

UNIVERSITEIT TWENTE.

Master Thesis

Unitary Patent Protection Under Enhanced Cooperation:

Is an EU patent feasible in the future?

Faculty of Management and Governance

Name: Alexandra Dominique Danielle Theben

Supervisors: Prof. dr. N. S. Groenendijk and Drs. E.E. de Lange MA

Date: January 2014

Table of Contents

1. Introduction	4
2. Development of the European Patent System.....	7
2.1 The European Patent Convention	11
2.2 The Community Patent Convention.....	14
2.3 The Community Patent Agreement	17
2.4 The Community Patent Regulation	20
3. The Lisbon Treaty and the ‘EU’ Patent.....	24
3. The Lisbon Treaty and the ‘EU’ Patent.....	24
3.1 Recourse to Enhanced Cooperation.....	25
3.2 The Reformed Patent System under Enhanced Cooperation	28
3.2.1 Unitary Patent Protection under Regulation 1257/2012.....	29
3.2.2 Translation Arrangements under Regulation 1216/2012	30
3.2.3 The Unified Patent Court Agreement	32
4. Enhanced Cooperation as a flexibility mechanism	34
4.1 The Treaty provisions on Enhanced Cooperation	35
4.3 Rationale underlying Enhanced Cooperation	38
4.4 Advantages of a Common Approach vis-à-vis Enhanced Cooperation.....	40
5. Theoretical Framework	47
5.1 Super-systemic Decision-making	49
5.1.1 Neofunctionalism	50
5.1.2 Liberal-intergovernmentalism.....	53
5.2 Systemic Decision-making.....	56
5.2.1 New Institutionalisms.....	57
6. Applying Theory to Patent Policy Integration	60
6.1 Bargaining at the Super-systemic Level	60
6.2 Bargaining at the Systemic Level.....	81
7. Discussion: Is a Common Approach feasible?	88
Conclusion.....	91
References.....	94

List of Tables and Figures

Figure 1	11
Figure 2	28
Table 1	40
Table 2	42

List of Abbreviations

CPC	Community Patent Convention
CFSP	Common Foreign and Security Policy
EC	European Commission
ECJ	European Court of Justice
ECPC	European Community Patent Court
EEUPC	European and European Union's Patents Court
EPC	European Patent Convention
EPJ	European Patent Judiciary
EPO	European Patent Office
EPLA	European Patent Litigation Agreement
EU	European Union
IGC	Intergovernmental Conference
MS	Member States
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
R&D	Research and Development
UPC	Unified Patent Court Agreement

1. Introduction

The single market for patents in the EU has recently undergone important changes. With the signing of the European Patent Convention (EPC) in 1973 and its creation of a European patent granted by the European Patent Office, the Member States of the European Union had taken the first steps to a harmonized system of patents. The European patent system governed by the EPC, however, suffered from severe shortcomings: the successful application for a European patent results in a bundle of national patent rights, which must be enforced on a national basis and consequently leads to a high degree of fragmentation and costs arising from different national legislation and translation requirements. In response to these shortcomings, the Member States have made various attempts to establish a Community-wide patent and litigation system under the framework of the treaties, coupled by parallel efforts through intergovernmental approaches to improve the existing European Patent System governed under the European Patent Convention.

In fact, the idea to create a common system of patents dates back to the very beginnings of the common market and has been envisaged in various initiatives that never led to the desired outcome of a single market for patents. More recently, the Europe 2020 Strategy identified the creation of an economy which is based on knowledge and innovation as a necessary step in order to turn the EU into a smart, sustainable and inclusive economy which is able to deliver high levels of employment, productivity and social cohesion and was reinforced by successive proposals for a highly competitive social market economy that foresaw the introduction of an EU patent and a unified patent litigation system as measures of 'utmost importance to stimulate European competitiveness and boost research and innovation' [Com (2010) 608 final].

Despite common agreement on the necessity of setting up a common system of patents and a unified patent litigation system to improve European competitiveness by creating favorable framework conditions for businesses to innovate, it was verified in December 2010 that the Member States of the EU were unable to reach unanimous agreement on the language arrangements applicable to the European intellectual property right providing uniform protection. The impossibility to establish unitary patent protection applicable to the entire EU territory within a reasonable period of time inclined several Member States to establish enhanced cooperation in the area of the creation of unitary patent protection and overcome the decision deadlock that dominated the area of patent policy for decades. Within this context, the research at hand seeks to elaborate on the feasibility of a common approach in the area of unitary patent protection in the

future. This common approach would entail that all Member States agreed on the Council Regulation on language arrangements applicable to unitary patent protection, in line with the provisions of Article 118 (2) TFEU, which, together with the Regulation on the establishment of the EU patent, would enable the setting up of a union-wide patent system under the framework of EU law, and thus would be applicable to all European Union Member States.

A common approach in the area was inhibited by the circumstances that the Member States negotiating in the Council of Ministers were not able to find an unanimous solution to the language arrangements subject to the European intellectual property right. Under Article 118 (2) TFEU, this measure requires unanimous agreement in the Council after consultation of the European Parliament under the special legislative procedure. Whereas the language arrangements preclude unanimous decision making in the Council, all other aspects related to the establishment of a unitary patent title could be decided on the basis of supranational decision making of the institutions in accordance with the ordinary legislative procedure. With the recourse to enhanced cooperation, which serves as a flexibility mechanism to enable a number of Member States to integrate within a policy area without necessarily all Member States being involved, the European patent with unitary effect will be introduced among 25 Member States, leaving Spain and Italy as the only two Member States that will not participate. Given these developments, the research will elaborate on the interstate bargaining process within the context of European Integration and governance, and within the framework of the use of enhanced cooperation in the area of unitary patent protection as postulated by theory and apply it to the case at hand. For that purpose, the paper will take a look at two decision-making levels, the super-systemic and systemic level, to which different theoretical frameworks will be applied in order to elaborate on how theory depicts the interstate-bargaining process and inter-institutional bargaining and explains the outcomes of decision-making at these levels. Ultimately, it is sought to identify how integration might proceed in the future.

The main research question and sub-questions that will be dealt with are as follows:

“Is it feasible that the current enhanced cooperation scheme covering 25 Member States will eventually turn into a common approach (i.e. a EU patent) after all?”

Sub-questions:

- 1. What is the importance of a patent system and how did the European patent system develop?**
- 2. To what extent is enhanced cooperation able to tackle the shortcomings of the European patent system?**
- 3. What does theory have to say on interstate and inter-institutional bargaining within the context of European integration and governance?**
- 4. What does the bargaining process look like in the integration process and the use of enhanced cooperation in the area of unitary patent protection?**
- 5. How can cooperation in the area of unitary patent protection be expected to proceed in the future?**

In order to elaborate on the above-mentioned questions, the research at hand, which is qualitative in nature, will make use mainly of legal and policy documents issued by the institutions of the European Union, as well as secondary sources published in the policy area in question. The legal acts that are subject to the thesis cover mostly proposals from the European Commission and acts from the Council of Ministers, while it also covers international agreements negotiated by the Member States. As the starting point of integration in the area of patent law serves the European Patent Convention, as it constitutes a first successful step for harmonization in the area.

The paper is structured in two main parts - a descriptive and analytical part. Following this introduction, chapter 2 will elaborate on the first sub-question, providing an overview about patents and patent systems in general, as well as how the European patent system evolved. Chapter 3 finalizes sub-question one, while it continues in answer to sub-question two by providing an overview on the developments since the inception of the Lisbon Treaty, which covers the recourse to enhanced cooperation and its implications for the European patent system. Chapter 3 is complemented by an elaboration on enhanced cooperation as a flexibility mechanism that expands to the ensuing chapter 4. The analytical part starts with chapter 5, which seeks to answer the third sub-question by elaborating on the theoretical frameworks subject to this study, while covering both theoretical frameworks applicable to the super-systemic and systemic decision-making level. The subsequent chapter 6 is dedicated to the application of these theoretical frameworks to patent policy integration, compiling the elaboration of sub-question four. On the basis of the findings from these chapters, it follows a discussion that will critically evaluate the events in the light of how cooperation

could proceed in the future, treating the fifth sub-question. Lastly, a conclusion will summarize the main findings of this paper in answer to the main research question and the sub-questions elaborated above, while providing indications for further research.

2. Development of the European Patent System

The chapter at hand serves to illustrate the existing European patent system and how it developed in the light of the first sub-question guiding this research. Patent protection in the European Union has until now been governed by two distinct systems. Neither of them is based on union law, but is either governed through the respective national laws of the EU Member States or on the basis of international agreements among the EU Member States and non-Member States. The idea to create a Community patent system based on community law, however, dates back to the very early years of the European Community (Bender, 2000). In the 1960's, the Commission already made a proposal for a Community patent system, which would *'offer a single community patent in the territory of the European Union the basis of one uniform patent law'* [COM (2000) 412 final]. Although the national patent systems have relatively uniform rules regarding the conditions of the grant of a patent due to the harmonizing influence of international conventions or unilateral adaptations, considerable differences exist among the different national patent systems as regards the *'substantive terms of protection, the procedure and costs of granting protection, and the forms, costs and rigor of enforcement'* (Ullrich, 2002, pp. 6). The European Patent System under the European Patent Convention has been established to harmonize intellectual property law among the EU Member States to some extent, albeit limited to a central granting procedure. The 'European patent' as granted by the European Patent Organization is equivalent to a bundle of national patents that can be enforced separately in each designated state. The system suffers from fragmentation, high costs and legal uncertainty accordingly (van Pottelsberghe, 2009). The creation of a community patent and a centralized litigation system has been a long desired common goal of EU Member States and several initiatives have been put forward to that end. However, none of these initiatives have led to the desired outcome of a common approach. Enhanced cooperation, a mechanism introduced by the Treaty of Amsterdam in 1999, enables the integration of this policy area among a number of EU Member States within the treaty framework of the EU and stands out as the only solution after more than 40 years of negotiation. This chapter treats the first sub-question. Before elaborating on the European patent system

under the European patent Convention and successive agreements to harmonize the policy area, the following will provide an overview on patents and patent systems in general, as well as its relation to the internal market.

Importance of Patents and the Patent System

A patent is “*a legal title that grants its holder the right to prevent third parties from commercially exploiting an invention without prior authorization*” (van Pottelsberghe, 2009, p.3). With the European economies increasingly being knowledge-based, the European Commission has a long tradition of emphasizing that patents are important for economic growth, as they would stimulate innovation by providing ‘*a limited monopoly in return for the broad dissemination of new ideas*’. Further, it referred to intangible assets such as patents, trademarks and copyrights as economically one of the most important aspects of business in our time [COM (2011) 482 Final]. Investments in research and development (R&D) accounted for 1.9% of GDP in the EU in 2008, and an effective patent system would play an essential part to ‘*translate that investment into economic growth*’. In line with the Europe 2020 Strategy, proposed investment in R&D by 2020 should target 3% of the EU’s GDP, giving patents an ever important role.

According to Schovsbo (2011), a patent system is made up of both rules and institutions. At the core are specific patent rules and the respective patent offices, which are in charge of issuing patents. A patent application must generally satisfy two key, cumulative conditions, which is its novelty as regards the state of the art and include an inventive step or non-obviousness. A patent that is granted to the holder is normally valid for a period of maximum 20 years from the date of its application. Patents involve the protection of monopolies, which are closely monitored by competition authorities for abuse of dominant position, but at the same time protect the inventors’ benefits of his invention. Thus governments seek to balance the net gain from patent protection to the net loss caused by lack of competition (van Pottelsberghe, 2009). An ultimate objective of any patent system is the stimulation and promotion of innovation. Being connected to competition, industry, science and technology, as well as other important economic-related areas, an efficient and balanced patent system is a necessary precondition to stir innovation in an economy. In addition to that, potential gains for the patent holder and for society increase with the size of the jurisdiction in which it is valid. Schovsbo (2011) provides a definition of an ‘efficient’ and ‘balanced’ patent system. An efficient patent system ‘*is one that is able to reach overall goals set out for it*’, whereas in a

balanced patent system '*[the overall goals are achieved] and at the same time overall societal interests can be maximized*', without patents being seen in itself the goal of the patent system, but rather as a means to reach certain overall societal goals (Schovsbo, 2001, p1.). The public policy rationale for patents is that they help to foster innovation and promote sustainable growth by disseminating knowledge. Yet must the public policy aim of stimulating innovation be weighed against a potential loss that arises through limited competition. According to the Commission [COM (2011) 482 final], a well-designed patent policy is able to balance the incentives for inventors and the generation of welfare for society. For businesses the most important feature of any patent system is the ability to have legal certainty and reasonable costs to receive patent protection (van Pottelsberghe, 2009). In the ideal case a company could apply a 'one-stop-shop' patent that is valid in any jurisdiction where protection is sought, may it be global, national or European. A patent system, in which the costs of acquiring the patent beyond the jurisdiction where the patent was issued become unreasonably high due to administration fess and translation charges, would naturally be less attractive for any company. On the contrary, potential gains for society and the patentee are maximized with the size of the jurisdiction in which the patent is granted. Governments should ideally balance the stimulation of innovation and the dissemination of knowledge with the provision of proper incentives for companies to innovate and seek patent protection. Van Pottelsberghe (2009) notes that these provisions are not always present, may it be for political reasons or governments' unwillingness, inability or lack of resources.

The Internal Market and Patents

The shortcomings of the European patent system as regards fragmentation and high costs have been the base for my initiatives to reform the patent system in order to allow businesses and to develop within the internal market '*as conducive as possible to innovation as creativity, in order to face international competition*' [SEC (2011) 482 final]. The establishment of measures for the creation of European intellectual property rights to provide uniform protection throughout the Union is explicitly related to the establishment and functioning of the internal market under Article 118 TFEU. While the European Patent Office (EPO) provides a uniform granting procedure for 'European patents' under the European Patent Convention (EPC), the Member States have been in agreement for decades that a coherent system of patent protection in the internal market was a necessary step to take to ensure innovation and competitiveness. At the

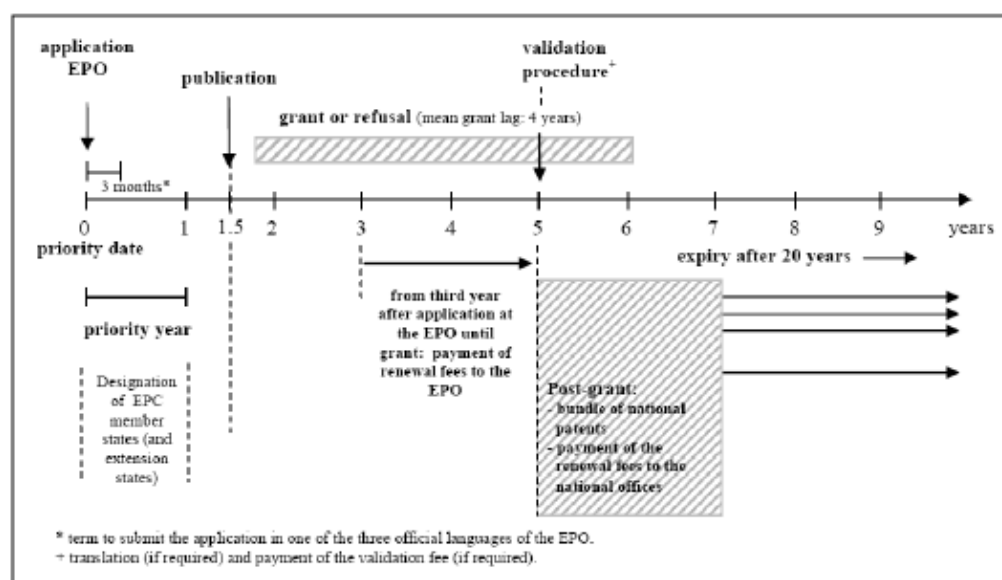
European Council summit in 1986, the Commission issued a White Paper which listed the Community Patent as one of the measures to be implemented as part of the completion of the internal market by 1992, which found general approval by political leaders by then (Sugden, 1991). Both the Europe 2020 and the Single Market Act sought to improve the framework conditions for businesses to innovate within the internal market by promoting the creation of unitary patent protection and a unified European patent litigation system within the European Union and abolish the last remaining barriers for entrepreneurs within the internal through this [SEC (2011) 482 final].

However, until now the European patent system was faced with the challenge of high fragmentation: national patent offices and jurisdictions retain the ultimate power to grant or invalidate patents, which can lead to different results across countries. Often the results are even opposite to what the centralized procedure by the EPO would conclude (van Pottelsberghe, 2009). According to the Commission, the fragmentation of the European patent system has four main aspects: (1) high costs related to the translation and publication requirements, (2) diverging rules in relation to renewal fees, (3) complex national provisions in relation to registering transfers, licenses and other rights and (4) the legal uncertainties due to the lack of a Unified Court System [SEC (2011) 482 Final]. Related to these shortcomings, Schovsbo (2011, p. 7) identifies that from a policy perspective, a main problem of the European patent system is the lack of direct EU-political and legal control, *'even though an effective system for the protection of patents is seen as instrumental for the broader innovation policies of the EU'*. Since patent law is part of property law, national leaders have been reluctant to cede powers to supranational actors in this policy area. However, van Pottelsberghe (2009) sees the opportunity costs of such reluctance as considerable. The fragmentation of the patent system entails fewer innovatory activity and lower economic growth. It is argued that *'for Europe in particular, with a single market and supranational market surveillance, fragmentation of patent systems is clearly a major anomaly and inimical to Europe's innovation and growth'* (van Pottelsberghe, 2009, p. 5). It is assumed that a Community patent and a unified and integrated European patent litigation system constitute key ingredients to ensure the working of the single market. However, as patent harmonization covers both matters of procedural law and litigation, the quest for a common EU ground has proved to be rather difficult to achieve. The following is dedicated to provide an overview on the initiatives to harmonize patent law so far, starting from the European Patent Convention that provided a first step to patent law harmonization.

2.1 The European Patent Convention

The European Patent Convention (EPC) is an intergovernmental agreement that was signed in October 1973 by the (then nine) Member States of the European Community and seven non-EEC Member States (Ullrich, 2012). It established ‘a system of law, common to the Contracting States, for the grant of patents for invention’ (Art. 1 EPC). The convention set up the European Patent Organisation with administrative and financial autonomy to grant European patents, acting through an Administrative Council and the European Patent Office (Art.4 EPC). The European Patent Convention has played an important role in the recent developments in the area of intellectual property law, as will be pointed out later. With the accession to the Convention, the Member States of the European Community made an important step towards the harmonization of European patent law by providing a unified set of rules governing the patent application and examination procedure (Lloyd, 1998). However, the system is limited to the centralized grant of national patents in accordance to standardized conditions. According to Ulrich (2012, p. 7) this essentially entails that the European Patent System as governed by the EPC ‘only represents a measure of administrative rationalization of a granting procedure’. The graph below depicts the application and renewal procedures for patent applications filed under the existing European patent systems as established by the EPC.

Figure 1: Application and Renewal Procedure for European Patents under the EPC



Source:[SEC(2011) 482 final

Under the existing patent system, an applicant may chose to apply for a European patent at the EPO, which follows the procedures established under the EPC. It offers a centralized procedure for the search, examination and grant of European patents. The

application is processed in any of the official languages of the EPO (English, French or German) and published by the EPO 18 months after the filing date in the official language of the EPO in which the application was processed. The application comprising the claims, description and drawings is subsequently made available to the public through the European publication server in electronic format [SEC (2011) 482 final]. Once granted, it is published by the EPO together with a translation of the claim in the other two official languages. The following will dedicate a closer look at European patents under the EPC.

European Patents under the EPC

The 'European patents' granted by the EPO under Article 2 EPC provided an alternative to seeking national patent protection in each of the Member States of the Convention. However, there was no uniform protection right created through the EPC that would be valid across all Member States. It solely allows applicants to obtain as many independent national patents for as many Member States it is intended to seek protection through a single application and a single procedure of full examination. Thus not a unitary patent title would be granted by the EPO that is valid in all EPC contracting states, but rather a bundle of national patents for a predefined number of states. Before the European Patent Convention was revised in 2007, the patentee was to designate in advance all the countries in which he sought protection. In its current version, all Member States that are part of the Convention at the time of filing a European patent are deemed to have been designated in the request for the grant by the patentee as outlined in Article 79 EPC. However, a patentee can request a withdrawal from any Contracting State up to any time until the patent is granted, so as to reduce the number of designated Member States (Art. 79 (3) EPC). The reduction of the designated Member States makes sense if the patentee intends to reduce the payment of fees, which rises with the number of states in which protection is sought accordingly.

According to Article 14 EPC, European patent application has to be filed in one of the official languages of the EPO, which is English, French or German. However, under Article 14 (2) EPC an exception is made insofar, as if it is filed in a language other than the official languages of the EPO, it has to be 'translated into one of the official languages in accordance with the implementing Regulation'. These translations may be '*brought to conformity*' during the proceedings before the EPO and need to be filed in '*due time*'. Once granted, this bundle of independent national patents is subject to the different rules of all those Member States which were designated in the application. A

European patent granted by the EPO would *'in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless this Convention provides otherwise'* (Art. 2 EPC).

However, under the EPC, the different national patents that make up the European patent are subject to some autonomous, uniform rules: the conditions of patentability as governed Art. 52-57 EPC, the period of protection (Art. 63 EPC), the scope of protection *ratione materiae* (Art. 64 (2) & Art. 69 EPC), as well as the grounds for revocation as governed under Art. 138 EPC (Ullrich, 2012). Although the centralized searching, examining and granting procedure under the EPO was generally recognized as being a success and had the advantage of being extremely flexible, the system established by the European Patent Convention was subject to a range of limitations, unless it would be supplemented by a unitary Community patent title [COM (1997) 314 final]. These limitations mainly referred to the problems caused by the complex and costly post-granting procedure: high costs for the translations of specifications which had to be filed in each designated country, the high national renewal fees for a European patent, the complex revocation and infringement proceedings, the absence of provisions for a common court and an unequal distribution of applications of patent protection towards the larger Member States (COM (1997) 314 Final).

