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And Now For Something… Completely The Same: The Agreement On The UPC Whatever Happened To 'Classical' European Patents?

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Although the Agreement on a Unified Patent Court (AUPC) cannot be considered Union (EU) Law, it is couched in the wording of EU legal acts seeking to create "unitary patent protection" as part of "enhanced cooperation" between Member States enshrined in Articles 326 *et seq.* of the Treaty on the Functioning of the European Union (TFEU), namely Council Decision of 10 March 2011 (Official Journal L 76/53 of 22.3.2011) (Council Decision) and Regulation (EU) No. 1257/2012 (RPEU).

The Council Decision authorizes the requesting Member States to enhance their cooperation "in the area of the creation of unitary patent protection".

The RPEU implements the enhanced cooperation in the area of the creation of unitary patent protection as authorized under the Council Decision (Article 1.1 RPEU), while being a "special agreement" to all intents and purposes of Article 142 of the European Patent Convention (Munich Convention) (EPC).

Unitary patent protection exclusively benefits "European patents with unitary effect" (EPU) under the RPEU, that is to say, European patents that have been "granted with the same set of claims for all the participating Member States", "provided that its unitary effect has been registered in the Register for unitary patent protection"[1].

Basically, the RPEU does not afford unitary effect to any patents granted by the European Patent Office but only to patents meeting the requirements and formalities listed above. Only patents for which the relevant applicant requests unitary effect will have such effect.

The RPEU out-and-out allows the coexistence of two European patent types (in addition to national patents): classical European patents (CEP), which can be granted for one or more EPC Contracting States, and European patents with unitary effect (EPU).

Recital (26) RPEU clearly shows that the Union legislator did not intend to change Member States' national patent law.

However, Articles 25 through 27 AUPC appear to regulate in the same (unitary) manner both the effects of EPUs and CEPs, although the latter fall outside the scope of the Council Decision, or of

any eventual “special agreements” set out in Article 142 EPC.

But if we conclude (although we fail to see on what basis) that these rules also apply to CEPs, a new issue arises, namely the discrepancy between the framework established in those acts and that contained in the EPC (Article 64.1). Notably, according to article 64 (1) EPC, a European patent shall confer on its proprietor, in each Contracting State in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State. And not the rights granted to European patents in that State.

Differently put, under the EPC, each CEP is essentially a bundle of national patents vesting the same rights in their holders in each Contracting State as such State’s national patents. A different possibility is implied in Article 142.1 EPC but just for patents having a unitary character for a group of Contracting States and granted together for those States, i.e., for EPU (not for CEP).

The matter is all but moot in practice if the *jus prohibendi* of an AUCP contracting Member State granted under national law for the relevant national patents matches that arising from Articles 25 through 27 of the agreement. The same result as regards the CEP’s effects will always be achieved whether by reference to the rights vested under a national patent or the application of Articles 25 through 27 AUCP.

However, this will not always be the case, because at present there are aspects of the substantive effects of national patents in certain Contracting Member States that are not mirrored by those arising from the AUCP.

In this sense, moving the substantive rules on the CPEs to Articles 25 through 27 AUPC is at odds with the EPC’s provisions on the effects of this European patent type. In other words, it could reasonably be argued that the AUCP is a unilateral derogation to Article 64.1 EPC by the Member States Participating in enhanced cooperation to the extent that it might be construed to subject CEPs to a unified substantive framework regarding the rights they grant (which is not achieved by unifying the rights granted under national patents).

Going about addressing this issue might also prove controversial, in that one would need to ascertain the effects of a potential contradiction between Articles 25 through 27 AUCP and Article 64.1 EPC.

One might in a way argue that the AUCP is partially null and void because it breaches the “*pacta sunt servanda*” principle (or the principle of sanctity of treaties), a general international law peremptory norm (“*jus cogens*”). Such breach could entail the invalidity of those rules pursuant to Article 53, coupled with Article 41, of the Vienna Convention on the Law of Treaties (Vienna Convention).

One could also argue that it is just a question of applying successive treaties on the same subject-matter, to be addressed in accordance applicable public international law rules, arguably Article 30 of the Vienna Convention.

But even then, it still needs to be ascertained whether the AUCP is in any way subordinated to the EPC (which seems to be the case). If so, Article 64.1 EPC would prevail over Articles 25 through 27 AUCP regarding the relations between all EPC Contracting States with respect to CEPs.

If that were not the case, however, Article 30.3 of the Vienna Convention would apply, meaning

that Articles 25 through 27 AUCP would only apply to relations between Participating Member States, and Article 64.1 EPC would only apply to relations between Participating Member States and the remaining EPC Contracting States.

As far as we can tell, there is only one way to reasonably solve this additional AUCP's hydra-headed interpretation and application problem, namely, to amend the AUCP to clearly exclude CEPs from the scope of Articles 25 through 27 AUCP. In other words, we must remove from their content that which should never have been there in the first place.

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[1] Article 3.1 RPEU

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