legal disparities between Member

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[49] David T. Keeling, *Intellectual Property Rights in EU Law.* Volume I. *Free Movement and Competition Law* (Oxford University Press 2003), 33 and 55; Inge Govaere, *The use and abuse of intellectual property rights in E.C. law. Including a case study of the E.C. spare parts debate* (Sweet & Maxwell 1996), 168.

[50] More about that problem: Roberto Romandini, Alexander Klicznik, *The Territoriality Principle and Transnational Use of Patented Inventions – The Wider Reach of a Unitary Patent and the Role of the CJEU*, 44:5 IIC – International Review of Intellectual Property and Competition Law (2013), 524-540.

[51] Florence Hartman-Vareilles, *Intellectual property law and the Single Market: the way ahead*, 15 ERA Forum (2014) 159.

States. Consequently, full harmonisation (understood in a wide sense, i.e. embracing Regulations) excludes application of the general Treaty provisions on the free movement of goods. Actions taken by Member States are examined only from the angle of conformity with those secondary law unifying rules.[52] *Prima facie*, it seems to be the case of the European unitary patent Regulations as well.

However, despite introducing the unitary patent through regulations, that patent will not produce the same effect in the entire Union. As has been discussed above, it will not be uniform territorially since Spain and Italy do not participate in enhanced cooperation. Therefore, it is likely that in that regard the system creates barriers to trade between participating and non-participating Member States.[53] What is more, an open question remains if the exercise of a unitary patent in trade relations between participating and non-participating Member States might still be considered as a measure having equivalent effect to quantitative restrictions, as provided in Article 34 TFEU.

Moreover, one should take into the consideration the very specific content of the UPC Agreement. Its Articles 25-27 provide for the essence of patent holder's rights (to prevent the use of the invention). At the same time, those rights are the axis of the interplay between free movement of goods and exercise of intellectual property rights. Therefore, it remains problematic whether Article 34 TFEU should remain applicable to such actions with respect to the entire Union. The exercised rights will be almost European Union-wide, yet derived from non-European Union law. This question, the answer to which deserves a separate analysis, is significant also in terms of the presented problem. One of the solutions may lead to the conclusion that the unitary patent protection system provides for a tool of adopting measures having equivalent effect to quantitative restrictions (i.e. exercising unitary patent) which is considered as falling within scope of the concept of 'harmonisation' and consequently is not examined from the perspective of Article 34 TFEU. In other words, one cannot exclude that the unitary patent in the proposed legal shape will constitute a measure for factual hindrance of free movement of goods which legally will be considered as 'harmonised' and consequently out of the scope of Article 34 TFEU.[54]

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[52] On that matter see in general cases: C-37/92 Vanacker Lesage, para 9 (ECLI:EU:C:1993:836); C-324/99 Daimler Chrysler, para 32 (ECLI:EU:C:2001:682); C-322/01 Deutscher Apothekerverband, para 64 (ECLI:EU:C:2003:664); C-309/02 Radlberger Getränkegesellschaft Spitz, para 53 (ECLI:EU:C:2004:799); C-470/03 A.G.M.-COS.MET, para 53 (ECLI:EU:C:2007:213).

[53] Sceptically on that view: Tihana Belagović, *Enhanced cooperation: is there hope for the unitary patent?*, 8 Croatian Yearbook of European Law and Policy (2012) 320, who claims that such conclusion would need to rely on unreasonably stricter reasoning comparing to the one adopted in the case of national patents.

[54] This observation may apply especially to licensing: Katharina Kaesling, *The European Patent with Unitary Effect – A Unitary Patent Protection for a Unitary Market?*, 2 UCL Journal of Law and Jurisprudence (2013), 87-111.

CONCLUSIONS AND SUGGESTED SOLUTIONS

It is at least probable that the unitary patent protection is capable of undermining the internal market. Due to the system's territorial and legal non-uniformity, it is likely to contribute to restoring barriers to trade between Member States. It may also hinder the free movement of goods in a manner described above.

The perspective on interpretation of the notion of 'undermining the internal market' adopted in this paper seems right. If there is a definition of such a crucial concept as 'internal market' provided in the Treaty, we should take it into account when interpreting specific notions containing that concept. The case of 'undermining the internal market' seems to be relatively easy and indeed should be understood as opposing the basic definition of internal market: an area without internal frontiers in which the four freedoms are ensured.

There is nothing wrong in taking into account the economic factors when evaluating the potential influence of an adopted measure of internal market. However, economic reasonableness should not be considered as the sole premise of legality of a certain act. Nor should the fact of issuing an impact assessment document decide on such legality.