The European patent had to be enforced, i.e. translated, validated and renewed each year in each designated national jurisdiction in order to become and remain effective (van Pottelsberghe de la Potterie & Mejer, 2008). For a patent to be validated in each designated country, the patentee is faced with several costs. According to Article 65 EPC, *'Any Contracting State may, if the European patent as granted, amended or limited by the European Patent Office is not drawn up in one of its official languages, prescribe that the proprietor of the patent shall supply to its central industrial property office a translation of the patent as granted, amended or limited in one of its official languages at his option...[and also] ...may prescribe that the proprietor of the patent must pay all or part of the cost of publication of such translation within a period laid down by that State'*. The costs for a European patent would rise according to the number of designated states in which protection is sought, which could entail very high costs both for the translations that have to be made and its subsequent publication (see also COM (2011) 215/3, p. 3). Next to the translation and publication costs, the holder of a European patent further has to pay renewal fees in each country and each year in accordance with Article 2 (2) EPC. In line with the provision that the European patent is subject to the same conditions as a national patent, different legislation would apply in each Member State. This also includes different time frames, amount and means of

payment that are valid in different countries. With the EPO acting as a central granting authority only, all questions involving infringement and enforcement of a European patent title remained decentralized. Litigation processes remained in the hands of the national courts of the participating states as outlined under Article 64 (3) EPC, which states that 'any infringement of a European Patent shall be dealt with by national law' (Art. 64(3) EPC). With the absence of a central European court to deal with infringements of a European patent, no harmonized litigation procedures exist that could prevent different outcomes in national jurisdictions in the event of a conflict.

2.2 The Community Patent Convention

It was the intention of the EEC Member States that the European Patent Convention of 1973 should soon be followed by a subsequent Convention that would establish a Community patent (Lloyd, 1998). The successive draft Convention, the Convention on the Community Patent (CPC), was concluded in 1975 by the Member States of the European Community on an intergovernmental basis, who were in agreement to give unitary and autonomous effect to European patents granted in respect of their territories. However, the Community Patent Convention could not be ratified by a sufficient number of Member States in order to enter into effect. As the main '*stumbling blocks*' to the ratification appeared to be the provisions on legal enforcement (Sugden, 1991). The Community Patent Convention was sought to be amended in 1989 through an Agreement relating to Community Patents (89/695/EEC), which was reached in a successive diplomatic conference. Despite improvements that were made to the original text of 1975, the new agreement could again not be ratified and left the efforts to reach a solution on unitary patent protection in vain. As at the time the Community Patent Convention and Agreement were signed the Community's competence in the area of intellectual property law was unclear, both were concluded as agreements between the Member States outside community law and on an intergovernmental basis (Lloyd, 1998).

The Community Patent under the CPC

Through the Community Patent Convention in 1975 it was sought to establish a unitary patent system that would be linked to the Community legal order and which would contribute to the attainment of the objectives of the EEC Treaty. To

that end, it intended to merge the bundle of protection rights resulting from the grant of the 'European' patent title and provide a single, unitary protection right that would be valid throughout the Community. Under Article 2 CPC, it was established that *'European patents granted for the Contracting States shall be called Community Patents'* and these *'shall have a unitary character'*.

The main difference between the bundle of national patents resulting from a 'European' patent and the new Community Patent title that was to be established, apart from the community-wide application, would be the law applying to it. Article 2 CPC established that Community Patents *'shall be subject only to the provisions of the European Patent Convention and those provisions of the European Patent Convention which are binding upon every European Patent and which shall consequently be deemed to be provisions of this Convention'*. Thus instead of being subject to different national laws as had been the case with European Patents under the EPC, the Community Patent would be governed by the provisions of the Conventions. According to the CPC provisions, however, Member States retained their right to continue to grant purely national patents alongside Community patents (Article 5 CPC). In line with the provisions of the EPC on the designation of the States in which a European patent was to have effect, Article 3 of the CPC governed that a *'designation of the States parties to this Convention in accordance with Article 79 of the EPC shall be effected jointly. Designation of one or some only of these states shall be deemed to be designation of all these states'*. As a transitional provision, the Convention provided for the option to acquire a European patent, rather than a Community patent. However, through a unanimous decision by the European Council within the first years of entry into force or by qualified majority after the expiration of that time, the provision could be brought to an end (Sugden, 1991).

The system established by the Community Patent Convention was to be administered through the EPO. For that purpose, special departments were to be set up within the European Patent Office who should be supervised by a Selected Committee of the Administrative Council of the European Patent Organization (Art. 4 CPC). Despite the improvements made on the unitary character of the Community patent, the system proposed by the CPC did not bring forward a suitable solution to the problems related to the translation requirements. Before an application could proceed to the actual granting, after its examination, the proprietor had to issue translations of the claims into an official language of each Community State and a fee paid to publish these in line with ex. Article 33 CPC. The translations would have to be filed within three months from the date of the application, extendable by two months. An application not fulfilling these conditions would, however, be declared void *'ab initio'* (Sugden, 1991, p.6). Any

Member State could prescribe that the applicant would not enjoy any rights in its territory until a translation of the claim would be provided to either the competent national authority or to the alleged infringer (see ex. Article 34 CPC).

In line with the provisions of the EPC, the patent specification after the grant of a Community Patent would be published in the language of the proceedings. Under ex. Article 14 CPC, however, Member States could not call for translations, as was possible in the case of a European Patent. Under ex Article 88 CPC, a transitional provision enabled Member States to declare that a translation was required in the event that rights were to be enforced in that state. A rather complex procedure was to be established: if within 3 months of the grant a translation was provided, rights would start from the date of the grant; if the translation was issued after a period of three months since the grant, rights would start from the filing of the translation and compensation claims could be made of any use before that date could be made; if, however, translations were filed after a period of three years and nine months after the grant of the patent, then a *'use started at that time could continue on reasonable terms'* (Sugden, 1991, p.6). The European Council could, however, decide by unanimity to repeal this transitional provision.

As regards infringement actions, ex Article 69 provided that these should be heard by national courts, which were under ex Article 76 CPC obliged to treat the patent as valid. If a defendant wished to challenge the validity of a patent these should be heard by revocation divisions or by revocation boards of the EPO on appeal. The European Court of Justice would be in charge of further appeal under ex Articles 56-63 CPC and the infringement actions would have to wait for the findings thereof (ex Art. 77 CPC). As the procedure gave rise to contrary results and different interpretations, a resolution on litigation was enclosed to the Convention of 1975, recognizing the problems associated to the separation of jurisdiction related to infringement and validity issues. It was decided that a Protocol should be established within 10 years to bring a solution to this problem (Sugden, 1991).

2.3 The Community Patent Agreement

In 1985 another intergovernmental conference was held in order to deliberate on a solution to the problems surrounding the Community Patent project. Main issues of concern was the previously negotiated resolution on litigation of the 1975 Convention, that was sought to solve the problem arising from a separation of jurisdiction in respect of infringement and validity (Sugden, 1991). A further issue of debate was the problem of bringing the CPC into force without Denmark and Ireland, which became even more severe with the prospective accession of Spain, Portugal and Greece to the Community in 1986. In Ireland and Denmark, constitutional problems arising from the delegation of power to a centralized granting authority and litigation procedure occurred. The newly acceding Member States would, however, not join the Convention without the old Member States Ireland and Denmark acceding to it (Sugden, 1991).

During the successive Conference in 1989, which culminated in the Community Patent Agreement (89/695/EEC), the by then twelve Member States could agree on a wide range of issues that had been posed in the proceeding conference in 1985. The Member States agreed that *'the problem of dealing effectively with actions relating to Community Patents and the problems arising from the separation of jurisdiction created by the Community Patent Convention as signed at Luxembourg on 15 December in respect of infringement and validity of Community Patents will best be solved by giving jurisdiction in actions for infringement of a Community Patent to national courts of first instance designated as Community Patent Courts which can at the same time consider the validity of the patent in suit and, where necessary, amend or revoke it; and that an appeal to national courts of second instance designated as Community patent courts should lie from judgments of these courts'* (89/695/EEC). To that end, it was established that a uniform application of the law on infringement and validity of Community Patents would require the establishment of a Community patent appeal court, which would hear on appeal referrals on questions of infringement and validity from the Community patent courts of second instance. Following the same requirement of uniform application of the law would lead to conferral upon the Common Appeal Court of jurisdiction to decide on appeals from the Revocation Divisions and the Patent Administration Division of the European Patent Office, which would replace the Revocation Boards provided for in the Community Patent Convention of 1975 (89/695/EEC). The Community patent appeal court would be established by the Protocol on litigation and would be, as the special departments that were to be set up within the European Patent Office, in charge of implementing the procedures of the Convention.

In order to obtain a Community wide ruling, a patent holder would be able to sue an alleged infringer in a designated Community Patent Court within a Member State of the Community where the defendant has his domicile or establishment. In the event that a defendant would not have his domicile or establishment within the Community, the country where the plaintiff has its establishment or domicile would be used, or the state where the Common Appeal Court is located. In any case the court would have to be designated as a Community Patent Court. The plaintiff could also sue in a Community Patent Court in a state where the infringement has occurred, but if the domicile provision was not met, only a national ruling on the infringement would be obtained. The defendants would be able to counterclaim for invalidity, which in case it was successfully counterclaimed, the ruling would have Community-wide application (Sugden, 1991).

In case a ruling of a Community Patent Court of First Instance was appealed, the appeal was referred to a designated Community Patent Court of second instance. The court of second instance would not be able to review issues of infringement and validity, but these would have to be referred to the Common Appeal Court, which would give a final ruling on the issue. The ruling would be returned to the national court of second instance, which could incorporate their findings on different issues of the appeal, such as the level of damages or matters on prior rights. It would be possible to appeal to court of third instance, but not on those issues that were previously settled in the ruling made by the Common Appeal Court (Sugden, 1991). As concerns the revocation procedure, the protocol on litigation entailed some major changes. All appeals from revocation divisions would be dealt with by the Common Appeal Court, which would entail that all decisions on validity of Second Instance would be made by the Common Appeal Court. The Common Appeal Court would have the authority to give preliminary rulings on the interpretation of the Agreement on Community Patents, even in matters not falling within its exclusive jurisdiction. To ensure conformity with the Community legal order, however, Member States or the Commission could ask for a (preliminary) ruling of the European Court of Justice (Sugden, 1991). Important agreement was also made on the choice between a European and a Community Patent, which could be made at the very time limit of the granting stage, so as to enable the applicant to issue either all translations for the Community patent, or fewer translations as needed for the European patent in line with (Sugden, 1991). As concerned the translation requirements, it was agreed that a translation of the whole patent specification into an official language of each Community state would have to be filed within three months

following the grant of the application. Failure to issue all translations within the given time frame would implicate a loss of the patent title.

Although the European Patent Convention and the Agreement on the Community differed in their aims, they still complemented each other [Com (1997) 314 final]. The EPC sought to establish a centralized grant procedure managed by the EPO in Munich. According to its provisions, the accession was open to any European State, whereby states could also be invited by the Administrative Council of the EPO (Art. 166 EPC). The Agreement on the Community Patent on the other hand sought to promote the *'completion of the internal market and the establishment of a European technological community by means of a community patent'* (89/695/EEC). The Community Patent Agreement concerned the community of twelve Member States, but did not take into account the 1995 enlargement in which Austria, Finland and Sweden became part of the Community. Although the three newly acceded states were not directly concerned by the Agreement, they were still legally required to accede to it [Com (1997) 314 final]. However, according to its provisions, a special agreement could be concluded between the contracting states and the acceding states in order to determine the details of application of the Agreement as necessitated by the accession of that state (89/695/EEC, Art. 7a). Thus a special agreement would have to be negotiated and ratified by all the contracting parties of the 1989 Agreement, which would become even more complicated in the event that further states joined the Community. Despite these efforts, ratification of the Agreement by a sufficient number of Member States failed, as had been the case with the previous Convention. In 1992 the successive Lisbon Conference aimed at lowering the ratification threshold for the entry into force of the Community Patent Convention. With its failure, however, the prospect of a unitary Community Patent title at that time failed too.

2.4 The Community Patent Regulation

On the basis of Article 308 Treaty establishing the European Community (ex. Article 235 EC), which postulates that *'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'*, the European Commission proposed the creation of a Community patent system that would significantly reduce costs and provide legal certainty under a Community Patent Regulation in 2000 [COM (2000) 412 final]. The regulation aimed to *'significantly lessen the burden on business and encourage innovation by making it cheaper to obtain a patent and by providing a clear legal framework in case of dispute'* and proposed that the Community acceded to the European Patent Convention to *'enable the Community to be included in the Convention system as a territory for which a unitary patent can be granted'* [COM (2000) 412 final]. It would entail important implications on legal aspects as the Community could limit the regulation to *'the creation of the law applicable to the Community patent once granted'*. The Regulation would establish a comprehensive set of rules under Community law on patents, which would be applicable to all the patents granted by the European Patent Office throughout the entire Community, which would consequently be considered as Community patents of autonomous character. Article 2 of the Regulation governed that the Community patent would be subject only to the provisions of the regulation and the general principles of Community law, without prejudice to *'the application of law of the Member states with regard to criminal liability and unfair competition'*. Actions and claims relating to the Community Patent were proposed to come under the exclusive jurisdiction of the Community intellectual property court. The Community intellectual property court would be competent for Community patents only and have full infringement and revocation jurisdiction instead of national courts. The terms and procedures relating to invalidity or infringement proceedings, as well as counterclaims for invalidity applications would have to *'be established in the statute or rules of the procedure of the Community intellectual property court'* (Art. 30). As regards translation, the proposed regulation provided under Article 58 *'the option of producing and filing with the Office a translation of his patent in several or all of the official languages of the Member States which are official languages of the Community'*. It would reduce translation costs to a considerable extent by not requiring any translation beyond that already foreseen in the European Patent Convention for the granting of patents. This would imply that a patent would be granted and published in one of the working languages of the EPO (English, German or French)

and that the claims, which define the scope of protection, would be translated in the other two.

The London Agreement

In 2000 also the so-called London Agreement was signed, in which states agreed on the application of Article 65 of the European Patent Convention to European patents. The agreement intended to reduce the costs related to the translation of European patents and entered into force in 1 May 2008. The contracting states of the EPC, which have ratified the London Agreement, agreed to waive, entirely or partially, the requirement for translations of European patents. To that end, the first Article of the London Agreement postulates that *'a state which has an official language in common with one of the official languages of the EPO shall dispense entirely with the translation requirements provided for in Article 65(1) EPC'* and *'a state which does not have one of the official languages of the EPO shall dispense with the translation requirements provided for in Article 65 (1) EPC if the European patent has been granted in the official language of the EPO prescribed by that state, or translated into that language and supplied under conditions provided for in Article 65(1) EPC'*. The state may, however, require that a translation of the claims into one of their official languages be supplied. Unlike the proposed Community Patent Regulation, the London agreement eventually entered into force.

The Common Political Approach 2003

After a 30-year deadlock in the area, a common political approach on Community patents was adopted by the Council in 2003 in order to abolish the obstacles to the proposed Community Patent Regulation (Council Doc. 7159/03). The agreement focused on four essential elements: (1) the jurisdictional system of the Community patent, (2) a language regime meeting the objectives of affordability, cost-efficiency, legal certainty and non-discrimination, (3) the role of the EPO and national patent offices, and (4) and the distribution of fees applicable to Community patents. It followed that in 2003 and 2004 amendments to the Community Patent Regulation were proposed (Council Doc. No 15086/03, Council Doc. 711904 of 08 March 2004). These comprised issues regarding the administration of the EPO, the autonomous and unitary character of the Community Patent granted by the EPO and the comprehensive set of

rules on the substantive patent law. This was accompanied by a Court Proposal in 2003 [COM (2003) 827 final; COM (2003) 828 final], in which on the basis of Article 2 (26ff.) of the Treaty of Nice amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, inserting Articles 229a and Article 225a into the EC Treaty, it was proposed that the Community patent jurisdiction would be established by two Council decisions based on those Articles. These would confer jurisdiction on the Court of Justice in disputes relating to the Community Patent and establish a Community Patent Court, which would within the Court of Justice exercise at first instance the jurisdiction on issues relating to the Community Patent. The decisions further contained provisions on the function of the Court of First Instance as appeal instance according to Article 225(2) EC against decisions of the Community Patent Court. With regard of the structure of the Community Patent Court, a centralized and specialized community jurisdiction was expected to ensure legal certainty regarding the unitary Community patent. Thus a Community patent title covering the territory of all EU Member States would be granted by uniform standards under the EPC, and would after its grant be governed by uniform provisions of Community law as contained in the proposed Community Patent Regulation. However, Member States did not support a common position neither regarding the single jurisdictional system that would decide on matters affecting the validity of patents, nor as regards the applicable language regime, despite the success of the London Agreement established on the basis of intergovernmental agreement.

The European Patent Litigation Agreement

Already in 1999, the EPC contracting states had set up a working party on litigation, who sought to draw up an optimal protocol to the EPC committing its signatory states to an integrated judicial system. In 2005, the latest initiative was put forward by the working party by means of a draft agreement on the establishment of a European Patent litigation system (EPLA) on the basis of an international treaty. It sought to improve the enforcement of European patents, enhance legal certainty and promote the uniform application and interpretation of European patent law. For that purpose, it set out the establishment of a European Patent Judiciary (EPJ) that would settle litigation concerning the infringement and validity of European patents in the contracting Member States. The EPJ would comprise a European Patent Court and an Administrative Committee, composed of representatives from the contracting states supervising the European Patent Court. The draft agreement did, however, not enter into force. A

further EC Communication in 2007, entitled 'Enhancing the Patent System in Europe' [COM (2007) 165 final] subsequently emphasized the need to establish a Community patent together with a centralized patent judiciary that would deal with litigation for European and Community Patents, calling for '*a combined effort by Member States and the Community institutions*'. The Commission reiterated that the proposed EPLA, as developed outside the Community context and dealing only with European patent litigation, would require a separate jurisdiction for a future Community patent. It therefore proposed an integrated approach combining features of the EPLA and a Community jurisdiction in order not to jeopardize the creation of a Community patent because of concern of two competing jurisdictions. For that purpose, a judicial system based on a unified and specialized patent judiciary with competence for litigation on European patents and future Community patents was proposed, which would have competence for infringement and validity actions as well as for related claims. The Community jurisdiction for European and Community patents would have to '*respect the ECJ as the final arbiter in matters of EU law, including questions related to the *acquis communautaire* and to the validity of future Community patents*'. These measures were expected to allow for a harmonious integration in the Community jurisdiction. It followed that a draft agreement and statute was published on a 'European and European Community patents Court' by the end of 2008. In June 2009, the Council requested an opinion of the ECJ on the compatibility of the draft agreement with EU law.

3. The Lisbon Treaty and the 'EU' Patent

The chapter at hand elaborates on the developments in the area of patent law harmonization with the inception of the Lisbon Treaty in answer to the first sub-question, while chapter 4 will continue with an elaboration of the second sub-question.

With the entry into force of the Lisbon Treaty, the European Union gained legal personality, succeeding and replacing the European Community. The name 'Community' patent was subsequently replaced by 'EU' patent and the 'European and Community Patent's Court' (ECPC) changed to 'European and European Union's Patents Court (EEUPC) accordingly. Next to the change of name of the patent title, the Lisbon Treaty also brought some important changes as regards the legal base for the EU patent. Under Article 118 Treaty on the Functioning of the European Union a new, specific legal base for the creation of a unitary intellectual property title in the European Union was created. Although unanimity would still be required for deciding on the language arrangements of the unitary patent title, including the consultation of the European Parliament, all other aspects related to the patent title could from now on be decided by qualified majority under the ordinary legislative procedure, co-decision.

Political breakthrough was achieved in the Competitiveness Council in December 2009, when Ministers reached agreement on a number of elements constituting the future of the EU patent system, which culminated in the adoption of the Council conclusion on an 'Enhanced Patent System for Europe' (Council Doc. 17229/09) and a general approach on a draft Regulation on the EU patent on the basis of Article 118 TFEU (Council Doc. 16113/09 ADD 1). The basis underlying the future of the patent system would be that the EU accedes to the European Patent Convention (EPC) with the EPO granting the EU patents alongside European patents. The EU patents should have unitary effect within the territory of the European Union and would contribute to the abolishment of obstacles to the free movement of goods and to the attainment of the objective of creating a system ensuring an undistorted competition in the internal market. The jurisdictional system for the EU patent should be part of the European and EU patents Court, having jurisdiction for both European and EU patents. The envisaged draft Regulation referred to the proposal for a Council regulation on the Community patent issued by the Commission in 2000 [COM (2000) 412 final]. However, the conclusion did not provide for a solution on the translation arrangements for the EU patent. The Council conclusions were adopted without prejudice to the opinion requested in June 2009 to the ECJ on the compatibility of the envisaged jurisdictional system with European Union Law. In June 2010, the Commission subsequently submitted a

proposal for a Council Regulation on the translation arrangements for the EU patent [COM (2010) 350 final] providing for the missing translation arrangements applicable to the EU patent.

Despite the common consent that improvement of the patent system was a necessary step to take, in November 2010 it became apparent that no unanimity could be reached to go ahead with the proposed regulation on the translation agreements as part of the 'first EU patent package' introduced under the ordinary legislative procedure. This was followed a month later by the acknowledgment that '*insurmountable difficulties*' existed, which made a unanimous approach impossible '*at that time and in the foreseeable future*' (Council Doc. 16041/10). The failure to reach agreement on the proposed Regulation on translation agreements thus again jeopardized the attainment of unitary patent protection throughout the Union within a reasonable period of time by applying the relevant provisions of the Treaties. This drawback was followed by the ECJ giving its opinion 1/09 on the EEUPCT Agreement as part of the first EU patent package, stating that it was incompatible with EU law, in particular its broad jurisdiction to interpret and apply general EU law.

3.1 Recourse to Enhanced Cooperation

After it was verified that the failure to reach the required unanimity approach on the translation arrangements would make it impossible to establish a unitary EU patent within a reasonable period, several Member States expressed the wish to establish an enhanced cooperation, as enshrined in the EU treaty under Articles 326 to 334 TEU and Article 20 TFEU, in the area of the creation of unitary patent protection. The main constraint to reach unanimous agreement was that Spain and Italy opposed the idea to use English, French and German as the official languages in patent granting. In these circumstances, twelve Member States addressed requests to the Commission in December 2010 indicating that they wished to establish enhanced cooperation. When the requests were confirmed at a meeting of the Council the same month, thirteen more member states indicated their wish to participate in the envisaged enhanced cooperation, making it twenty-five member states in total.

Following these developments, in February 2011 the European Parliament gave its consent for the use of enhanced cooperation in the area of the unitary patent, followed by a Council Decision in March 2011 '*authorizing enhanced cooperation in the area of the creation of unitary patent protection*' (2011/167/EU) to enable the Member States

that supported the Regulations in question, to establish enhanced cooperation in the area of the creation of unitary patent protection in the Union. After the Commission presented proposals for a Council Regulation implementing suchlike enhanced cooperation in the area of the creation of a unitary protection [COM (2011) 215 final] and in the area of unitary patent protection with regard to the applicable translation arrangements [COM (2011) 216 final], the Council could agree on a general approach on the Commission proposals in June 2011 (Council Doc. 11328/11) by means of draft regulations, on which it reached agreement with the EP by December the same year. Enhanced Cooperation is expected to provide the necessary legal framework for the creation of a unitary patent protection in the participating member states. As a part of the Unitary Patent, the applicable translation agreements should correspond to those proposed in the Council Regulation on the translation arrangements for the European Union patent (COM (2010) 350 Final) including some amendments proposed by the Council Presidency in November 2010. The envisaged Unitary Patent Court (Council Doc. 16741/11) would enforce unitary patents and hear validity disputes while providing greater protection to the role of the ECJ and the national courts. The UPC would have the same legal personality as a national court and would be able to make preliminary references to the ECJ for clarification of fundamental questions on EU law, while being subject to the same obligations under EU law. In the event of an infringement of EU law, the participating Member States would be held jointly liable. Complementary to its jurisdiction over unitary EU patents, it would also have jurisdiction over unitary European patents and supplementary protection certificates.

However, on May 2011 Italy and Spain had filed actions to the European Court of Justice to rescind the Council Decision authorizing enhanced cooperation in the area of the creation of unitary patent protection. Both countries objected the decision as being unlawful and likely to distort competition within the European Union, since the use of enhanced cooperation will not achieve the objective of providing uniform protection for intellectual property rights. Furthermore, it was claimed that the conditions for invoking the provisions of the Lisbon Treaty on enhanced cooperation were not fully met, but instead were argued to be a mere mechanism to circumvent the unanimity requirement by excluding Member States from negotiations. In April 2013, however, the ECJ dismissed these challenges in its ruling in Joined Cases C-274/11 and 295/11.

The last obstacle to the introduction of unitary patent protection was removed with the agreement reached by the EU Member States on the location of the future Unitary Patent Court. After lengthy discussion, the Member States agreed in June 2012 that the Court's central division should be located in Paris, with two specialized sections

operating in Munich and London. The Unitary Patent court will be established on the basis of an international treaty and will retain exclusive jurisdiction in infringement and revocation proceedings of both European and unitary patents (European Council, 2012). The single patent litigation system should eliminate the risk of multiple patent lawsuits in different member states concerning the same patent, and should also solve the problem of opposite court rulings in different member states. Furthermore, the costs for patent litigation are expected to be reduced significantly for small and medium-sized businesses operating in Europe.

In July 2012 the European Parliament had to adopt a common opinion on the second unitary patent package as negotiated by the Council, but postponed their decision. Reason for the postponement was disagreement about the Council's move to delete 3 key articles from the long-awaited EU patent regulation (European Parliament, 2012). However, on 17 December 2012 the Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection (Regulation No.1257/2012) was adopted by the Council and the European Parliament and will apply from 1 January 2014 of the date of entry into force of the Agreement on a Unified Patent Court together with the Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to translation arrangements (Regulation No.1260/2012). After Member States signed the Unitary Patent Court Agreement in February 2013, it has to be ratified by at least 13 Member States participating in enhanced cooperation on unitary patents (Austria was the first country to ratify the Agreement in August 2013). As an international agreement outside the EU institutional framework, the Unitary Patent Court will be court common to the contracting Member States and subject to the same obligations under EU law as national courts. The ratification is expected to be in early 2014 and will give force to the two EU regulations at the same time. It will enable 25 Member States to issue a Unitary Patent that is valid in the participating Member States, with the new court avoiding the occurrence of multiple court cases with regard to the same patent in different Member States and preventing contradictory rulings on the same issue. The newly established system is expected to bring competitive advantages to business as regards innovation through its cost-effectiveness and legal certainty compared to the previous patent system. However, the very fact that enhanced cooperation is applied entails that it will not apply to all EU Member States. Whereas Spain and Italy do not participate in the enhanced cooperation scheme on unitary patent protection and the related translation arrangements, Poland and Spain did not sign the Unified Patent Court Agreement. Before dedicating a closer look on enhanced cooperation as a flexible integration

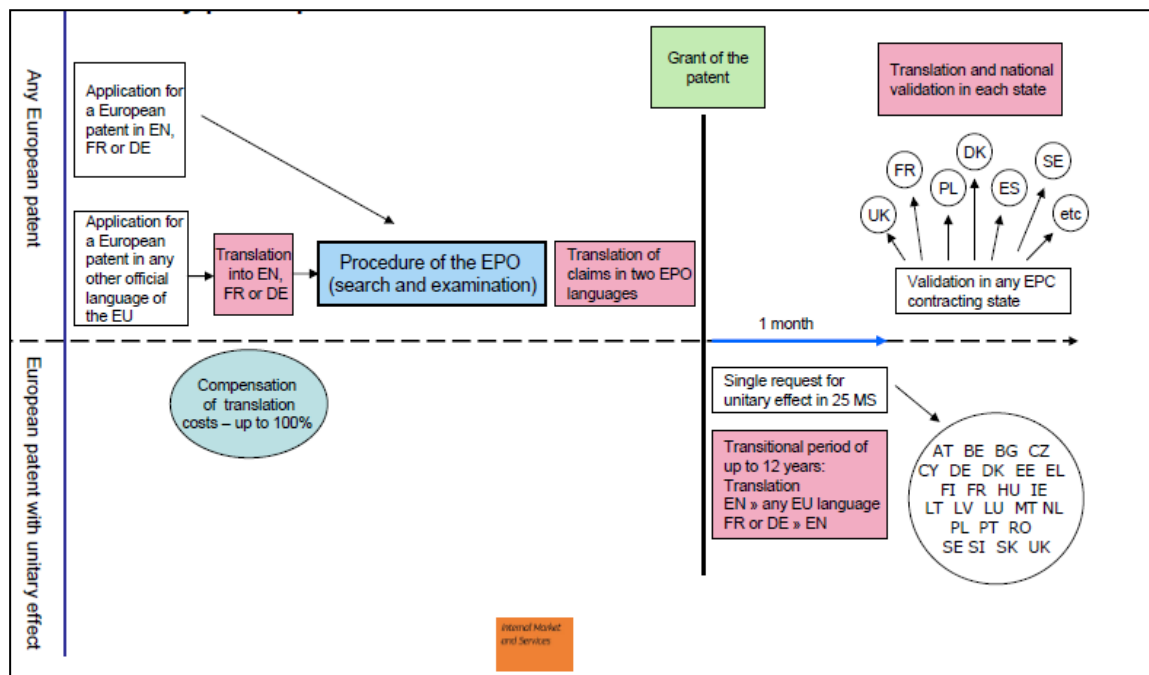
arrangement available to the EU Member States in the event that not all states wish to participate in the cooperation of a given policy, the following part will elaborate on how the new system governed under the two regulations and the international agreement on the Unified Patent Court are expected to tackle the problems of the European patent system as regards fragmentation, legal certainty and cost-effectiveness.

3.2 The Reformed Patent System under Enhanced Cooperation

According to the Commission, the creation of a European intellectual property right providing uniform protection throughout the EU and the associated language arrangements are provided for in Article 118 TFEU and needed to be addressed at EU level accordingly [SEC (2011) 9482 final]. Given the importance of patents for innovation and economic growth, and the deficiencies of the current patent system, enhanced cooperation is expected to improve the framework conditions for patent protection in the participating Member States and to foster the functioning of the internal market by *'making access to the patent system easier, less costly and legally secure'* (Regulation No. 1257/12).

The new system created by the 'unitary patent package' is governed by Regulation (EU) No 1257/2012, Council Regulation (EU) No. 1260/2012 and the Agreement on a Unified patent Court (2013/C 175/01). With European Patent Convention (EPC) of 1973 providing for a single procedure for granting of European patents by the European Patent Office, the new provisions give unitary protection for those Member States participating in enhanced cooperation, including facilitated language arrangements for the unitary patent and a common judicial system with exclusive competence in respect of European patents with unitary effect and European patents granted under the provisions of the EPC. The European patent with unitary effect will be available on a one-stop shop basis at competitive costs, as no further validation requirements need to be fulfilled after the central granting procedure and the applications can be filed in any language. The figure below depicts the procedure for the European patent with unitary effect compared to the classical European patent. Whereas the EPO is entrusted to grant European patents and European patents with unitary effect, the translation and national validation requirements will be facilitated with a single request for unitary effect in 25 Member States.

Figure 2: European patent and European patent with unitary effect



Source: European Commission (2013), http://ec.europa.eu/internal_market/indprop/docs/patent/faqs/how-does-it-work_de.pdf

The following will elaborate on the patent system under the applicable regulations and Unified Patent Court Agreement more thoroughly.

3.2.1 Unitary Patent Protection under Regulation 1257/2012

The European Patent Organization is entrusted with the granting of European patents (Art 9), which, on request of the proprietor, can have unitary effect in the territory of the participating Member States, while the patent would be registered in a single European register with regard to the territories of the of the participating Member States. Unitary protection of the patent is achieved by attributing unitary effect to European patents in the post-grant phase by virtue of Regulation No.1257/12. This unitary character of the patent will provide uniform protection and have equal effect in all participating Member States. As a consequence, the European patent with unitary effect '*should only be limited, transferred or revoked, or lapse, in respect of all the participating Member States*' (Reg. 1260/2012). It will nevertheless be possible for a European patent with unitary effect to be licensed in only in some of the participating Member States. To safeguard the uniform substantive scope of protection, however, only European patents that have been granted for all the participating Member States with the same set of claims are able to benefit from unitary effect. This is manifested in Article 3 of

Regulation 1257/12, which states that *'a European patent granted with different sets of claims for different participating Member States shall not benefit from unitary effect'*.

The European patent with unitary effect thus exists alongside 'traditional' European and national patents of the respective Member States. As a consequence, applicants can up to the grant choose between (1) a European patent that is valid in the territories of the participating Member States having unitary character for these states, (2) a European patent that is valid in the territories of the participating Member States, for which it would have unitary character, but also be valid in other selected EPC contracting states (including those not participating in enhanced cooperation), or (3) a European patent that would be valid in a selected number of EPC contracting states, disregarding whether they participate in enhanced cooperation or not [SEC (2011) 482 final]. The European patents with unitary effect granted by the EPO would enjoy unitary protection in the territories of the participating Member States without any validation with the national patent offices. The respective renewal fees would have to be paid at the EPO. As regards the scope of protection, the European patent with unitary effect confers on its proprietor *'the right to prevent any third party from committing acts against which that patent provides protection throughout the territories of the participating Member States in which it has unitary effect'*, subject to limitations applied by the law on European patents (Art. 5.1, 5.3 Regulation 1257/12). This scope of protection and its limitations will be uniform in all participating Member States by virtue of the regulation. The renewal fees for European patents with unitary effect, as well as additional fees, are payable to the EPO, while its level *'shall be set, taking into account, among others, the situation of specific such as small and medium-sized enterprises, with the aim of [...] facilitating innovation and fostering the competitiveness of European businesses'*.

3.2.2 Translation Arrangements under Regulation 1216/2012

The application for a European patent can be filed in any official EU language, but need to be accompanied by a translation of the application into English, French or German if the original application did not take place in one of these official EPO languages. The new translation regime will provide for a limited compensation scheme of all the translations costs if the application of the patent was filed in one of the official languages of the EU other than the official languages used by the EPO and the patent proprietor have their principal place of business within the EU. With the EPO being responsible for the grant of European patents with unitary effect,

the translation arrangements applicable to these patents correspond to the official languages used in the EPO. Under Council decision 2011/167/EU it was already outlined that the translation arrangements should be simple and cost effective, while corresponding to those provided for in the proposal for a Council regulation on the translation arrangements presented by the Commission in 2010, building on official languages used by the EPO – English, French and German. Therefore, the European patent with unitary effect is granted in one of the three official EPO languages. Before the grant, however, the applicant is required to provide translations of the claim into the other two official EPO languages.

The provisions of Regulation 1260/12 provides that the translation arrangements for the European patent with unitary effect are built on the current procedure of the EPO, with the aim to balance between the economic and public interests, as well as in terms of the cost of proceedings and the availability of information. In that regard, Article 3 of the Regulation postulates that *'[...] where the specification of a European patent, which benefits from unitary effect has been published in accordance with Article 14 (6) EPC, no further translation shall be required'* and that *'a request for unitary effect as referred to in Article 9 of Regulation (EU) No 1257/2012 shall be submitted in the language of the proceeding'*. Article 14 (6) EPC provides that the specification of a European patent is published in the language of the proceedings before the EPO and includes a translation of the claims into the other two official languages of the EPO. Within the transitional period up to the point until high-quality machine translations are available, Article 6 of Reg. 1260/2012 provides that the European patents with unitary effect that were granted in French or German, need to be accompanied by a translation in English as well, while those granted in English will need to be accompanied by translations into any other official language of the EU. Under Article 4 of Regulation No. 1260/2012 the translation arrangements in the event of a dispute are outlined. It provides that a full translation of the European patent with unitary effect into the official language of the Member State has to be provided, in which an alleged infringement took place or where the infringer is domiciled, at the expense of the patent owner. The alleged infringer can request this translation from the patent proprietor. Furthermore, the court competent for that dispute can request a full translation of the patent into the language used in the proceedings of that court.

The translation arrangements outlined in the Regulation aim to achieve legal certainty and benefit in particular small and medium-sized enterprises by making the patent system as whole easier and less costly. To that end, the patent information will be disseminated in all languages of the European Union through high-quality machine

translation services, being publicly available and free of charge. The new system is thus expected to bring huge cost advantages and reduced administrative burden compared to the current system. After the expiration of the transitional period, in which certain additional translations will be required, the cost to obtain a European patent will decrease from currently about EUR 36 000 to around EUR 5 000 [SEC(2011) 482 final]. The transitional period is expected to cover a timeframe of maximum 12 years (Art. 6 Reg. 1257/2012), and entails that the costs for a European patent with unitary effect are slightly higher, as costs for additional translations come up until the high-quality machine translations become available.

3.2.3 The Unified Patent Court Agreement

The agreement on the Unified Patent Court seeks to provide legal certainty for litigation relating to the infringement and validity of patents, by giving the Unified Patent Court exclusive competence in respect of European patents with unitary effect and European patents granted under the provisions of the EPC. The risk of multiple parallel proceedings will be eliminated, so as the possibly divergent outcomes of these proceedings in different jurisdictions. The newly established court is subject to the same obligations under Union law as any national court of the contracting Member States, and will comprise a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance will comprise local and regional divisions, so as a central division. The location of the Court of First Instance will be Paris, while the Court of Appeal will have its seat in London. Further will there be centralized sections of the central division located in London and Munich. As a court common to the participating Member States, questions relating to the interpretation of European Union law are to be referred to the European Court of Justice. Under Article 24 (1) of the Agreement, the Court, when hearing a case brought before it, has to base its decisions on '*(a) Union law, including Regulation No 1257/2012 and Regulation No 1260/2012, (b) [the Unified patent Court] Agreement, (c) the EPC, (d) other international agreements applicable to patents and binding on all the Contracting Member States; and (e) national law*'. In the case a decision has to be based on national law, including the relevant law of non-contracting states, the second paragraph of Article 24 provides that the relevant law applied to the decision has to be determined by (a) relevant provisions of Union law containing rules on private international law, (b) by international instruments containing private international law rules in the absence of the relevant Union law provisions or (C) by national provisions on private international law as determined by the Court in the

absence the relevant Union law provisions and international instruments. Under Article 32 the competences of the Court are listed, whereas paragraph 2 of Article 32 provides that the national courts of the contracting Member States remain competent for actions that relate to patents and supplementary protection certificates that are not covered by the exclusive competence of the Unified Patent Court. The provisions under Article 32 provide that the exclusive competence of the Court covers actions related to infringements of patents as well as declarations on non-infringements, provisional and protective measures and injunctions, actions related to revocations and invalidity, counterclaims for revocation, actions for damages or compensations, actions for compensation for licenses and the use of the invention prior to the granting of a patent. The court further has exclusive competence on actions concerning decisions of the European Patent Office while carrying out its tasks conferred to it by virtue of Regulation 1257/2012. During a transitional period of 7 years, outlined under Article 83 of the Agreement, it will be possible to bring actions for infringements or revocation measures concerning 'traditional' European patents before national courts, rather than the Unified Patent Court. Furthermore, it will be possible for the proprietor or applicant of a European patent to opt out from the exclusive competence of the Court before the expiration of the transitional period and unless an action has already been brought before it. This procedure would require prior notification to the registry no later than one before expiry of the transitional period. After the transitional period, however, the Unitary Patent Court will have exclusive competence not only for all European patents with unitary effect, but also for all 'classical' European patents. On decision of the Administrative Committee, the transitional period can be extended to another seven years. The Agreement on the Unified Patent Court '*shall be open to accession by any Member State*' [Art. 84 (4)].

4. Enhanced Cooperation as a flexibility mechanism

It is argued that the case of cooperation in the area of patent law shows that European integration as a process is marked by the dilemma of tension '*between expansion and consolidation*' (Lamping, 2011, p.3). After various enlargements in the past and present, the management of an increased diversity of Member States gave rise to the need of more flexible arrangements for decision-making in order to continue the integration process and overcome institutional impasse arising from sovereignty concerns. It is argued that the path to integration '*lies primarily in overcoming the decision thresholds*' that were put in place to prevent particular Member States from having too much influence (Lamping, 2011, p.12). According to Chalmers et al. (2006), enhanced cooperation as an instrument for flexibility grew out of the debate that emerged prior to the Treaty of Amsterdam. When it became clear that there were deep-seated differences between Member States about the pace and extent of integration, it was agreed that those Member States that wished more integration were not held back from developing common laws between themselves through the provision of flexibility mechanisms. Also Szyszczak & Cygan (2005, p. 19) note that the inclusion of flexibility mechanisms recognized that EU integration had developed a '*heterogeneous nature*'. Flexibility would allow Member States to pursue an array of policies with different procedural and institutional arrangement, both because it is an essential tool to maintain dynamic integration and because the Maastricht and Amsterdam Treaties were characterized by '*dissidence and intransigence*' by certain Member States. The incorporation of more flexible arrangements would avoid the creation of an '*a la carte*' Europe outside the EU institutional framework. Accordingly, three different forms of flexibility mechanisms have evolved into the EU legal framework to allow integration in which not all Member States take part (Tekin & Wessels, 2008). These comprise a '*predefined flexibility*', which enables possible partial integration within a specific subject area, while the objective, scope and participating Member States of this integration are precisely defined. There exist various examples of this type of flexibility, as e.g. in protocols and declarations in relation to Justice and Home Affairs (e.g. Schengen), and most prominently in the area of the European Monetary Union. Another form is '*case-by-case*' flexibility to enable member States to abstain from a decision without vetoing it, but at the same time accepting the decision to be legally binding for the other Member States. Examples of this constructive abstention can only be found in the intergovernmental cooperation under the former CFSP. The third form of flexibility constitute '*enabling clauses*', which provide a procedure for a number of Member States to cooperate under a clearly defined framework, as is the case of enhanced cooperation

(Tekin & Wessels, 2008, pp. 26). It is argued that the institutionalization of enhanced cooperation concerned above all transparency and control, as it would counteract further differentiations of the Member States outside the Treaty framework (Lamping, 2011). Today, enhanced cooperation is one of a range of flexibility instruments available to the Union that serves to facilitate the integration process through differentiation within the legal and institutional system of the EU. Although the mechanism has already been instructed by the Treaty of Amsterdam that entered into force in 1999, it has only recently been put forward as feasible option to enable integration in specific policy fields, of which one is the harmonization of patent law. The following will provide a closer look on the Treaty provisions on enhanced cooperation and the rationale underlying this flexibility mechanism in the light of sub-question two and as a basis of the main research question guiding this research.