In the context of enhanced cooperation, it is indeed only the Council's authorising decision that can be challenged with pleas concerning infringement of Article 326 second para TFEU, or, more specifically, the undermining of the internal market. However, it cannot be accepted that at this stage only a procedural act, abstracted from the entire legal framework it aims to create, is reviewed. Such an approach deprives the conditions spelled out in Article 326 second para TFEU of any effectiveness. Therefore, when considering an action for annulment of the authorising decision, the Court should take into account that *de facto* it is hearing a case concerning 'annulment' of enhanced cooperation. Consequently, it needs to give full effect to all the provisions – both of procedural and substantive nature – that condition the launching of enhanced cooperation. To do so, what needs to be taken into account is not only the authorising decision, but the entire legal framework which that decision ignites. Moreover, if part of the system is removed from the EU law – as in the case of the UPC Agreement – that part should also be taken into account in evaluating the entire legal context. Doing so, the Court would not go beyond its jurisdiction, whereas it would not rule on interpretation of that Agreement. It would merely consider the legal environment in which enhanced cooperation is supposed to function.

It is true that upon introducing an authorising decision, the substantive laws to be adopted on its basis do not enjoy an ultimate shape yet. However, those laws are usually already drafted or at least proposed. Those proposals seem to be advanced enough to apply to them the conditions from Article 326 second para TFEU. Moreover, as the present author sees it, Article 4(3) TEU requires that those proposals should not be changed substantially after authorisation from the Council is granted. That should suffice for the Court to evaluate substantive law from the perspective of accordance with the substantive conditions of adopting enhanced cooperation.

To conclude, the notion of 'undermining the internal market' deserves full effectiveness as any other concept building the European Union law. In order to guarantee that effectiveness, the case-law of the Court of Justice should change at two points. Firstly, an impact assessment should not prevail or replace the regular legal interpretation of that notion, as seen it in the unitary patent case. Secondly, when applying Article 326 second para TFEU, the Court should not limit its review merely to the procedural act which is being challenged, but it should take into account the entire legal framework of enhanced cooperation.

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Słowa kluczowe: rynek wewnętrzny Unii Europejskiej, naruszenie rynku wewnętrznego, wzmocniona współpraca, warunki dopuszczalności wzmocnionej współpracy, patent europejski o jednolitym skutku

Keywords: European Union internal market, undermining internal market, enhanced cooperation, conditions for application of enhanced cooperation, European unitary patent

ABSTRACT

The paper aims at establishing the meaning of the notion of 'undermining the internal market'. It is not only a general notion of EU law, but also a specific, negative condition for employing enhanced cooperation procedure in European Union law.

The problem is significant for both theoretical and practical reasons. Firstly, it concerns the proper method of interpretation of the notion in question – especially when we consider the fact that in case law, the Court of Justice of the EU relies solely on arguments of economic (pragmatic) nature and does not employ any methods of legal interpretation. Secondly, the proper method of interpretation of the notion of „undermining the internal market" may lead to the conclusion that enhanced cooperation is not allowed in certain situations.

To deal with the issue, we briefly present the procedure of enhanced cooperation with its hitherto adoptions in the EU law. We also analyse the Court's case-law on these adoptions, with an emphasis on the interpretation of the notion of 'undermining the internal market'. Having done this, we suggest another method of interpretation of the discussed notion.

Against such a background, the suggested method is confronted with the system of unitary patent protection being introduced in the internal market through the enhanced cooperation procedure.

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W cieniu Auschwitz.
Niemieckie masakry polskiej ludności cywilnej 1939-1945

Seria „Przekłady Instytutu Zachodniego”

Tłum. z niemieckiego Roman Dziergwa

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Jest to pierwsza w zachodniej historiografii monografia analizująca niemieckie masakry polskiej ludności cywilnej w okresie okupacji 1939-1945. Na podstawie archiwalnych źródeł niemieckich i polskich, protokołów z powojennych przesłuchań sprawców oraz relacji tych, którzy ocaleli z hitlerowskich „pacyfikacji”, autor szczegółowo i w nowatorskiej formie przedstawia okoliczności, w jakich na terenie okupowanej Polski dochodziło do tego szczególnego rodzaju zbrodni wojennych. Swoją uwagę skupia na motywach sprawców i późniejszych próbach usprawiedliwiania tych czynów. Dodatkowym walorem książki jest rozdział przedstawiający niepowodzenia zachodnioniemieckiego wymiaru sprawiedliwości w zakresie karania sprawców zbrodni.