4.1 The Treaty provisions on Enhanced Cooperation

The Treaty of Amsterdam provided the first general rules on the possible authorization of 'closer cooperation' of some member States. These provisions were subject to many preconditions and restrictions, which made the application of closer cooperation as set out by the Treaty a highly complicated issue. It is claimed that its complexity was the main reason why the mechanism never applied as outlined by the Treaty of Amsterdam (Cantore, 2011). Nevertheless, the provisions introduced by the Amsterdam Treaty constitute the basis of the mechanism and the current provisions on enhanced cooperation are strongly influenced by the original. The Treaty of Nice that entered into effect in 2003 revised the provisions on closer cooperation as outlined by the Treaty of Amsterdam and subsequently renamed the mechanism 'enhanced cooperation'. The amendments included both procedural and substantive conditions to be met to launch an enhanced cooperation scheme. However, despite the modifications that were made regarding the procedural and substantive conditions for the establishment of enhanced cooperation, they did not find application in any proposed project after the entry of force of the Nice Treaty. After the launch of the Treaty of Nice only one proposal on the choice of law applicable to divorces of international couples came to the scene, which, however, followed the provisions introduced by the Lisbon Treaty.

The Lisbon Treaty again brought about some important changes to both procedural and substantial requirements of the enhanced cooperation mechanism. Its regulatory scheme is outlined under Article 20 Treaty of the European Union and Articles 326-335 Treaty on the functioning of the European Union. The Treaty lays down the conditions

to be met when some Member States wish to cooperate in particular policy areas, and makes a clear reference to the goals that an enhanced cooperation approach should pursue. According to Article 20, Par. 1 TEU ‘ [...] *Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce integration process* [...]’. According to Cantore (2011), this paragraph is of fundamental importance, as it exhibits the essence of enhanced cooperation as a regulatory means to facilitate integration in areas where not all Member States wish to deepen political integration right away, while leaving it open to other Member States to participate at a later stage with the ultimate aim to ‘*reinforce the integration process*’. At the same time it is argued that the fact that the decision authorizing the enhanced cooperation has to be adopted by the Council as a last resort under the second paragraph of Article 20 TEU, that is, when cooperation cannot be achieved within a reasonable period of time, gives evidence that the instrument is intended as an exception and not an alternative to finding a compromise among the Member States, while it is open for all Member States to participate in its deliberations (Lamping, 2011).

The Lisbon Treaty provides uniform rules for the application of enhanced cooperation in all areas but those of exclusive competence, whereas the EP has the power of assent over all authorizations for enhanced cooperation, except in the area of foreign policy. In case the Commission gives no consent to a Member States’ application to join a pre-existing enhanced cooperation scheme, the applicant Member States can appeal to the Council in order to receive the authorization to join the enhanced cooperation procedure of the other Member States. The provisions laid down in the Treaty on the Functioning of the European Union provide that enhanced cooperation ‘*shall comply with the Treaties and Union Law*’ (Art. 326, para. 1 TFEU), ‘*shall not undermine the internal market or economic, social and territorial cohesion*’ nor ‘*constitute a barrier to or discrimination in trade between the Member States, nor shall it distort competition between them*’ (Art. 326, Para. 2 TFEU). Article 327 TFEU further provides that ‘*any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it.*’ The non-participating Member States are obliged to refrain from measures that impede its implementation. According to Cantore (2011), the pivotal provision of the architecture of enhanced cooperation under the framework of the Treaty of Lisbon is provided under Article 328 TFEU. The article acknowledges that the mechanism should be open to all Member States which are able to prove that they met the requirements listed in the authorizing decision. Additionally, enhanced cooperation has to be open to third parties at any later stage, provided that they comply with the conditions imposed by both the Treaties and the participating

Member States, while both the participating Member States and the Commission are to promote the participation by as many Member States as possible. This general openness provision is important to maintain unity in the long run and prevent the so called 'two-speed' or 'multi-speed' Europe that occurs temporarily when not all Member States participate in the integration of a policy area right away (Cantore, 2011). Under Article 329 TFEU ff. the procedure to establish enhanced cooperation among at least nine Member States is set out. Those member States that wish to launch an enhanced cooperation in any area except those falling under exclusive competence or the CFSP need the Commission's support on their proposal. For that purpose they need to submit a request to the Commission in which the scope and objectives of the proposed enhanced cooperation is clarified. The Commission can decide whether *'to submit the proposal to the Council to that effect'* (Art. 329, Par. 1) or reject the request by the Member States while motivating its decision. The authorization to proceed with enhanced cooperation is granted by the Council, on the proposal from the Commission and with the consent of the Parliament. It is argued that the very wording of Article 329 Par. 1 TFEU is very important, as it draws up to safeguard the unity of the system and prevent the risk of fragmentation in the Union (Cantore, 2011). The Lisbon treaty gives the European Parliament the power of consent on all enhanced cooperation proposals, except for areas covered under the CFSP. It is regarded as an evidence of the concerns for the unity of the EU political institution system. The extension of the co-decision procedure to all enhanced cooperation procedures reinforces the power of the European Parliament and *'gives it a role of co-protagonist in the evolution of the EU system'* (Cantore, 2011, p. 8). The provisions governing the enhanced cooperation procedure in the Lisbon Treaty emphasize transparency and openness of the system. Under Article 330 TFEU all Members of the Council are authorized to participate in the deliberations of enhanced cooperation, no matter if they are participating members or not. However, the non-participating Members of the enhanced cooperation scheme do not enjoy voting rights. Additionally, Article 331 TFEU lays down the conditions to be met by other Member States to subsequently join pre-existing enhanced cooperation schemes. Under paragraph 1 of Article 331 TFEU the Commission has to indicate the arrangements to be adopted to fulfill the conditions of participation in the event that it considers that a Member States applying for an existing enhanced cooperation scheme does not fulfill the conditions to join. After an unsuccessful re-examination by the Commission, the Member State in question may refer the matter to the Council, which may decide on the request, acting in accordance with Article 330 TFEU. The provision is claimed to constitute an important feature for the unity of the entire EU legal system. The Member States that initiated the enhanced cooperation scheme do not decide on

later accessions to the original group of Member States, which enables the governing of asymmetry at the EU level and serves to avoid a situation in which a group of '*states decides to move too fast in a multi-speed Europe*' (Cantore, 2011, p. 9). Under Article 333 TFEU Member States that participate in an enhanced cooperation procedure are authorized to change the decision-making rules of the measures in areas that regard them. It is thus possible for Member States that are part of an enhanced cooperation to decide unanimously to take decisions by qualified majority, even if in the area in question the use of unanimity is the rule. The same applies to a move from a special legislative procedure to the ordinary legislative procedure, whereas in the latter case the European Parliament has to be consulted. The last provision on enhanced cooperation serves as a final safeguard mechanism for the unity of the system. It postulates that '*the Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end*' (Art. 334 TFEU). Both the Commission and Council thus maintain the responsibility to ensure that the activities undertaken under enhanced cooperation schemes do not stand in contrast with the policies and objectives of the Union as a whole. When enhanced cooperation stands out as a 'last resort' option, a minimum of two decisions are needed. The first decision to be made is by the Council acting unanimously on proposal of the Commission and with approval of the European Parliament on the authorization of enhanced cooperation. By means of the second decision the authorized enhanced cooperation scheme is implemented by adopting substantive provisions and using the relevant Treaty provisions.

4.3 Rationale underlying Enhanced Cooperation

Having elaborated on the Treaty provisions that govern the enhanced cooperation mechanism, the basic rationale of its use becomes more visible. Enhanced cooperation is supposed to present a treaty-based flexibility mechanism providing an alternative to intergovernmental cooperation outside the EU within the legal framework of the Union as a measure of '*last resort*'. This last resort requirement stipulates that a differentiated integration taking place by means of an enhanced cooperation scheme is only conceivable if it is proven that a common approach is not feasible at that time and the foreseeable future. It allows a group of States to develop a specific policy area that is not yet sufficiently integrated, but where not all States wish to participate, by providing a framework for cooperation. If this cooperation aims at furthering the objectives of the

Union, the initiative is able to make use of the EU institutional framework under the constraints outlined under Art. 20 TFEU and Art. 326 TFEU (Ullrich, 2012). Enhanced cooperation is also referred to as pre-empting possible obstacles to the further deepening of the EU that might arise from '*different moods and capacities with respect to the time and density of European integration*' (Lamping, 2011, p. 9), while it strives not to perpetuate already existing divergences among the Member States. It thus allows some Member States to continue integration and overcome stagnation, while respecting the reluctance or inability of the other Member States to refrain from cooperation without affecting existing integration or be against the general objectives of the Union. From this perspective, enhanced cooperation should not be regarded as an instrument for deterrence, but more as a mechanism that enables the consolidation of the *acquis communautaire* in the long term (Lamping, 2011). As such it constitutes a powerful tool to overcome institutional impasse with the ultimate purpose is to reinforce integration, while the mere existence of the enhanced cooperation mechanism is claimed to serve its own purpose: in areas governed under unanimity, that is, areas sensitive to national interests, the possible threat of deeper integration by a small group of Member States is assumed to lead to consensus and reinforce an upward-directed flexibility (Tekin & Wessels, 2008), while any recourse to a differential approach to integration is only acceptable if based on general consensus and the ability to '*agree to disagree*' (Lamping, 2011, p.11). Also Craig (2010) argues that enhanced cooperation constitutes a suitable mechanism in the event that a common approach at a distinct point of time is not possible, while at the same time it is hoped that it would serve as a catalyst for other Member States to join in the future. In that regard, it is indeed the case that there is an inherent obligation to re-establish the unity of law as soon as the difficulties underlying the recourse to an enhanced cooperation procedure have ceased to exist (Langeheine, 1984). While integration, as based on common objectives, would be pursued initially only by a few number of Member States, the non-participating states would be allowed to remain at a lower level of integration for an unlimited time, but in all instances on a temporary basis (Lamping, 2011). Beside the temporary aspect of the differentiation, any enhanced cooperation measure should further reflect socio-economic differences rather than subjective political preferences of the Member States, while the act should be based on integrity and good faith. Taking up on this, it is important to see enhanced cooperation as a flexibility mechanism that exists alongside existing unanimity rules and not as a substitute measure for majority voting in order to circumvent blockages. Gomes de Andrade (2005) acknowledges that enhance cooperation creates fragmentation and leads to a division of Member States into formally distinct groups. Whether this fragmentation is, however, positive or negative, depends on how the EU deals with it. In

that sense, fragmentation is argued to be a necessary condition for the continuity of the integration process, but any enhanced cooperation scheme should be accompanied by a common dimension of shared objectives, rather than the pursuit of conflicting goals of the Member States. The application of enhanced cooperation in the area of unitary patent protection on grounds of disagreement on the applicable language regime is accordingly rather contested. While some welcome the launch of the enhanced cooperation scheme in the area as a historic breakthrough, others see it as an act of exclusion of Spain and Italy, not at least because they brought complaints against the decision to launch the enhanced cooperation procedure before the ECJ and on the basis of their general commitment to the project of unitary patent protection. While it is not within the limits of this research paper to assess whether the legal conditions for the use of enhanced cooperation in the area of unitary patent protection are fulfilled or not, the discussion part will address this issue superficially, based on the insight that is sought on the conditions that need to be fulfilled to achieve a common approach on unitary patent protection.

4.4 Advantages of a Common Approach vis-à-vis Enhanced Cooperation

The Member States of the EU have been struggling for several decades to integrate in the area of unitary patent protection. A main drawback of the European patent system was its high fragmentation that led to a lack of EU political and legal control, and led to high costs and complexity that made the system internationally uncompetitive and less attractive for inventors. It further was argued that European inventors could not enjoy the full benefits of the single market if they had to seek patent protection on a country-by-country basis, which would impact negatively on the competitiveness of the Union as a whole. While it is commonly acknowledged that the stumbling blocks to achieve a common approach in the area of unitary patent protection with all Member States has been the choice for the language regime governing the patents, as well as the establishment of a common patent litigation system, the path taken by the Member States in the area through the use of the enhanced cooperation scheme gives rise to the question what advantages a truly common approach, that is, a participation of all Member States, would have.

Costs

According to the European Commission, the creation of a unitary patent title, even in the event that it is valid for a group of Member States only, would entail immediate tangible advantages for users of the patent system in Europe, both in the area of patent protection (legal certainty) and cost reduction and simplification [SEC (2011) 482 final]. Under the framework of enhanced cooperation, unitary patent protection will coexist with the current system of European patents granted by the EPO. The table below shows the costs for obtaining patent protection in 25 Member States under the current system compared to the costs for obtaining a European patent with unitary effect in 25 Member States during and after the transitional period.

Table 1: Costs of classic ‘European Patent’ and European patent with unitary effect

	European „bundle“ patent (25 MS)	European patent with unitary effect (25 MS) – during transitional period	European patent with unitary effect (25 MS) – after transitional period
Procedural fees (filing, search, examination and grant)	4 045 € (not concerned by reform)	4 045 € (not concerned by reform)	4 045 € (not concerned by reform)
Validation costs:			
Translation	20 145 €	2 380 €	680 €
Local patent agents	5 250 €	0 €	0 €
Official local patent offices’ fees	2 679 €	0 €	0 €
Validation costs total	28 074 €	2 380 €	680 €
TOTAL COSTS	32 119 €	6 425 €	4 725 €

Source: European Commission (2013) http://ec.europa.eu/internal_market/indprop/docs/patent/faqs/cost-comparison_de.pdf

As gets visible, there is an enormous cost reduction from € 32 119 for a European patent validated in 25 MS under the current system compared to € 6 425 for a European patent valid in 25 MS during the transitional period and € 4 725 after the transitional period. While it is argued that in the case of participation by 25 Member States in the enhanced cooperation scheme, the total annual savings of costs would cover about € 58.5 million and the protection costs would be only about 15% of the costs of a European patent valid in 27 Member States today, the average costs of validation for patents in the area of enhanced cooperation would only be about € 680 [SEC (2011) 482 final]. The Member States that expressed the wish to participate in the enhanced cooperation make up a total of about 79% of the EU population, while the applicants from the participating Member States have filed approximately 92% of all applications from the EU with the EPO in 2009 [SEC (2011) 482 final]. As a result, the territory covered by the enhanced cooperation scheme would cover a market of

considerable size and enable patent holders to have protection without any validation requirements at national patent offices and applicable translation costs. It entails a substantial reduction of costs and complexity, which, however, largely depends on the number of Member States participating, whereas all patent holders would equally enjoy the benefits irrespective of whether they are residents or countries participating or not. The Commission acknowledged, however, that an EU patent, as a continuation of the discussions in the Council on the basis of the Commission's proposal for a Regulation on the Community Patent of 2000 [COM (2000) 412 final] and the proposal for a Council regulation on the translation arrangements applicable to the EU patent of 2010 [COM (2010) 350 final] would constitute the most effective solution by achieving patent protection that covers all Member States and reaching the objective of a simpler and more-cost effective patent system for all EU Member States. The EU patent would be of autonomous character and provide uniform protection throughout the territory of the EU, while there would be no more translation or validation requirements applicable after the grant, which would make its costs highly competitive. The table below depicts the estimated costs for 50 000 EU patents covering all 27 Member States or the costs for 37 500 EU patents and 12 500 European patents¹

Table 2: Estimated costs of the EU 27 patent

Scope	Patents per year	Costs per patent (in EUR)	Total costs (in EUR)
EU 27 patent 100%	50000	680	34 million

Or:

EU patent 75%	37 500	680	25.5 million
European patent 25 %	12 500	680	8.5 million
Total			34 million

Source: European Commission [SEC (2011) 482 final].

Given an estimated annual validation cost of EUR 193 million² for patents in the EU, the cost savings for the users of the patent system would amount to about EUR 159 million per year, while the total costs for the users would be equal whether all European patents would become EU patents or part of them would remain European patents limited to three Member States [SEC (2011) 482 final]. Despite the benefits of this option, the political obstacles made it unachievable. While the Unified Patent Court has

¹ Assuming a minimum of € 680 validation cost and that part of the European patents would remain validated in only 3 MS for specific marketing decisions, for example covering only Germany and Switzerland [SEC (2011) 482 final].

² For 50 000 patents validated annually.

been agreed upon by means of an international agreement that will create this new centralized judicial authority for patent litigation and standard-setting, for which states gave up part of their sovereignty, the disagreement over the language issue has inhibited the introduction of an EU-wide unitary EU patent, and instead led to the introduction of the European patent with unitary effect granted by the EPO that will only be applicable to the Member States participating in the enhanced cooperation scheme and not for the entire internal market. While it is beyond doubt that the use of enhanced cooperation brings about a reduction of costs for patent protection within the territory of the participating Member States, the EU patent, providing unitary patent protection for all EU Member States, would be even more cost effective and beneficial for all MS alike.

Fragmentation

Despite the obvious disadvantage of enhanced cooperation compared to a common approach as regards fragmentation, it is argued that enhanced cooperation would nevertheless increase the level of integration not only between the participating Member States, but also between the participating and non-participating countries compared to the status quo [SEC (2011) 482 final]. This results from the high costs inherent in the current system, that inhibits validation of European patents in more than a few Member States. It is nevertheless argued that the co-existence of the European patent with unitary effect along with the current European patent and the national patents of each Member State poses several challenges. It is assumed that the optionality given to the patent applicant in choosing the scope of patent protection allows for an escape from the EU's innovation policy objective and bears negatively on the economic unity of the internal market by reinforcing fragmentation (Lamping, 2011). In the same line Jaeger (2012, p.5) points out that '*patent protection afforded only for a part of the internal market leads to new degree of fragmentation of markets*'. Whereas patent fragmentation has been a rule in the current system, the states that do not participate in the enhanced cooperation scheme would in the future be marginalized in terms of their ability to participate economically in the internal market and their capacity to innovate. This stands in contrast to one of the central principles of the CPC of 1975, which foresaw '*that the procedure for the grant of a European patent in which a Member State is designated should lead only to the grant of a Community whose scope extends to all the Member States and which is subject to the uniform law created by the Convention for a Community Patent*'. Accordingly, the impact on market fragmentation

would become an ever more serious issue, which is confirmed by Ullrich (2012), objecting that the enhanced cooperation on unitary patent protection will not only have negative effects on economic, social and territorial cohesion among the Member States, but as well on the internal market by discriminating trade between states and distorting competition. This is contrasted to the protective function of Article 326 (2) TFEU which provides that any enhanced cooperation scheme shall not undermine the internal market or economic, social or territorial cohesion, nor constitute a barrier to or discrimination in trade between. According to Lamping (2011, p.31) the explicit reference made on the provisions for enhanced cooperation testifies to the importance of the protection of the internal market within the context of the '*temporary abandonment of the unity of law*'. In that regard, the policy fields that have an impact on economic development and inter-community competition are claimed to require in principle uniform legal conditions so as to ensure the prevention of disintegrative effects and competitive disadvantages for Member States. However, there is reason to assume that the fact that unitary patent protection creates a third level of patent protection, which does not substitute or replace, but rather supplement the existing framework of European and national systems, provides evidence that the system established under enhanced cooperation cannot be considered as creating new disparities, which is reinforced by the rulings of the ECJ (see e.g. Case C-44/98 BASF [1999] ECR I-06269), and with a view to the fact that unitary effect can be obtained regardless of the residence or nationality of the patent proprietor. In the Commission's view, this would ensure equal access for inventors and companies from non-participating Member States [Com (2010) 790 final]. This argumentation is rejected by Lamping (2011), who postulates that despite the fact that the unitary patent does not distinguish between participating and non-participating Member States in terms of availability, it does create additional burdens and uncertainty for market participants whose patents do not acquire validity in their mother tongue, which amounts to discrimination. Next to the territorial fragmentation that is reinforced through the use of enhanced cooperation in the area, also substantive fragmentation is assumed to take place due to the optionality given to the patent applicant, that in turn enables the existence of a system of four overlapping levels of patent protection (Hilty et al., 2012). Along with the national patents granted by the Member States nationally, there would be the option to have a classic European patent granted by the EPO within the system of the Unitary Patent Court Agreement or outside the agreement, or as a fourth option, to have a European patent with unitary effect. The European patent with unitary effect as such would be subject to only one national law throughout the territories of enhanced cooperation under Art. 10 of the Unitary Patent Regulation, which implies, however, that different

national laws would apply to different unitary patents and consequently no uniformity and transparency is provided through the Regulation on unitary patent protection (Hilty et al., 2012).

Legal certainty

The change of the patent's denomination and its application not covering all Member States came along with important other implications, namely the technicalities of how the right comes into existence (Jaeger, 2012). Whereas under previous initiatives the EU patent would have been a '*sui generis*' type of right that would be autonomous and consequently independent of national rights, as outlined under Art. 2 of the proposed Community Patent Regulation [COM (2000) 412 final], under enhanced cooperation the European patent with unitary effect remains a right that is derived from a bundle of national patents granted by the EPO, which, however, will now enjoy identical territorial and substantive scope under Art. 3 (1) of COM (2011) 215 final. According to Hilty et al. (2012, p. 5), the '*hybrid creature of a European patent with unitary effect casts doubts about the quality of protection that is thereby afforded*'. This concern arises because the unitary effect is attached to the European patent as an '*assessory feature*', which does not clarify its legal character as international law, EU law or a new *sui generis* right. A truly autonomous and supranational character of the patent and a complete system of legal protection could only be guaranteed by the EU. In the event of a participation of Spain and Italy in the enhanced cooperation scheme, however, it is argued that the unitary patent would constitute *de facto* a genuine Union right (Lamping, 2011). As the applying Regulation provides that the unitary effect of the European patent arises within the entire territory of the participating Member States upon its registration, giving uniform protection and equal effect in all the participating Member States, the content of the right would not be any different from that proposed in the original regulation on the Community Patent COM (2000) 412 final. According to Lamping (2011), the decisive factor is the legal nature of patent protection, which is based on a legal act of the Union and with it the creation of protection is confirmed through European law. Enhanced cooperation would in this case, however, be unacceptable, given the fact that the act adopted under its framework does not form part of the *acquis* and the creation of a European right must be regarded as an exclusive competence of the Union. In the view of the Commission (2011), the creation of an EU patent would '*create a level-playing field across the EU also in the legal sense*', whereas '*in the case of enhanced cooperation too, the users of the patent system would equally benefit from unitary*

patent protection' [SEC (2011) 482 final]. These drawbacks arising from the legal nature of the European patent with unitary effect are accompanied by concerns about the fragmentation of jurisprudence that is brought about by the Agreement on the Unified Patent Court.

Based on the elaborations above, the advantages of a common approach appear more evident. While the use of enhanced cooperation in the area brings about the advantage of considerable cost reduction and a certain degree of simplification, the creation of an EU patent would constitute the most effective solution and diminish the need for any additional procedure in the EU as the system would truly be harmonized. An EU patent would provide for a single centralized procedure applying to the registration of patents, the payment of renewal fees, the registration and transfer, as well as other rights and have the most positive impact on the internal market by integrating the entirety of the internal market in terms of patent protection, which cannot be achieved by the enhanced cooperation scheme for reasons of its very nature. In terms of direct legal and political control, the enhanced cooperation on unitary patent protection shifts these powers to the EPO which ultimately grants the European patent with unitary effect, on whose governance and policy the EU has no direct influence (Lamping, 2011). Having laid down the characteristics and rationale of the enhanced cooperation scheme, as well as the advantages of a common approach in the area of unitary patent protection vis-à-vis the enhanced cooperation scheme that will apply, the following part seeks to shed light on how theory depicts the interstate bargaining process that leads to integration, as well as how the interstate bargaining process looks like in the case of use of enhanced cooperation. It follows an analysis of the integration process in the area of unitary patent protection through the lens of different theoretical paradigms, based on the decision-making levels. It is sought to provide an account of how cooperation in the area evolved and what direction integration might take in the light of a possible common approach.

5. Theoretical Framework

Having laid down how integration in the area of patent policy developed over time, culminating in the adoption of an enhanced cooperation scheme, the following chapter seeks to identify how theories depict decision-making within the context of European integration and governance in answer to the third sub-question, and in order to successively apply these theoretical frameworks to the integration in the field of patent protection and the use of enhanced cooperation. The purpose of this chapter is to develop an understanding of the actors and mechanisms underlying integration in the light of different theoretical paradigms and in doing so explain in the ensuing chapter how integration has developed in this specific case and how it might proceed in the future. According to Wiener & Diez (2009) European integration is to some extent an end in itself, but it may also be the means for attaining the capacity to govern a large territory with complex economic and social structures. The political process through which European policies are selected and implemented are complex, involve a number of actors and may be less determinate even than many national policy processes (Richardson, 2004). European Integration theory is defined by Wiener & Diez (2009) as the field of systematic reflection on the process of intensifying political cooperation in Europe and the development of common political institutions, as well as on its outcome. These theories help to identify an explanation of why integration takes place and why policy makers choose particular policies and institutional arrangements. Closely related to the process of integration is the concept of European governance, which is defined by Peterson & Bomberg (1999) as the imposition of overall direction or control on the allocation of valued resources. It is of synthetic nature, resulting from a mix of factors including political leadership, state-society relations, institutional competition, electoral politics etc. However, the meaning of the concept of governance is a contested one, as it is to some extent normative, as it defines how the process should be undertaken as well as how it is done. According to Painter & Pierre (2005) the capacity to govern in the European context also influences directly the ability of this system to maintain its progress toward greater economic and political integration. The European Union is often conceptualized as a *sui generis*, and as not matching established models of governance (Nugent, 2006). Instead, the EU is depicted as a system of multilevel governance in which decision making competences not only lie with national governments but also with institutions and actors at other levels. The most important of these levels is the EU level, where supranational actors exercise an independent influence on policy processes and policy outcomes. The formal logic of this governance is that the Commission has the right to initiate legislation, but in reality with a lot of

influence from national and social actors (Peterson, 2001). Other characteristics that lie at the heart of the multilevel governance system are that collective decision-making by states at the EU level is regarded as involving a significant loss of national sovereignty and control, and the interconnectedness of political arenas (Nugent, 2006). The multilevel nature of European governance is one aspect that causes the EU policy making system to be rather complex. The existence of multiple veto-points makes effective governance more difficult, and produces more need for bargaining accordingly. Scharpf (1988) points out that bargaining among nations or regions may produce sub-optimal policy choices. The actors involved in multilevel governance may be forced to adopt solutions that correspond to the lowest common denominator among them. If unanimity is required and each actor pursues his or her own interest, then bargaining will proceed until there is a decision acceptable to all, usually one not much different from the status quo. According to Marks et al. (1996), *'lowest common denominator outcomes are available only on a subset of EU decisions, mainly those concerning the scope of integration'*. If European policy making is to move forward, then the actors involved in multiple levels must find some means of bargaining across issues and across time to create positive outcomes. According to Peterson & Bomberg (1999), all policies result from decisions about what and how to do, and how to reach a decision on what to do. However, as noted earlier, decision-making within the framework of the EU takes place on different levels. They identify three types of decision making levels in the EU: a super-systemic level, on which the European Council, governments in intergovernmental conferences, or the ECJ make decisions that are 'history-making'; a systemic level, in which the Council, COREPER or the EP under co-decision make 'policy-setting' decisions; and a sub-systemic level, in which the Commission, Council working groups and EP committees make 'policy-shaping decisions'. However, the framework of these three levels does not in every case correspond to organizational aggregation or political jurisdiction, but instead offers categories for analytical framework.

It is argued that different theories can be applied for different parts of the '*EU puzzle*' and to the different levels of decision making (Sandholtz, 1996, p. 427). Also Verdun (2002) emphasizes the fact that different theoretical approaches apply to different parts of the integration process. Peterson & Bomberg (1999) builds on this and propose a '*best theory*' for each decision-making level. For the super-systemic level, in which intergovernmental bargaining leads to 'history-making' decisions, the best theory to explain and predict the outcomes of decision making is liberal intergovernmentalism or neofunctionalism. For the systemic level, at which inter-institutional bargaining leads to

'policy setting' decisions, new institutionalism is depicted as providing the best theoretical account on decision making to derive at explanations. Lastly, policy network analysis gives the best theoretical accounts on 'policy shaping' decisions that occur through resource exchange at the sub-systemic level. For the purpose of the study at hand, which serves to shed light on the interstate bargaining process within European integration and governance, and more specifically, within the framework of enhanced cooperation used in the area of patent policy, liberal intergovernmentalism and neofunctionalism will be used as theoretical frameworks at the super-systemic level in order to identify which actors and mechanisms at hand led to integration in the policy area. Both theories serve as grand theories of integration (Verdun, 2002), and theorize the overall nature of the integration process. However, in order to provide a more complete picture which enables an account on the decision making on the systemic level in which institutions play a major role, decisions based on the interinstitutional-bargaining mode will be analyzed through the lens of new institutionalism. The application of different theoretical paradigms will enhance the capacity to explain the interstate and interinstitutional bargaining process in the area of integration of patent law and the use enhanced cooperation on unitary patent protection, and providing an explanation for the current non-participation of Spain and Italy. It is expected that the selected paradigms will offer valuable insights into how integration of the policy area be explained and helps to outline under which conditions Spain and Italy might join the enhanced cooperation in the future and the feasibility of a common approach. The following will provide an outline of the main assumptions of each theory.

5.1 Super-systemic Decision-making

The super-systemic level refers to the level where 'history-making' decisions are made. The term refers to decisions that change the nature of the EU by altering procedures or the relative powers of the institutions on a level that transcends the EU's policy process. The decisions made at this level are '*quasi-institutional*' in character. Therefore decision makers of the highest political levels bargain at this level and the decisions are outcomes of intergovernmental bargaining (Peterson & Bomberg, 1999). It is assumed that decision-making at the super-systemic level is less institutionalized than at any other levels of EU governance, which entails that governments, especially when acting in the form of the European council, remain unconstrained in their choice for action, whereas its authority cannot be challenged by any other decision-making body (Peterson, 2001).

Decisions at the super-systemic level arise when new high level bargains make it possible for *'specific linkages and interdependencies to become important'* (Ross, 1995). There are three distinct ways for history-making decisions in the EU to come up. The first is through intergovernmental conferences (IGC's) that are held before revision of the founding treaties. Secondly, they arise when the European Council, formed by the heads of state and government, determine the agenda of the EU, set priorities of action and finances. Lastly, the European Court of Justice engages in history-making decisions. These occur when the ECJ makes legal decisions that define the limits of the powers and competences of the EU and its institutions, or its principles of governance (Peterson & Bomberg, 1999). The European Commission is assumed to *'offer leadership at the super-systemic level only if its agenda is supported by a unified constituency of private actors'* (p. 68). Both neofunctionalism and liberal intergovernmentalism provide theoretical frameworks to determine the general pace and direction of European integration. From a fundamental perspective, both are theories of international relations and seek explanations on how and why states cooperate and compete (Peterson, 2001). But whereas neofunctionalism provides a theoretical account of how the context of EU decision making evolves, there focusing on explaining how the structural context of EU decision making changes, liberal intergovernmentalism is primarily focused on explaining the process of bargaining between Member States (Peterson & Bomberg, 1999). Despite the fact that the theories appear to offer rival explanations for the same outcomes at the same level of governance, the theories are claimed to be more complementary than competitive (Verdun, 2002; Peterson, 2001). The following part will elaborate the theoretical considerations of both approaches more thoroughly.

5.1.1 Neofunctionalism

Neofunctionalism was developed as a theory to analyze the evolution of competencies in the EU and identify the mechanisms and actors that would lead to further regional integration. Central to the neofunctionalist explanation of what is referred to as 'task expansion' was the question of why the Member States of the community have been willing to compromise their sovereignty in some policy areas, while resisting any loss of sovereignty other areas within the evolution of European integration (Börzel, 2006). Haas (1958) provided a definition of integration as *'the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new center, whose institutions possess or demand*

jurisdiction over the pre-existing national states. The end result is a new political community, superimposed over the pre-existing ones' (Haas, 1958, p.16). The theory rests on a number of fundamental assumptions. According to the neofunctionalist claims developed by Haas (1958), integration has to be understood as a process which evolves over time and develops its own dynamic. This process of integration is not the result of deliberate choice, but rather developed through unintended consequence of earlier decisions (Moravcsik, 1998). It contests the assumption developed by traditional realist theories that states are the only relevant actors in the process of integration, but rather implies that a multiple number of actors interact across national frontiers and bureaucracies which increasingly turn their attention to supranational levels of decision making (Wiener & Diez, 2009). From a neofunctionalist perspective, integration is a dynamic process that advances through 'spillover' pressures and is therefore largely self-sustaining. The concept was first applied to describe both the occurrence of further integration and to identify the driving force of integration based on increased functional or economic interdependence. Later its use was extended to explain all the different neofunctionalist dynamics that reinforce integration (Wiener & Diez, 2009). The concept rests on the assumption that initial steps towards integration '*trigger endogenous economic and political dynamics leading to further cooperation*' (Moravcsik, 1993, p.445). Policies and institutions are centralized as a consequence of pressure exerted by organized economic interests to manage economic interdependence to their advantage. The decision to integrate economically in turn creates pressures for further economic and also political integration. This idea was reinforced by Lindberg (1963), who defined spillover as '*a situation in which a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth*' (p. 123).

Spillover is assumed to take place in two main forms, both of which deepen and widen integration as a consequence of pressure exerted by interest groups, public opinion, elite socialization or other domestic actors and processes (Börzel, 2006). The first form, functional spillover, refers to process by which the cooperation in one policy area makes it necessary to cooperate in other related areas in order to ensure the well-functioning of the initial policy area. The idea behind this is that some sectors are so interdependent that it would be difficult to limit integration to one functional sector only. Technical pressures would increase the need to cooperate in other functionally related sectors to ensure the smooth functioning of the initially integrated sector. The problems arising from the functional integration of one task can thus only be solved by integrating

more tasks and sectors (Wiener & Diez, 2009). To this functional motor of economic integration, a gradual learning process among economic and political elites would support the integration process, which is referred to as political spillover. The integration of a particular sector would incline the relevant interest groups to transfer part of their activity to a higher level of aggregation and with it, gradually shift their focus and expectations to the supranational level. The domestic actors in the form of interest groups, trade unions or business associations discover that they could create policies more effectively by conducting them at the supranational level and shift their loyalties to the supranational decision making level. At that level supranational actors would create policies that would further develop the integration process (Haas, 1958). This occurs because the authorities at the supranational level would inevitably use a certain degree of autonomous initiative. At the same time a socialization process amongst national civil servants would take place within the Council framework as a consequence of frequent interactive patterns at the supranational level, which would lead to more integrative outcomes. To this end, consensus formation and the habit to look for a European solution to common problems constitutes a challenge to the classic intergovernmentalist vision of Community decision-making. Instead of being merely based on national strategic bargaining, the neofunctionalist view claimed the existence of a supranational problem-solving process, in which *'participants refrain from unconditionally vetoing proposals and instead seek to attain agreements by means of compromise upgrading common interests'* (Haas, 1958, p.66). For Lindberg (1970), the emergence of a collective decision-making system constitutes the essence of political integration. With the increased focus on integration, pressure would arise for political control and accountability at the supranational level. The existence of supranational organization would in turn set in motion a self-reinforcing process of institution building (Moravcsik, 1993). In the neofunctionalist perspective, the Commission plays a decisive role to achieve integrative outcomes. As opposed to the lowest common denominator bargaining underlying the classical intergovernmental bargaining mode, supranational systems would allow a bargaining process that upgrades common interests. States would agree on mutual support for each other in the form of package deals, in which participants in negotiations would agree on concessions under the auspices of an institutionalized mediator such as the Commission (Wiener & Diez, 2009). As a consequence common interests are being upgraded without participants feeling they would have to make disadvantageous concessions without receiving in return. At the same time, the Commission is claimed to have a privileged position of centrality and authority that would allow it to cultivate contacts with civil servants and interest groups to realize European objectives. While the supranational institutions and non-

governmental actors increase their influence on the integration process, the influence of nation states and governmental actors decreases.

With its strife to provide a general theoretical framework applicable to all settings of integration, neofunctionalism has been heavily contested. Above all, a fundamental critique is that neofunctionalism failed to theorize why integration could eventually fail (Verdun, 2002). Moravcsik (1993, p. 476) negates the neofunctionalist claim that integration was a self-sustaining process based on a technocratic imperative, but instead postulates that *'the process of Community-building has proceeded in fits and starts through a series of intergovernmental bargains'*. At the same time integration has *'only intermittently spilled over into related sectors and policies'*, whereby the autonomous influence of supranational actors did not advance to the extent claimed by neofunctionalism (Moravcsik, 1993, p. 476). Revised accounts (see e.g. Niemann & Schmitter in: Wiener & Diez (eds.), 2009) of neofunctionalist theory do not only see actors as rational and self-interested, but capable of learning processes that have an impact on EU decision outcomes. Integration is not longer seen as an automatic and exclusively dynamic process, but rather as occurring under certain conditions. Further is the scope of spillover broadened as to comprise more than merely economic linkages. It is argued that integration has to be seen as a product of both dynamics and countervailing forces, which can either be stagnating or opposing (Wiener & Diez, 2009). Two concrete countervailing forces constitute *'sovereignty-consciousness'* and *'domestic constraints and diversities'*. The following section will look at liberal intergovernmentalism as another 'grand theory' to explain decision making and outcomes at the systemic level.

5.1.2 Liberal-intergovernmentalism

Liberal intergovernmentalism seeks to explain the broad evolution of regional integration, and grew out of dissatisfaction with neofunctionalist assumptions on the main actors and mechanisms accounting for the integration process (Wiener & Diez, 2009). The theory helps to explain the interstate bargaining process leading to integration, which is accelerated by national interests in favor of integration. For this purpose, the European Community is seen as an international regime for policy coordination. The national preferences of governments and the strategic interactions among governments with sometimes diverging national interests account for the substantial and institutional development of this coordination (Moravcsik, 1993). LI

assumes that states are the '*masters of the treaties*' who enjoy the ultimate decision making power and political legitimacy in international cooperation as opposed to a supranational authority making and enforcing political decisions (Wiener & Diez, 2009).

To explain integration in the European Union, liberal intergovernmentalism combines at least three theories, which are linked together into a single, coherent approach. According to Moravcsik (1998, p.18), '*EU integration can be best understood as a series of rational choices made by national leaders. These choices responded to constraints and opportunities stemming from economic interests and powerful domestic constituents, the relative power of states stemming from asymmetrical interdependence, and the role of institutions in bolstering the credibility of interstate commitments*'. This allows a synthesis along three essential elements (Moravcsik, 1993).

The first one is that states are assumed to be rational actors. It implies that states' actions are directed towards the achievement of some objectives or goals which were defined on the domestic level. Governments are assumed to act purposively on the international arena, but within the constraints of the national preferences aggregated on the domestic level through political conflict of various societal actors. In the event that states agree to cooperate or to bargain substantive agreements, it must be seen as a collective outcome of rational choices made by these states in intergovernmental negotiations. Institutions are eventually created to secure the outcomes in the face of future uncertainty (Wiener & Diez, 2009). To account for the national preference formation at the domestic level, a liberal theory is applied. It is assumed that states are unitary actors, despite its acknowledgment of a wide range of domestic actors being involved in the formation of domestic preference. These preferences, however, vary among states depending on the issue and time (Moravcsik, 2008). Instead of being linked to general policy concerns, it is assumed that state preferences are driven by issue-specific preference functions about how to manage growing interdependencies caused by the forces of globalization (Wiener & Diez, 2009). In the case of the European Union, preferences of national governments regarding integration are based mainly on concrete economic interests. Moravcsik (1998, p. 3) assumes that preference emerged on the domestic level '*from a process of domestic conflict in which specific sectoral interests, adjustment costs and, sometimes, geopolitical concerns played an important role*'. Integration is pursued to serve the interests of the domestic producer groups by securing '*commercial advantages, subject to regulatory and budgetary constraints*', as well as '*the macro-economic preferences of ruling governmental coalitions*' (Moravcsik, 1998, pp. 3, 38). With the primary interests of governments to maintain themselves in office, it is necessary for them to aggregate the

preferences articulated by a coalition of domestic voters, parties, interest groups and other domestic actors, which consecutively emerge as the set of national interests that are brought into international negotiations (Moravcsik, 1993, p. 483).

As a third component, an intergovernmentalist analysis of interstate negotiation is applied to explain the nature of the outcomes among the diverging national preference in the bargaining process. As states have to achieve cooperation for mutual benefit, they must overcome outcomes that are suboptimal, while deciding how mutual gains are distributed among the cooperating states. LI assumes that the relative bargaining power of the states determines the outcome of these international negotiations. Within the context of the EU, the relative bargaining power of a state rests on information about preferences of other states and the distribution of benefits derived from a specific agreement (Wiener & Diez, 2009). It is assumed that states which possess more and better information about other states' preferences are in a position that enables them to manipulate the outcomes of negotiations to their advantage. At the same time those states, which find themselves in least need to enter into an agreement, taking into account the status quo, can force other states to make concessions through the threat of non-cooperation more easily. The empirical findings of Moravcsik (1998) confirmed that the distributive outcomes of agreements reflected the relative bargaining power of states. States compromising most to achieve certain gains could realize most economic benefits from cooperation, relative to alternative coalitions. On the other hand, those states gaining the least benefits from cooperation, or for whom adaptation costs or alternatives were highest, enjoyed more room to impose conditions for its cooperation. It is suggested, however, that the transaction costs within the framework of the EU are relatively low compared to the substantive benefits states receive from cooperating with each other.

Liberal intergovernmentalist theory follows neoliberal institutionalist accounts by assuming that international institutions are a necessary condition to foster durable cooperation among states (Wiener & Diez, 2009). Once international agreements are reached, states would deliberately delegate authority to supranational institutions, which are assumed to reach collectively superior outcomes of future negotiations on specific issues. This occurs because uncertainty about other states' future preferences and behavior is reduced through the pooling of information at the supranational level. States will eventually develop rules for the distribution of benefits of further bargains according to the pre-existing bargain and will be able to reduce the costs for coordinating and monitoring their activities. Non-compliance with the established rules will be mutually sanctioned (Wiener & Diez, 2009). It is argued that *'issue specific variation in the*

delegation and pooling of sovereignty reflect the issue specific concerns of national governments about each other's future ability to comply with the substantive deals reached' (p. 72).

Thus depending on the issue area, states are assumed to be more willing to delegate authority to the supranational level in some area than in others within the framework of the EU. In cases of pure 'coordination' serving the purpose of establishing norms and procedures for efficient bargaining, states would delegate decision-making powers to the EU level in order to reduce the transaction costs of reaching a common solution (Scharpf, 1999). Cases of more extensive delegation of decision-making powers to the EU level, such as the use of qualified majority vote in the Council, are aimed to bring about credible pre-commitment and a solution to problems related to control, sanctioning and incomplete contracting (Pollack, 2003). Despite the criticism that liberal institutionalist theory is limited to explaining treaty amending decisions and not everyday policy making, it is suggested that the theory can be applied to explain integration under most conditions, as long as its inherent assumptions about preferences, bargaining and credible commitments are not violated. The theory is assumed to work best when decision-making takes place in decentralized settings under an unanimity requirement and not in supranational settings of decision making (Wiener & Diez, 2009).

5.2 Systemic Decision-making

Decisions made at this level are taken at the end of the EU's legislative process, or when the '*policy decision point*' is reached at which the EU chooses a particular course of action or inaction within a defined field of competence (Richardson, 1996). During the legislative process, the institutions of the EU operate in a political system that is marked by a power-sharing between institutions (Peterson & Bomberg, 1999). Policies are assumed to be 'set' in a variety of ways, and the Union has a variety of alternative courses to choose from in those policy sectors in which it has the competence to act. This decision-making level is assumed to be characterized by '*bitterly fought battles for institutional advantage between the Council, the EP and Commission*' (Peterson & Bomberg, 1999, p. 17). New institutionalism is claimed to provide powerful diagnostic tools to account for decision making at this level, highlighting how the EU institutions have become key players in their own right. What is new about this approach lies in the fact that it is concerned with factors beyond the formal roles of decision-making actors, while highlighting how actors become socialized to the rules of EU making. In that

regard, it seeks to provide explanations on how the EU works as a political system in its own right, as opposed to a system of international relations (Peterson, 2001).

5.2.1 New Institutionalisms

New institutionalism serves as an approach to understand the policy effects of institutional politics. It is not a 'grand' theory of integration like neofunctionalism or liberal intergovernmentalism, but rather a middle-range theory of institution building. Its basic assumption is that institutions function as a source of political behavior and not '*as impartial "black boxes" which transform national preferences into policies*' (Peterson & Bomberg, 1999, p. 16). Accordingly, institutions are claimed to affect decision-making outcomes in various ways. This influence on decision-making is elaborated by Sandholtz (1996, p. 404), who postulates that '*the fact that most EU decisions look like interstate bargains...tells us nothing about how the institutional context shaped preferences and EU decision making*'. Also Pierson (1996, p.159) argues that '*the path to European Integration has embedded Member States in a dense institutional environment that cannot be understood in the language of interstate-bargaining*'. It is argued that in order to understand the legislative process, the interactions among the Council, Commission and EP need to be analyzed thoroughly '*as well as the particular sequencing of decisions*' (Garrett & Tsebelis, 1996, pp. 269-70). Usually, it is not possible to set a major policy without the agreement of all major legislative institutions, including in some instances also the ECJ. Despite the importance of intergovernmental bargaining at the systemic level, the increased use of co-decision as the ordinary legislative procedure enhanced the role of inter-institutional bargaining. The result is that the institutions in the EU find themselves in a competition to increase their impact on the decision-making process.

New institutionalist theory is a very diverse approach made up of different schools of thought and comprises a rational choice, a sociological and a historical variant. Each of these variants applies different conceptions and definitions of institutions, but agree in the fundamental claim that institutional configurations have an impact on political outcomes. For the purpose of the study, we treat new institutionalism as a single theoretical framework and adopt the approach of Aspinwall & Schneider (2000), who assume that institutions encompass both formal and informal structures that influence human behavior and decision-making. In the case of the EU, voting or legislative procedures form part of the formal institutions that affect behavior, whereas the strife for

consensus in the Council –even in the event that qualified majority voting is possible– constitutes an informal institution. It is argued that the EU is faced with the dilemma of shared decision-making, because regardless of whether a decision has to be made on the basis of qualified majority voting and not on the basis of unanimity, informal institutional norms in the Council ‘*often dictate unanimity- or something close to it*’ as a precondition to set an important policy. The result is a ‘*joint-decision trap*’ which leaves the Union as ‘*incapable of true policy innovation*’ (Peterson & Bomberg, 1999, p. 18). This account is further elaborated by Scharpf (1988) who argues that institutional rules under certain joint decision-making systems, such as the EU, lead to situations in which a given institution or policy, once initiated, tends to remain inflexible and resistant to change, even if policy environments have changed that would favor measures. These ‘*joint decision traps*’ are likely to occur in institutions subject to (1) intergovernmental decision-making, (2) a voting rule of unanimity, (3) and a default condition in which a certain policy or institution would persist if no agreement can be reached. Under these circumstances, policies are likely to become locked-in, unless a change in one of these rules could end this joint decision-trap and enable the adaptation of existing policies to changed circumstances. Related to the notion of the joint-decision trap is the concept of path-dependency, which entails that a particular step towards a direction makes it hard to reverse from that particular track. It is argued that the need for agreement between so many different decision-makers makes it not only difficult to set policy in the first place, but also to change policy, even if its usefulness is doubted. Institutions are thus claimed to ‘*become a force of continuity more than change*’ (Peterson & Bomberg, 1999, p. 20), because policy outcomes are a product of agreement between so many different institutions and decision-makers. According to Peterson (2001, p. 302), ‘*paradoxically, it is often easier to alter the EU institutions at the super-systemic level than to alter EU policy at the systemic level*’. A main reason for this is the fact that policy sectors are highly compartmentalized, and the specialized and fragmented institutions promote path-dependency in policy outcomes even further. In the context of the EU, the decision making within different policy sectors are also marked by a high degree of procedural differentiation, while at the same time the competition between institutions leads to constant attempts to ‘*shift*’ decision rules (Peterson & Bomberg, 1999). Of particular importance is the fact that the abundance of decision-making procedures seems to empower the ECJ, which must frequently mitigate in inter-institutional disputes about the procedures applicable to particular initiatives. According to Pierson (2000), institutions and policies can create positive or negative effects over time, depending on the characteristics of the institution or policy in question. Accordingly, Member States find themselves either in support of existing institutions or policies which creates inertia

or lock-ins, or rather under pressures for institutional and policy change that enables the adaptation to changed political environments. It is argued that with the introduction of flexibility mechanisms in the Amsterdam Treaty, the way was paved to process a multi-speed, differentiated system of integration, as opposed to an institution in which all Member States move on at the same speed. Enhanced cooperation is one of these flexibility mechanisms and assumed to help alleviate decision-making deadlock (or joint-decision trap) to enable integration in areas where Member States find themselves unable to find agreement. The mechanism, however, has an explicit notion towards a temporary differentiation and should reinforce integration in the long term. In the context of integration in the area of patent law the application of new institutionalist theory will provide interesting insights into the inter-institutional bargaining process among the Commission, Council and EP, especially with regard to the recourse to enhanced cooperation, which led to a situation in which the unanimity requirement as prescribed under Article 118 (2) TFEU could be overcome by qualified majority vote in the Council. The protective function of unanimity that should help Member States to prevent others to launch measures that are against their interest is thus sidelined by the enhanced cooperation mechanism that has of its ultimate goal the reinforcement of integration of all Member States in the long term.

6. Applying Theory to Patent Policy Integration

In this chapter the theoretical approaches outlined above will be applied to the process of integration in the area of patent law in answer to the fourth sub-question. The first part of this chapter is dedicated to the application of liberal-intergovernmentalism and neofunctionalism to the intergovernmental bargaining process underlying integration. After giving a brief outline about the expectations derived from these theoretical frameworks, it follows an elaboration of the most important steps in the integration process in the light of both theoretical assumptions. This elaboration takes as a starting point the Convention on the Community Patent of 1973 as a first step to integration and continues with successive milestones in the integration process until it ultimately handles the recourse to enhanced cooperation. After the application of neofunctionalism and liberal-intergovernmentalism to the intergovernmental bargaining at the super-systemic level, institutionalist theory will be applied to the systemic decision-making level in which focus lies on the inter-institutional decision-making. Given this focus on the inter-institutional bargaining mode, the elaboration on the bargaining process at this level starts with the Community Patent Regulation proposed by the European Commission in the year 2000 and covers successive inter-institutional negotiations until it handles the recourse to enhanced cooperation.

6.1 Bargaining at the Super-systemic Level

The previous chapter described the two main 'grand' theories of European integration that serve to explain the decision-making at the super-systemic level, which takes place mainly through intergovernmental bargaining among Member States. These two theories hold different assumptions about the integration process, such as who the main actors are and what mechanisms lead to integration. Based on the neofunctionalist view we expect that the integration in a policy area takes place because pressures to integrate are perceived as compelling which reinforces that some actors see it as functionally practical to transfer the policy issues to the supranational level. Once the initial step of integration has been managed successfully, it will eventually require that decision-making competences of other related areas are transferred to the supranational level as well, in order to secure the well functioning of the initial policy area. In revised neofunctionalist accounts this 'spillover' process is not fully automatic, but is assumed to occur in cases where the original issue area and the inherent objectives are salient and has a strong interdependence with other areas, such as the internal market (Wiener & Diez, 2009). The European Commission is assumed to play a

key role in the process of integration through the exertion of cultivated spillover. In that regard, it is expected to play a proactive and integrative role, through the shaping of the agenda and its support from powerful interest groups. From a liberal intergovernmentalist perspective we assume that integration evolves as a consequence of interstate-bargaining, with the larger Member States, based on their relative bargaining power, playing a dominant role in the integration of policy area. Integration is pursued because it coincides with national interests, while coordination seems more likely if the national interests of the Member States have converged to some extent. Even though the national preferences of Member States are assumed to be issue-specific, they nevertheless reflect concrete economic interests, which emerge domestically as a consequence of conflict among specific sectoral interests. Governments pursue integration as a means to serve these interests of domestic producer groups in the inter-state bargaining process. However, states must overcome collective outcomes that are suboptimal and instead achieve cooperation for mutual benefit. The distributive gains from cooperation in turn, again, reflect the relative power of states. The integration in the area of patent policy has proved to be highly difficult. The repeated failures to harmonize the policy area already provides an indication of its importance and shows that integration is stifled if Member States disagree about issues that are sensitive to their national interest. However, it is plain to see that the European Commission, backed by powerful interests, has played an active role in keeping up the patent policy issue on the negotiating agenda, while the recourse to the enhanced cooperation scheme shows that the relative bargaining power of some Member States, especially Germany, England and France has important impacts on integrative outcomes, even if it means that they have to overcome decision deadlock caused by unanimity requirements. The neofunctionalist logic provides an account of why Member States were initially inclined to start negotiations on the integration of the policy area, while the liberal-intergovernmentalist assumption that Member States retain the ultimate power to decide on integration would explain why all initiatives to integrate the policy area so far have ultimately failed, while more powerful states move onward through the specific integrative project enabled through enhanced cooperation. The ensuing section will take closer look at the most important steps of the integration process in the light of both liberal-intergovernmentalism and neofunctionalism.

The Community Patent Convention and the Community Patent Agreement

As noted earlier, the idea of a Community patent dates back to the early beginnings of the European Community. Initial thoughts were given back then to the creation of a patent system that would be applicable to the entire territory of the common market of the community. However, it became soon clear that a pure Community approach was not feasible at that time, given the sensitivity of the policy area regarding national interests. Nevertheless, it was this early idea that led to the signature of the 'Convention of the Grant of European Patents' (EPC) establishing the European Patent Organization and a single procedure to grant European patents [COM (2000) 412 final]. By that time the Member States of the European Economic Community had already started deliberations on the provisions of the 'Convention of the European patent for the Common Market' (Community Patent Convention) upon invitation of the Commission (Ullrich, 2006). With the *de facto* harmonization of the national patent systems through the signing and accession of all Member States to the European Patent Convention (EPC) in 1973, establishing a central granting procedure of European patents by the EPO, the successive Community Patent Convention (CPC) of 1975 provided for the post-grant rules of a Community Patent that was to be established for the then nine Member States of the Community. It would have transformed the national stages in the granting of European patents into a single stage common for all the Member States. As was the case with the European patents under the EPC, the Community Patent would be granted by the EPO, which would set up special departments for its administration (Ullrich, 2006).

The first steps towards cooperation in the policy area reflect the basic tenets of neofunctionalism. The situation in which the original integrative goal can be assured only by taking further integrative action is illustrated with the signing of the CPC and EPC and its claimed relation to the common market project. The harmonization that occurred with the signing of the intergovernmental convention in 1973 creating a centralized granting procedure can be taken as a first integrative step that would require further integrative steps, in line with the logic of functional spillover. By the signing of the CPC the Member States were already aware that the convention soon had to be followed by a successive convention creating a community property right, which, however, needed to be negotiated upon. In more broad terms, the harmonization of intellectual property rights was put in relation to the common market project and the economic benefits derived from an integration that would also cover a patent system for the common market. In line with rationalist thinking underlying both neofunctionalist and liberal-intergovernmentalist theory, the rationale behind states' willingness to cooperate

in the policy area can be assumed to reflect the considerations on the economic benefits derived in the post-granting phase of patents, whereas the delegation of authority for the grant of Community patents to the EPO reflect the Member States' considerations that the granting could better be conducted at the supranational level. Already by then the Commission exposed itself as a proponent of the project on the single market for patents. For the Commission, the intergovernmental conference that preceded the Convention on Community Patents in 1975, it was the first attempt to introduce the unitary patent. It was backed in its mission by industry operating in the common market that would profit from the harmonized system of patents. However, for a number of reasons the Community Patent Convention could not enter into force. Its failure to achieve ratification by a sufficient number of Member States is assumed to have arisen from the combined effects of inherent weaknesses of the provisions of the Convention and the accession of new Member States to the Community (Ullrich, 2006). The hesitation of some old Member States to ratify the Community Patent Convention before the newly acceding Member States (only seven Member States ratified the Convention in total), was due to the fact that some arrangements lacked both the support from Member States governments and industry. The Member States were mainly dissatisfied with the inherent arrangements such the provisions on the distribution of fees (Ullrich, 2006). Moreover, industry as an interested party was discontent with the legal uncertainty created through the lack of provisions on litigation. Both sides were opposed the applicable language arrangements, however, for opposite reasons (Ullrich, 2006). The lack of industry support for the litigation and translation arrangements that would be applicable shows its importance on the integration process as a necessary source for support for integrative measures. Support for supranational solutions only comes on the condition that the potential gains from integration are high and the benefits from supranational activity can be ascertained. In line with liberal-intergovernmentalist assumptions, the Member States engaged in interstate-bargaining and signed the European Patent Convention in 1975. Given, however, the intense preferences of business and industry as interested parties, it can be assumed that the pressure exerted by non-governmental actors on the domestic level regarding the benefits of the commitment ultimately inhibited the Member States' abilities to ratify the convention on their national parliaments. However, some matters covered in the convention were subsequently adopted by national law, which occurred partially by means of soft harmonization or pressure from Community law (Ullrich, 2006). Despite its apparent shortcomings regarding litigation and translation, the Member States nevertheless signed the Convention on the common agreement that the creation of a community patent title was beneficial for industry and businesses operating in the

common market. It could be taken as a first indication that a socialization process, as assumed by neofunctionalist accounts, has taken place which inclined states to seek to attain agreement and compromises upgrading common interests in line with the notion of political spillover.

The interdependency of the harmonization of intellectual property law with the single market project became more apparent at the European Council summit in 1985 in Milan, when the Commission submitted its White Paper [COM (1985) 310 final] listing the Community Patent Convention as one of the measures to be implemented as part of the completion of the internal market by 1992, which was approved by the heads of state and government (Sugden, 1991). The Commission expressed the importance of the Luxembourg Convention to enter into force *'at least among those Member States who are in a position to ratify it'* [COM (1985) 310 final, para. 148]. Embedded into the single market project, the Convention on the Community Patent was successively brought back on the agenda in the form of the Agreement on the Community Patent in 1989, no less than 14 years after the failure of the 1975 Convention (Ullrich, 2006). Enduring negotiations in the intergovernmental conference resulted in the new agreement which covered revisions and the completion of the 1975 project. Under the amended Convention, a patent had to be translated into every language of the Community, which was, however, widely regarded as being too excessive. It was accompanied by a Protocol on Litigation which was missed by industry in the Convention of 1975, providing for a complicated system of shared jurisdiction of national and Community Patent Courts. A division of labour between these courts to deal with either matters of Community patent law or issues of national law rested on the lack of rules on remedies available in the system of Community patent protection and the differing provisions of national law in this respect (Ullrich, 2006). This diversity in national legal provisions constituted the main obstacle to the achievement of the more ambitious project of a Community Patents Appeal Court at an earlier stage. The highly complex judicial system caused severe distrust on side of industry as an interested party. National judges would have been able to declare a Community patent invalid with effect for the entire Community. From an industry perspective, the legal uncertainty these provisions caused was not supportable [Com (2000) 412 final], as they were widely considered as practically unmanageable (Ullrich, 2006). Coupled with the dissatisfaction over the language regime which again did not satisfy the interested parties, the agreement was bound to fail. Two Member States faced specific problems to ratify the Convention and Agreement: Ireland and Denmark were unable to ratify both texts on special grounds of their respective domestic law.

Once more, neofunctionalist theory would provide an account of the harmonization of patent law as part of the internal market and closely related to other economic policies that needed to be transferred to the supranational level for reasons of compelling pressures exerted from its functional interdependency. Hence also the failure of the agreement to enter into force can be explained in neofunctionalist terms by its lack of support from industry for the negotiated provisions. Based on a rational, economic point of view, a single European patent system would entail huge cost advantages compared to different national patent systems, especially with regard to the single market project. This explains why the issue did not rest but was brought on the agenda inexorably, not at least because of the Commissions' public estimations of the benefits that could be derived. With industry pushing for the litigation system that was missing in the 1975 version of the Convention, the CPC expanded through a Protocol on the Settlement of Litigation Concerning Infringement and Validity of Community Patents in 1989. The inclusion of the protocol reflects the importance of industry interests in the course of integrative outcomes, given their status as the most important future client of a Community patent and their request for legal certainty as part of the harmonization measures. The Commission on the other hand did not cease to emphasize its importance for the internal market project and conceived the support from the heads of state and governments of the Member States that the establishment of a common patent system would be of utmost importance for the single market project, even at the cost that not all States ratified the Convention. The negotiated provisions, whoever, did not find agreement among industry as the most important interest group, as the potential gains from integration were not convincing. However, based on the fact that for matters of domestic law, Ireland and Denmark were not able to ratify the Convention and Agreement domestically shows that Member state governments can only embark on integrative measures if domestic interests are heading into that direction.

The European Council summit held in Lisbon 1992 marked the end of the Community patent project proposed in the form of the Convention and its amended version, when some Member States for the first time took seriously into consideration a community patent that would cover less than the whole community. However, the idea was rejected by several Member States on the basis that a Community patent not covering the entire territory of the Community was '*unacceptable as a matter of principle*' (Ullrich, 2006, p.7). Neofunctionalist logic seems to uphold in the area of harmonization of intellectual property law to the extent that the integration of the policy area is related to the functioning of the internal market, and has been acknowledged as an area that would need integration as part of the single market project. However, although consensus

among the Member States governments about the necessity to take decisive steps toward the integration of the policy area existed, largely elaborated upon in intergovernmental conferences that included other states than EU Member States, intergovernmental bargaining did not lead to the desired outcome of harmonization of post-grant law of Community patents as the negotiated agreements could successively not be ratified domestically by a sufficient number of states. The Commission has performed an important role by promoting the project on the patent system, itself being supported by industry who sought economic benefits from a supranationalized solution. Whereas neofunctionalist logic again seems convincing to the extent that Commission, backed by industry-interests kept the matter on the agenda in order for governments to engage in bargaining, the liberal intergovernmentalist assumption that states as rational, self-interested actors aggregate demands of society and bargain at the international arena seems more convincing to explain why the negotiations did not lead to outcomes. Even though states were convinced and thus stood in agreement that a reform of the patent system would be beneficial from an economic perspective, the options that were put forward were simply too costly and expensive as to change the status quo. It did not satisfy the demands by industry that were aggregated at the national level, so that the relative intensity of these preferences ultimately led to the failure of the project. The availability of alternatives, such as the European patent that existed alongside the numerous attempts to establish a community patent enabled the Member States to maintain the status quo and not engage in undesired international obligations out of pressures exercised by interested groups. On side of the industry, legal certainty, derived from the provisions on litigation was a necessary condition to favor patent policy reform. Together with the quarrels over the language arrangements its lack of support led to the failure of the initiatives put forward so far. Both areas constitute sensitive issue areas that would not find support governed under international provisions that do not provide tangible benefits from cooperation.

As an important point to take into consideration that by the time the convention and agreement were negotiated, the Treaties did not provide for a specific legal base to establish a community patent title or an applicable litigation system. With the lack of a legal base provided for by the treaties, another supranational actor than the European Commission played an important role in the harmonization of the policy area: through its case law, the ECJ established that the EC was competent to take actions in the area (see Cases C-350/92 Spain/Council, Rep. 1995/1985, Case C-377/98 Netherlands/Parliament and Council, Rep. 2001 I 7079) and consequently undertook measures in the direction of integration.

The Community Patent Regulation

In the aftermath of the Lisbon conference in 1992, the European Commission finally decided to take over the project of the Community patent (Ullrich, 2006). In its Green Paper on '*Promoting innovation through Patents*' [Com (1997) 314 final] it opted for a Regulation on a Community patent instead of a Community Convention as part of a follow up to the first Action Plan for Innovation in Europe. The Commission once more stressed the need for a community-wide patent protection and provided a variety of possible solutions to the translation and litigation issues that had been contested so far. The main points of this initiative were presented in Communication from Commission in 1999 on '*Promoting Innovation through Patents - The Follow up to the Green Paper on the Community Patent and the Patent System in Europe*' [Com (1999) 42 final] that ensued a broad public discussion of interested circles (Lamping, 2011). The communication provided for both long- and short term harmonization measures of which, however, only a small number could subsequently materialize into positive law (Ullrich, 2006). Meanwhile, the ten-year debate surrounding the patentability of biotechnological inventions led to the adoption of the Directive 98/44/EC on the legal protection of biotechnological inventions in 1998, also known as the 'Biotech Patent Directive' on the basis of Article 100a EC Treaty. It sought to ensure the abolishment of barriers to trade and impediment to the proper functioning of the internal market arising from the differences in legal protection of biotechnological inventions in the Member States.

Following this, the Heads of state and government coming together in the European Council in Lisbon 2000 agreed on the necessity to create a Community patent system that would address protection of patents in the single market. In the wake of the summit, the Commission submitted its first Proposal for a Council Regulation on the Community Patent [COM (2000) 412 final] based on the residual Article 308 EC, on which the Council had to decide unanimously with consultation of the EP. The decision-making powers on the issue area subsequently lay within the Member States governments agreeing unanimously. The Regulation contained the basic principles that were outlined in the preceding communication of the Commission, focusing on the rules of substantive law and those on the institutional matters of the specialized judicial system handling Community patent litigation, as well as the granting procedure which presupposed the accession of the Community to the EPO (Ullrich, 2006). As an alternative to the accession to the EPO, some Member States originally had favored the delegation of granting power to the EPO as a matter of 'contracting out' the granting, especially Germany (Ullrich, 2006). As a tactical matter, a decision on the accession of

the EC to the EPO was hoped for before the EPO would be enlarged by another eight Member States from Central and Eastern Europe in 2002, which would consequently be involved in the negotiations, especially because some of them were also EU accession states (Ullrich, 2006).

However, the proposed Regulation entailed provisions that weakened its success significantly. It was perceived as *“asymmetric as regards its potential for full realization, and more sort of a promise than a project ready for realization”* (Ullrich, 2006, p. 8). It did not provide for a clear concept of the Court system that was to be established, nor did it entail corresponding draft rules or statutes for it for which it was widely contested, despite the fact that parts of industry welcomed the proposal. The inherent vagueness of the proposal was perceived as *‘evidence that the Union overestimated its position vis-a-vis the patent Community, especially the EPO’* (Ullrich, 2006, p. 8). It did not offer a broad overall strategy as a matter of legislative patent policy, but kept itself politically hesitant as it offered only a slightly revised version of the substantive law that was provided under the CPC. By providing for the option to have a Community patent that would not cover all Member States in its entirety, it made *‘market unity a matter of choice of the applicant, not a public policy desideratum’* (Ullrich, 2006, p. 9). The option was regarded as a move on side of the Commission to satisfy the formerly expressed wishes of industry, but raised the question among the Member States to what extent the Community patent under the proposed Regulation would be able to enhance cost effectiveness and legal certainty compared to the existing system (Ullrich, 2006). While providing only minor changes to the provisions of the CPC version as regards substantive law, the provisions on the language issues consequently became ever more important. The proposal issued by the Commission provided for translation arrangements of the patent specifications into one of the working languages of the EPO, which are English, French or German, and the translation of the patent claims into the other two languages, which was largely supported by industry. However, Spain and Italy favored a translation arrangement that corresponded to those used in the Office for the Harmonization for the Internal Market, which make use of English, French, German, Italian and Spanish as their official language. The language regime proposed in the Regulation underwent a series of modifications, of which none could be decided upon by the Member States unanimously. After several attempts to find compromise on the outstanding language issues, the Council failed to reach agreement and concluded that it would reflect on how to proceed further in the Competitiveness Council meeting in 2004 (Memo/04/58), despite the agreement on the broad outlines reached by the very same Council a year before in the form of a Common Political Approach that envisaged

a translation of claims into all EU languages (Memo/03/47). The sticking point in the negotiations was how infringement of patents, which might arise as a result of mistranslations, should be treated. The Commission expressed its disappointment about these developments after the Council meeting:

'[...] It is a mystery to me how Ministers at the so-called 'Competitiveness Council' can keep a straight face when they adopt conclusions for the Spring European Council on making Europe more competitive and yet in the next breath backtrack on the political agreement already reached on the main principles of the Community Patent in march last year. I must stress that this is despite the very courageous and determined efforts by the Tránaiste Mary Harney to broker a compromise. I can only hope that one day the vested, protectionist interests that stand in the way of agreement on this vital measure will be sidelined by the over-riding importance and interests of European manufacturing industry and Europe's competitiveness. That day has not yet come'-

(EU Press Release Database Memo/04/58: Internal Market and Taxation Commissioner Fritz Bolkestein speaking after the Competitiveness Council Meeting in March 2004).

With the Commission taking over the project of the Community patent and accordingly taking an even more proactive role than before to put the issue on the agenda, its skilful timing to issue the proposal for the Community Patent Regulation in 2000 just after the successful adoption of Directive 98/44/EC on the patentability of biotechnological inventions serves as evidence of its policy entrepreneurship. Its preceding Green Paper and follow-up to the Green paper on Patents were attempts to shape the agenda and it succeeded in its efforts by achieving general consent about the issue among the heads of state and governments of the Member States in the European Council Meeting in 2000. To that end, patent protection was rediscovered as an instrument for innovation policy, which brought into attention its disposal for industry operating in the single market (Ullrich, 2002). With the successful adoption of the Biotech Directive covering the harmonization of patentability of biotechnological inventions, the demand increased not only for a broader coverage of subject matter but also for larger markets. In addition to that, international conditions changed with intellectual property, and patents in particular, becoming a matter of economic policy with the TRIPs Agreement that was negotiating under the WTO-TRIPs framework (Ullrich, 2002).

However, despite the rise of both external and internal pressure on public patent policy, the proposal, as the numerous failed attempts before, was not able to provide acceptable provisions to achieve agreement among the Member States operating in the form of the Competitiveness Council, despite the common consent that was achieved among the Member States in 2003. The Commission based the language regime of the proposal to accommodate the interests of the stakeholders of a reformed patent system. The problems surrounding the language issue had become somewhat politicized so as to impair a feasible solution that would be cost-effective and acceptable for all Member States. With Spain and Italy having always been in favor of the adoption of the language regime applicable to the Office for the Harmonization of the Internal Market (English, German, French, Spanish and Italian) rather than that applicable to EPO proceedings (English, French and German) to the Community patent, the matter became an issue of conflict between commercial and cultural objectives (Lamping, 2011). With the signing of the London Agreement in 2000, however, which provided that EPC contracting states would waive entirely or largely the requirements for translations for European patents, other Member States already undertook measures to keep the costs for European patents under control in parallel efforts. It could be argued that this measure somewhat reduced the pressure to agree on the undesired provisions of the Regulation proposed by the Commission. Given the existence of the Community patent as proposed in the contested Regulation alongside national patent systems and the European patent, it simply did not convincing benefits so as to find a compromise. From a neofunctional perspective, however, we would assume that the integrative pressure exerted by the Commission, coupled with a socialization process that took place among governmental elites, would by now unfold an integrative bearing on outcomes while upgrading common interests. The neofunctionalist accounts of the Commission acting as a policy entrepreneur that cultivates relations with governments and interest groups are visible to the extent that it sought to accommodate the interests of both parties in its proposal. However ultimately, the hard governmental bargaining, which collapses on the language regime as an issue of national interest, as assumed by liberal intergovernmentalist accounts, seem to be more convincing to account for the failure of the Regulation. In the context of patent law, the applicable language regime can function as a source for commercial advantage or disadvantage (Lamping, 2011). Given the economic importance of the language regime for businesses and interests aggregated at the domestic level, the distributive outcomes from agreeing to the Regulation, relative to the status quo, which was in a parallel effort enhanced by the signing of the London agreement, did not offer acceptable terms for overcoming collectively suboptimal outcomes. Based on liberal

intergovernmentalist accounts on substantial bargains, it could have been assumed, however, that those states gaining most from cooperation (Germany, English and France as the countries with highest patenting rates) relative to alternatives, would compromise most to realize gains. On the other hand, those states gaining least would have some room to impose conditions for cooperation relative to the threat of non-cooperation. Not only the Community undertook measures to respond to external and internal pressures demanding a patent reform, but also the EPO reacted with a broad attempt to improve its operations and by reducing the prices for its services. As being used to having a leading position in the area of European patents, the EPO thus found itself in a sort of rivalry with the Community institutions, revolving around the maintenance of influence and independence, but also around different modes of integration and concepts of the functioning of a patent system (Ullrich, 2002). With the accession of the EC to the EPC, the Community would delegate the granting authority of the Community Patent to the EPO and not merely 'contract' out the granting procedure, whereas the EPO found itself negotiating the terms and conditions of the Community's entry to the EPC as a territory for which a community patent could be granted.

With the stalemate governing the negotiations on the language issues, deliberations on the envisaged Community Patent Court came to a halt as well. The original concept for the Community Patent Judiciary outlined in the proposal, before the introduction of the Treaty of Nice of a legal base for the creation of a specialized panel (Art. 229 a, Art. 225a), was a source of controversy both in its principle and details, as by then the establishment of a court outside the organization of the ECJ was not foreseen in the Treaties (Ullrich, 2006). With the Treaty of Nice providing for the corresponding legal base, the Community Patent Court would be a specialized panel, instead of the originally envisaged separate Community Intellectual property Court. For that purpose, the Commission submitted both a 'Proposal for a Decision of the Council to confer jurisdiction in Community patent matters on the Court of Justice' [Com (2003) 827 final] and a 'Proposal for a decision of the Council on the establishment of the Community Patent Court and concerning the appeal before the Court of First Instance' COM (2003) 828 final] in 2003. According to these proposals, the Court would have exclusive jurisdiction on all validity and infringement matters, including claims for damages and compensation, but excluding matters of contractual or compulsory licenses. This de facto centralization of jurisdiction for post-grant litigation comprising a Community of 25 Member States created huge problems to achieve agreement, not at least because the

remaining division of jurisdiction concerning the grant, limitation and revocation of the Community patent would remain within the competence of the EPO.

From a liberal-intergovernmentalist view, the decision deadlock surrounding the proposed litigation system can be explained through the same interest concerns as applicable to the language regime. Member States found themselves in a situation to give up sovereignty in an issue area sensitive to national interest. As by the time the regulation was forwarded, no legal base existed to set up a Court, this constituted a huge step for the harmonization process. The bargaining among the Member States reflects the lowest common denominator, as national governments bargain to safeguard their interests. With a bargaining mode of unanimous intergovernmental decision-making, the outcome was bound to be no integrative measure. Thus, as liberal intergovernmentalist theory would presume, and despite the convergence of preferences among the Member States as regards the objective to enhance the patent system, the national interests can ultimately inhibited the reaching of an agreement that could lead to collectively superior outcomes. However, another aspect deserves attention: the context for the establishment of the Community patent changed with the reduction of the cost of the European patent and its expected completion by a litigation system (EPLA) in 2003, as well as the signing of the London Agreement in 2000. These circumstances were accompanied by the demise of the Directive in Computer Related Inventions, on which, based on the absence of harmonized law, the Commission proposed a corresponding community measure. Even though the proposed directive was supported by large technology firms and the EPO, smaller companies, however, rejected the envisaged provisions (Ullrich, 2002). The European Parliament and the Council could successively not reach agreement on the issue and the envisaged directive found itself stuck in institutional impasse. These circumstances led to less favorable conditions for a Community patent to be agreed on, that was presented in a rather undesired version and thus offered no base for a commonly accepted solution (Ullrich, 2006). Thus, despite common consent reached in the European Council in 2000 for a general direction in the area of patent policy harmonization, successive bargaining in the Council of Ministers collapsed for reasons of national interests of the Member States. This decision deadlock arose even in the light of the legal base that was created with the Treaty of Nice for a specialized court panel in charge of Community patent. With the Commission having based its proposal for the Regulation on the Community Patent on Article 308 EC, a residual legal basis that was used abundantly for internal market measures, the inclusion of the legal base for the creation of a court constitutes an important integrative step. The Commission itself tried to

accommodate the interests of industry in its proposal, providing for a judicial system that should enhance legal certainty for businesses and a translation arrangement that would ensure cost effectiveness compared to the system in place. From a neofunctionalist view, the functional pressures to create a Community patent system have thus been compelling, as even in the light of the fact that Member States could not agree on the definite terms of cooperation, they committed themselves to the eventual creation of a Community Patent and corresponding litigation system.

Following these developments, the Commission issued yet another Communication to emphasize the importance of a patent system reform under the heading '*Enhancing the Patent System in Europe*' [COM (2007) 165 final], which was preceded by a broad consultation of stakeholders operating under the existing patent system as a renewed effort to break the deadlock. Backed by stakeholders in support of the Community Patent Regulation approach as a means to improve framework conditions for European Industry, it argued that stakeholders '*criticize the Council's Common Political Approach adopted in 2003 on the grounds of high costs of translation arrangements as well as the excessive centralization of the proposed jurisdictional system*' [COM (2007) 165 final]. With a large majority of stakeholders criticizing the Council's position on the language arrangements, which foresaw the translation of all claims of the Community Patent into all official EU languages (by then 23), it reinforced its conviction that '*a truly competitive and attractive Community patent can be achieved provided there is political will to do so*'. However, as regards the litigation arrangements, the Commission expressed concerns about the polarization of Member States' position on the options that were put forward so far, and called on the consensus building on a system in full compliance with EU law.

The Lisbon Treaty signed in 2007 brought important changes for future integrative measures in the area of patent law. Next to changing 67 areas from unanimity to qualified majority voting, it introduced a specific legal base for the creation of a common European intellectual property right under Article 118 TFEU, which fell under those provisions governed by qualified majority vote. The language arrangements applicable to the intellectual property right, however, would continue to require unanimity as outlined under paragraph 2 of Article 118 TFEU. In 2009 the Competitiveness Council reached new political agreement on the proposed Community Patent Regulation as far as the creation of substantial patent right concerned, but from then on the negotiations were administered by permanent disagreement among the Member States over the applicable translation arrangements that required unanimity. The adopted Council Conclusions on an '*Enhanced Patent System in Europe*' (Council Doc. No.1722/09)

envisaged the governing of the applicable translation arrangements in a separate regulation next to the EU Patent Regulation, on which the Commission presented a proposal by June 2010 [COM (2010) 350 final]. The proposal envisaged a publication of the EU patent specifications in one of the three working languages of the EPO and the inclusion of translation of the claims into the other two official languages of the EPO – with the requirements identical to its original proposal of 2000 and building on the existing language regime of the EPO and the use of language by a majority of applicants [COM (2010) 350 final]. A patent application not filed in one of the official languages of the EPO would have to provide a translation of the application in of the EPO working languages, which could however partially or fully reimbursed up to a fixed ceiling. As an accompanying measure it foresaw the provision of machine translations of patent applications and patent specifications available in all official languages of the EU free of charge yet without legal effects. In 2010 an extraordinary Council Meeting was held under Belgian Presidency, in cooperation with the Commission, in order to deliberate on the future of the European patent system. Building on the EU Council conclusions of 2009, which emphasized the need to reach a final agreement in patent reform it sought to enable ‘European companies the chance to reap the full benefits of the EU single market’. However, persisting opposition by Spain and Italy over the language arrangements made the reaching of consensus impossible. In the Competitiveness Council meeting that followed shortly, the failure to reach unanimity over the language requirements was officially confirmed.

Given these developments, the influence of the European Commission, backed itself by the support of European industry, is undeniable. The cultivation of close ties with industry as an interest group enabled the Commission to pursue a proactive role in the administration of its proposals, so as to accommodate the interests of the parties concerned, which evolved around the aspects of cost-effectiveness. It further succeeded in convincing the Member State governments on the necessity of patent reform, which responded with the inclusion of a legal base for the creation of an European intellectual property right (although competency had been confirmed in various ECJ case law before), despite successive disagreement about the substantive provisions on the language arrangements. Therefore, actors other than Member States acting unitarily have contributed to the development and integrative measures in the area of patent harmonization. However, the liberal intergovernmentalist assumption on Member States enjoying pre-eminent decision making power vis-à-vis supranational actors holds true in any case. The demise of the proposed Regulation and its amendments trace back to the disagreement about the language regime, which by the

time of the negotiations had become a highly politicized issue, to which several different solutions were sketched out and presented. With the Commission trying to accommodate the stakeholder interests of cost-effectiveness in its proposal, the three language regime governing EPO proceedings was the proposed option. Disagreement in the Council about these arrangements in turn led to the agreement of the common political approach which envisaged translation into all official languages, which was in turn sharply criticized by nearly all stakeholders due to high costs that would arise from these arrangements. The intergovernmental bargaining thus can be claimed to have failed for reasons of political interests of the Member States to have their national preferences accommodated in the agreement. From a liberal-intergovernmentalist perspective, the asymmetrical interdependence that arises from the agreement could be used to explain the deadlock. With Spain and Italy pressing for the inclusion of their languages in the arrangement, they are in lesser need of achievement agreement compared to other Member States (especially Germany, England and France based on the number of patent applications) and are thus best able to threaten with non-cooperation. The dilemma, however, arises with the cost increase that would come with the inclusion of two more languages. In line with liberal intergovernmentalist accounts, we would assume that the distributive outcomes of the agreement reflect the relative power of states based on patterns of asymmetrical interdependence and would therefore entail that the threat of non-cooperation would force the other states to make concessions or no agreement. Given the fact that the Commission, aggregating the interest of European industry as identified through numerous consultations, opted for a translation regime that would secure maximum cost effectiveness in order to serve the very same interests, agreement did not seem probable and can be taken as evidence that the Commission failed to broker compromise through the upgrading of common interests.

Recourse to Enhanced cooperation

It is argued that the 13 April 2011 '*marked the day for European integration*' (Lamping, 2011, p. 19). The background was that the Commission launched two proposals for the implementation of enhanced cooperation in the area of unitary patent protection on the basis of the Council's authorizing decision (Council Decision 2011/167/EU of 10 March 2011). After it was verified that no agreement could be found to go on with the proposed translation arrangements, several Member States had expressed the wish to pursue the issue on the basis of enhanced cooperation as laid down in Article 20 TEU and Articles

326-329 TFEU. The two proposals concerned a general approach on unitary patent protection based on Article 188 TFEU with the aim to provide unitary effect in the post-grant phase to European patents granted by the EPO and the applicable language regime based on Article 118 (2) TFEU, which in principle apply the arrangements as proposed by the Commission in June 2010. A final compromise was reached by the Council in the form of a general approach to the Commission's proposals in June 2011 (Council Doc. 11328/11), on which the translation arrangements provided for give the possibility of filing a patent in any language of the EU and ensure the full compensation of the costs related to the translations of applications filed in languages other than official language of the EPO. The European patents would, however, continue to be granted only in one of the official languages of the EPO. Spain and Italy, as the only two non-participating states, announced that they brought an action before the ECJ against the Council decision to authorize enhanced cooperation on the basis that the mechanism has been used to avoid further negotiations and the failure to provide an appropriate dispute resolution mechanism in the light of the negative opinion of the European Court of Justice on the envisaged Court System under the Draft Agreement of the European Community and Patents Court in March 2011.

From a liberal intergovernmentalist view, the recourse to enhanced cooperation can indeed be seen as a forming of an alliance of Member States against Spain and Italy as recalcitrant governments that inhibit integrative outcomes through the pursuit of their interests. As negotiations in the area have been enduring and highly contested, agreement could not be reached so far as to overcome collectively suboptimal outcomes for mutual benefit, which is remedied through the use of enhanced cooperation, at least of the participating Member States. Despite the fact that the ultimate decision-making powers lie undeniably within the Member States' government and should therefore, in the event of disagreement, lead to non-integrative outcomes, the treaty provisions provided for a mechanism to overcome decision-deadlock and indeed prevent a renewed situation of non-integration, even though it is by virtue of the treaty provisions on enhanced cooperation of temporary nature. Liberal intergovernmentalism is by assumption a theory of intergovernmental decision-making under anarchy and does as such not theorize pre-existing institutional rules such as enhanced cooperation, which would more thoroughly be explained through institutionalist theory (Wiener & Diez, 2009). However, given the unanimity requirement that applied in the case of the language arrangements applicable to the unitary patent protection, liberal intergovernmentalism serves well to explain how the bargaining process inclined some Member States to seek alternative measures in order to be able

to exploit benefits from cooperation. As the main sticking point has been the language issues, to which Spain and Italy were opposed given the non-inclusion of their language in these, the national preferences have been sought to be defended within the bargaining process. As governments pursue integration as a means to secure commercial advantages for domestic interest groups, it seems plausible that these interests had its impact on asymmetrical interdependence of the status and on the relative bargaining power accordingly. Liberal intergovernmentalist theory posits that the asymmetrical interdependence, which arises from an uneven distribution of benefits from a specific agreement, as well as the information about other states' preferences, plays a crucial role in intergovernmental bargaining. In the case of bargaining on the language arrangements, Spain and Italy, being in lesser need for the agreement compared to Germany, France and England, which can be assumed given their higher numbers of patent applications (with Germany having almost as many patents as the other 26 Member States, see Xenos, 2013), should usually be expected to have a better bargaining position vis-à-vis the other powerful Member States to force them to make concession given their possible threat of non-cooperation. With a view on the unanimity requirement stipulated in Article 188 (2) TFEU, the remaining states resorted to enhanced cooperation and could thus overcome the making of any concession to achieve cooperation, even at the cost of a common approach. The recourse to enhanced cooperation was subject to the authorization by the Council and the EP, for which, however, only qualified majority voting is needed in Council. It was thus possible to bypass Spanish and Italian opposition. Based on liberal intergovernmentalist rationale, we could have expected that those states, which gain economically most from an integrative measure, would find themselves in a position to compromise most on the margin to realize gains. With the recourse to enhanced cooperation thus serves as an alternative alliance that avoids further compromise. At the same time, liberal intergovernmentalist theory postulates that bargaining among Member States reflects the lowest common denominator or the result of greater bargaining power of the larger states. From the developments that have occurred until now the former has been certainly true, whereas the latter statement shows that in the end, the larger Member States which ultimately enjoy greater bargaining power which is undeniably true for Germany, France and England, are able to pursue integration if they wish so.

From a neofunctionalist point of view, the failure to achieve agreement on the issue can be explained insofar as the functional pressures requiring further action through the achievement of agreement simply were not perceived as compelling. Given the parallel efforts by Member States to derive at agreements outside the Community framework

and the fact that industry did not support the agreement derived commonly in the Council on the use of all official languages, it shows that the spillover pressures did not suffice to achieve integrative outcomes. Furthermore, the language issued became a highly politicized topic which impaired a socialization process among government elites to favor agreement for mutual benefit. At the same time European industry backed the Commission in its effort to broker a compromise in the issues, but within its continuing strife to find the most economically beneficial solution based on stakeholder consultation, it did not manage to find a solution that would satisfy stakeholders' interest of cost effectiveness and Member State's interest concerning the language regime. Applying neofunctionalism to explain the recourse to enhanced cooperation, it could be argued that the decision-makers, in this case Spain and Italy, did not anticipate a situation when it was commonly decided to introduce and expand the Treaty articles on enhanced cooperation that would render them in a more vulnerable bargaining position vis-à-vis the other Member States within the framework of bargaining about the translation agreements.

When the last obstacle to the induction of unitary patent protection was removed with the agreement on the Unified Patent Court, and the jurisdiction of the national courts in the legal disputes relating to patents with unitary effect being replaced by a new centralized authority for patent litigation and standard setting, the Member States, except this time Poland and Spain, it entailed that Member states gave up their national sovereignty to the authority of the UPC. Given the neofunctionalist logic of functional pressure, we can simply state that the rationale for states to enter into the agreement arises from the interconnectedness of the litigation system with the unitary patent protection that will be available through the enhanced cooperation scheme. With the introduction of a legal base already through the Treaty of Nice, before a special legal base was incorporated with the Lisbon Treaty for the creation of a European intellectual property right, the litigation system formed an important element for the harmonization of the area, not at least because it was a pre-condition for industry to have legal certainty. The Commission had continuously tried to attract political support for the project and presented the UPC as a new institutional solution of the EU's innovation strategy fostering development and economic competitiveness in the EU (Xenos, 2013). What is striking, however, is that Poland chose not to participate in the agreement. Its decision to do so was derived from a report that was commissioned from the Polish government after the EU Council's summit in June 2012 on the potential impact of the European patent with unitary effect and the European Unified Patent Court (Xenos, 2013). It was centered on a cost-benefit analysis comparing the scenarios of accession

and non- accession of Poland to the Unitary Patent System. As the study detected that it would not be economically beneficial to join the unitary patent system, the Polish government accordingly opted not to join. From a liberal intergovernmentalist view, an explanation can be derived from the fact that Poland, acting as a rational actor that seeks to satisfy national interests, especially economic benefits from cooperation, is not able to gain these economic benefits from a suchlike international cooperation, and accordingly chose not to adhere to agreement, especially because it would lose sovereignty over the issue, while the other Member States expect advantages.

Concluding it can be argued that neo-functionalist logic can be traced back in the integration of patent law to a large extent, not at least given the multiple actors that have been involved in the integration process. The need to cooperate in the area can be derived from functional pressures of the internal market project and the economic benefits that cooperation would bring about. In that sense, the context to which the single market for patents was framed played an important role, especially with regard to globalization forces and a common policy objective of convergence that formed as a response to international competition. Even though we can claim that the case of patent policy shows that states '*retain the ultimate right to decide*' in EU governance (Caporaso, 1998, p. 12), given the acute interrelatedness of this policy area with the single market project, the issue came up to the negotiating table over and over again, which is to a large extent due to the Commission's proactive role and its close ties with European industry. The European Union gained competence in the area incrementally: from initial attempts to cooperate in the area on an international basis, Community competence was first clarified through ECJ rulings and successive creation of legal bases for both the establishment of a litigation system and ultimately for a European intellectual property right. Despite the fact that the functional pressures from the internal market project, but also from the European Patent Convention that presumed successive measures, can be assumed to be salient and those initiatives that have been brought forward corresponded to the interests of European industry, the integration process nevertheless collapsed various times for reasons of national interest so that tangible outcomes could not be achieved. As has been the case for several initiatives before, the latest initiatives to achieve agreement were embedded in broader strategies that were promoted to a large extent by the Commission. The 'Horizon 2020' agenda, which builds on the Lisbon Strategy, achieved broad consensus of the Member State governments to make the EU economically more competitive and to achieve innovation and growth, of which agreement on the patent reform has been an important

component. At the same time, parallel efforts by states outside the Community framework had an impact on the success of proposed measures.

Nevertheless, liberal intergovernmentalist accounts hold true more thoroughly in the integration process of this policy area, especially its account that states retain the ultimate power to decide. The various initiatives that were put forward collapsed because of national interests and preferences regarding the language and litigation arrangements despite the fact that states shared common agreement on the benefits from cooperation in the policy area. The fact that according to Article 118 (2) TFEU the language arrangements for the European intellectual property right has to be established unanimously in the Council reflects the disagreement among the states that prevailed in the last decades over the issue. In line with liberal intergovernmentalist accounts, the national preferences of state often diverge to a large extent, and cooperation among states serves the aim to achieve mutual benefit. The relative bargaining power of states decides on which terms cooperation is achieved, while asymmetrical interdependence decides on the distribution of benefits. Applied to the case of unitary patent protection we could see that the larger Member States, which had a greater interest from cooperation in the area based on the relative patenting activity of their companies (Germany, England and France), form an alternative alliance so as to ensure the full benefits from cooperation and have their interests protected. Even though we could have expected that the larger Member States would be inclined to make concessions to Spain and Italy in order to reach agreement, the treaty provisions enabled them to overcome deadlock without forcing them to make concessions. Liberal intergovernmentalist logic is also visible in the area of the Unified patent agreement that was undertaken on an intergovernmental basis. Given the limited economic benefits from participation therein, the Polish government chose not to join the agreement. Despite liberal intergovernmentalists' strength to account for the interstate bargaining process, it fails to recognize that the support and pressure of societal groups, in this case industry, made it easy for the Commission to keep the issue on the negotiating table for around 40 years and enabled a preference formation of European industry at the EU level, aggregated by the Commission through public consultation proceedings.

As a more broad critique to liberal intergovernmentalism, which seems to provide a more accurate account of how the interstate bargaining process provided for integrative outcomes than neofunctionalism, the application of new institutionalism, which is claimed to serve as the best theory for the systemic decision-making level, would provide more institutional detail and therefore a more accurate account of how

institutional rules affect integrative outcomes. Enhanced cooperation would in this view serve as a means to overcome the joint-decision trap in the Council that renders the EU decision making process rather ineffective due to the unanimity requirement. The concept of path dependency would provide an account of how the initial choice for a distinct path is hard to reverse, which applied to our case, would provide insight of why, despite obvious disagreement among the Member States, the integration of the policy area was an almost inevitable measure as it is embedded in the internal market project. However, the fact that the protective function of the unanimity requirement, which serves to protect Member States from measures against their national interests, is simply overrun through the recourse to the enhanced cooperation scheme is a matter of controversy. However, this kind of differentiated integration should be temporary in nature and the common approach only a matter of time. The following section will elaborate on the integration process in the light of the bargaining at the systemic level applying new institutionalist theory more thoroughly.

6.2 Bargaining at the Systemic Level

Having elaborated on the integration process in the light of liberal-intergovernmentalism and neofunctionalism, this section is dedicated to the application of new Institutionalism to the decision-making outcomes at the systemic level as a continuation in answer to the fourth sub-question. Given its strengths to provide analytical insights the inter-institutional bargaining that takes place at this level, it is sought to apply its theoretical framework to the integration process in the area of patent law in the light of the institutions involved. At the systemic level, bargaining does not take place under anarchy, that is, it is not a theory of international relations, but rather treats the EU as a political system of its own (e.g. theory of domestic politics). As such, new institutionalism as a theoretical framework is concerned largely with the effects of institutions as intervening variables in EU politics (Pollack, 2008). Given the theoretical framework outlined earlier in this paper, we can expect that new institutionalist accounts provide analytical insights into why integration in the policy area has proved to be so difficult and how we might expect integration to proceed in the area from the perspective of the institutional context of the EU. For the purpose of the study at hand, the analysis will take the first attempt of the Commission to propose the creation of a Community patent under the treaty framework as a starting point and covers subsequent negotiations until it handles the recourse to enhanced cooperation.

The Community Patent Regulation

When the Commission took over the project of the Community patent from the Member States in the year 2000, it faced no major obstacles submitting the proposal for a Community Patent Regulation [COM (2000) 412 final]. In the preceding Lisbon and Feira European Council summits the heads of state and government had established that the creation of a Community patent would form an essential part in ensuring a competitive, knowledge-based economy in Europe and recommended the Community Patent to be available by the end of 2001 (IP/00/714). The Commission based its proposal on Article 308 TEC, a residual treaty base that allowed legislative measures related to the common market project that presumed unanimous agreement in the Council and consultation of the Parliament. The use of this legal base was in accordance with what had been done previously in relation to the Community trade mark and Community designs [COM (2000) 412 final]. From a new institutionalist point of view, the concept of path dependency could be applied to the first proposal, given the Community patents' close connection to the common market project and preceding measures to related issues, highlighted by the treaty base that served as a basis for the Community patent that served already for related measures. The Commission established in the proposal that the choice for a Regulation as the legislative instrument was based on the consideration that the member States should not be left with *'any discretion either to determine the Community law applicable to the Community patent or to decide on the effects and administration of the patent once it has been granted'* in order to safeguard its unity. This was confirmed by the ECJ that ruled out that the Community intellectual property rights could not be created through harmonization of national legislations (Opinion 1/94 of the Court of Justice of 15 November 1994). Given the requirement stipulated by the treaty base for unanimous agreement in the Council, and disagreement among the Member States acting in the Competitiveness Council about the proposed language arrangements, which foresaw the patent be valid as granted by the EPO in one of the three EPO languages (English, German and French), it is in line with institutionalist logic that successive amendments were proposed in the following Council meetings in the strive to reach consensus about the issue which caused inertia. These amendments were materialized by the Competitiveness Council in 2003 in the form of a common political approach (7159/03 PI 24) and successive work by the Working Party on Intellectual Property (Patents) and the Permanent representatives Committee reflecting the principles of the common political approach in the proposal for a Council regulation on the Community patent (Council Doc. No. 15086/03), as well as in the proposals before the Council in 2004 (Council Doc. No. 10404/03), that foresaw that translation of the claims of the patent be filed in all Community languages for the patent to be valid. Following new institutionalist

assumptions, it can be argued that the strife for consensus among so many actors involved and the institutional rules that applied to the policy area, have caused a joint-decision trap that left the Member States unable to move forward in the area despite overall consensus from the heads of state and governments to integrate. The accounts on the joint-decision trap postulated by Scharpf (1988) reflect the event surrounding patent policy all too good. While it is argued that the joint-decision trap is likely to occur in institutions characterized by intergovernmentalism, a voting rule of unanimity and a default condition in which a given policy would continue to persist in the event of no agreement, only a change in one of these rules could alleviate the joint-decision trap. At the same time the setting of the policy area would constitute an enormous step for the integration of the policy area, given the developments in the area before the Community approach was taken. Accordingly, one can argue that the disagreement reflects to some extent path dependent behavior, as it was still in the hands of the Member States to decide on the issue, just as has been the case in the convention approach and these continued the path pursued. This form of path dependency was reinforced by the necessity of finding agreement between so many actors involved, not at last due to the compartmentalization of decision makers in different formations. As a least common denominator solution in an area that precludes unanimous agreement, a situation of no agreement prevailed.

The Community Patent Regulation under the Lisbon Treaty

With the introduction of the Lisbon Treaty and inherent legal base for the EU patent, including the translation arrangements the institutional context for the patent changed. While a specific legal base for the creation of the European intellectual property right was created under Article 118 TFEU, the policy area remained to be locked-in given the governing institutional provisions. The procedural differentiation between the establishment of the intellectual property right and the applicable language arrangements complicated the decision-making even further. While the establishment of the patent title no longer needed unanimous decision-making but a qualified majority, the applicable translation arrangements continued the established path of requiring unanimity in the Council, perpetuating the joint-decision trap. While the Competitiveness Council still sought to find agreement on the amended text of the Commission's proposal of 2000, culminating in a General Approach on the Community Patent regulation adopted in 2009 (16113/09), it was perceived as a political breakthrough despite its modest changes to its amended proposal in 2004. The general

approach once more emphasized the need to reach a final agreement in the patent law reform and was followed by an extraordinary Council meeting in 2010 that sought to find a solution to the language arrangements that would serve all interests involved. In the same year the Commission provided a proposal for a regulation on Translation Arrangements [COM (2010) 350 final] on which the Member States would have to decide unanimously given its Treaty base Article 118 (2) TFEU.

From a new institutionalist perspective, we can conclude that despite the fact that the Member States acting in the Council could, on the basis of the legal provisions of the Lisbon Treaty, decide on the creation of the patent through qualified majority, its strife for consensus reflects an informal institutional norm that prescribes unanimous agreement among the Council Members, not at last because the appending translation arrangements would eventually presume unanimity which could not be jeopardized. Accordingly, the Member States simply continued the established path of trundling along in their quest to seek agreement. With the Competitiveness Council in 2011 this long established path of joint-decision trap eventually reached its climax when it was officially confirmed that the Competitiveness Council failed to reach agreement on the language arrangements through the persisting opposition of Spain and Italy. What is striking is that the Commission apparently never suggested the possibility of a substantial modification of its original concept for the translation arrangements, while the Council was engaged in numerous efforts to find a compromise between the Member States on the issue. Its proposal for the Council Regulation contained the very same concept for the language arrangements as it provide before, which, as a requirement of Article 118 (2) TFEU, would continue to presume unanimous agreement by all Member States. It was to be expected that this presumed to meet with resistance by the Member States, notably Spain and Italy (Ullrich, 2012). From a new institutionalist perspective it can be argued that the Commission became a player '*on his own right*' in the area and assumed that the Council would sooner or later agree to its proposal, given the various efforts in the area so far and the negative feedbacks the prolonged dissolution entailed. Further, the sequencing of decisions seems to be quite important here, given the political breakthrough achieved in the Council and the proximate proposal of the Commission on the language arrangements.

Recourse to enhanced cooperation

The successive developments that took place after the Competitiveness Council meeting in 2011 are highly interesting from a new institutionalist point of view. While it is argued that the 13 April 2011 '*marked the day for European integration*' (Lamping, 2011, p. 19), the 10 March 2011 marked the day for the end of the joint-decision trap that prevailed in the policy area. With the Council authorizing, by qualified majority, the use of enhanced cooperation in the area of the creation of unitary patent protection (Council decision 2011/167/EU) backed by the European parliament, the way was finally paved to move on with the integration of the policy area, albeit with some Member States left outside this cooperation. From a new institutionalist point of view, the recourse to enhanced cooperation can also be argued to reflect the battle of power between the institutions. After the numerous initiatives brought forward in the area, the joint-decision trap seemed to be insurmountable and impasse became normality under the precondition of unanimity. With the emphasis of decision-making no longer solely in the hands of the Member States in the Council, the position of the Commission and the EP could be strengthened. This reflects Peterson's & Bomberg's (1999) notion that '*in a system marked less by competition between different political philosophies than by competition between institutions, the new institutionalism highlights how apparently consensual policy-making does not preclude clandestine attempts to shift boundary and decision rules*', which is argued to be even further promoted by the proliferation of so many decision rules. The use of enhanced cooperation reflects a successful attempt to shift the decision rules in the area from the rather protective unanimity requirement to qualified majority voting and consequently enabled integration by overcoming the requirements stipulated by the treaty base and enables the adaptation of policies to changed circumstances. The notion of '*clandestine attempts*' becomes truly conceptual if one takes into account that Member States not participating in the enhanced cooperation scheme from its initiation would have to accept the *acquis* established by the other states on a potential future accession. From this point of view, enhanced cooperation constitutes a convenient way to circumvent the initial unanimity requirement in favor of qualified majority that facilitates the decision making, whereas the mechanism has an explicit notion towards temporariness. It can be argued the use of enhanced cooperation in this case entrenches the language rules enacted by the majority against the will of the minority, which is confirmed by Jaeger (2012). However, these circumstances could also be seen from the point of view of Pierson's (1996) analysis of control gaps, which would refer to these as unintended consequences of institutional choice made by the Member States participating in

enhanced cooperation, which would, however, turn to their advantage. Nevertheless control gaps are likely to occur also in a different form, namely for Spain and Italy, as long as they do not join the enhanced cooperation. Given that the institutional provisions of enhanced cooperation postulate that the initially non-participating Member States can join the deliberations in the Council that take place under the mechanism, but have no veto power, the Member States that are excluded are faced with further loss of control over the policy area in the long term. At the same time, Article 333 TFEU allows the Member States to change the decision making rules of the measures that regard them under the enhanced cooperation scheme. It is thus possible to change decision making from unanimity to qualified majority and from the special legislative procedure to the ordinary legislative procedure. For the excluded Member States it entails that their interests will not be taken into account in any new measures as long as they do not participate and accordingly constitutes a severe loss of control over the integration process in the area, while the participating Member States will more easily be able to launch measures in the policy area. The circumstances surrounding the launch of the enhanced cooperation scheme also reflect Scharpf's (1988) analysis of joint- decision traps and mitigation measures to overcome locked-ins. The institutional provision provided by the enhanced cooperation enabled the move to supranational decision making and terminated the long established joint-decision trap and allowed the adaptation to changed circumstances. As noted by Pollack (2008), no important policy can be set without all institutions being in agreement. Given the documented objection of Spain and Italy on the use of enhanced cooperation, the ECJ had to step in to adjudicate in the dispute as postulated by new institutionalist accounts, ruling that the switch from search for unanimity of decision as required by Article 118 (2) TFEU to the qualified majority vote pursuant to Article 329 (1.2) TFEU is admissible under Article 20 (3) TEU and Article 326 (2) TFEU. Given these circumstances, the institutional provisions concerning the enhanced cooperation scheme leave Spain and Italy in an ambiguous situation: even though they rejected the language arrangements applicable to the patent which will now be in force for the European patent with unitary effect, they will have to agree to these in order to regain control over the integration process in the area. With the same logic, the longer these Member States remain outside the scheme, the more control they lose over what they would have to agree on by the time of their accession.

Concluding it is possible to say that the area of patent policy exhibits an example for the joint-decision trap that Member States faced given the institutional requirements in the area, which could be mitigated with the recourse to enhanced cooperation which

constitutes a change in the decision-making rules. However, the application of the theoretical assumptions also demonstrates that the use of enhanced cooperation could overcome the unanimity requirement by use of qualified majority, leaving Spain and Italy in a situation where they lose control over the integration process in the area, which is amplified the longer they outside the enhanced cooperation scheme. Accordingly, these two states have become locked-in by the institutional choices taken by the other Member States and find themselves constrained by these in their further action. The concept of joined-decision trap applied by new institutionalist accounts provides an explanation why integration in the area was characterized with institutional impasse, while the notion of control gaps provides an account of why Italy and Spain could be induced to join the cooperation in the area in the near future. Given the developments in the area so far, this will, however, not be an easy venture. The language arrangements will certainly continue to be a matter of disagreement among the Member States, leaving a common approach in the area an issue that cannot easily be predicted.

7. Discussion: Is a Common Approach feasible?

Given the analysis above, this chapter seeks to elaborate on the feasibility of a common approach in the area of unitary patent protection in the future in the light of the fifth sub-question guiding this research. Enhanced cooperation, as elaborated earlier in this paper, provides flexibility within the framework of the EU treaties and institutions as opposed to mere intergovernmental cooperation between states. It is commonly regarded as a way to allow Member States that are in agreement to exploit the benefits from cooperation through a sub-union if not all states agree to cooperate, while the non-participating Member States may choose not to cooperate in order to preserve the status quo (Bordignon & Brusco, 2006). The recourse to enhanced cooperation is regarded as pareto - improving as long as the excluded countries can be guaranteed against the change of the status quo. The regulatory framework provided by the Lisbon Treaty is perceived as providing sufficient safeguards against potentially negative effects for non-participating Member States, while providing the possibility to join at any later stage of the process of integration. Taking up on this, Craig (2010) argues that enhanced cooperation constitutes a suitable mechanism in the event that a common approach is proven to be not possible, while at the same time it is hoped that it would serve as a catalyst for other Member States to participate in the future. According to Gomes de Andrade (2005), enhanced cooperation is even a major step towards European Integration and *'[...] puts, for the first time, the "cards on the table" and clearly demonstrates that the EU is open to differentiation and fragmentation, putting an end to parallel schemes and unclear (and usually discriminatory) agreements[...]'* (p.202). It is argued, however, that a basic dilemma resulting from flexibility is that any form of flexible integration needs to take account of the objectives defined by a group of Member States that desire more cooperation, *'ensuring that the overall construction of European integration'* and the interests of the non-participating Member State remain unaffected by this cooperation, while at the same time it should tackle *'the threat of dissolution of the current state of European Integration'* (Tekin & Wessels, 2008, p.2). What is peculiar to the flexible integration approach of enhanced cooperation is that a potential 'two-speed' situation of the extent of integration between the Member States should be temporary in nature, as the mechanism as such was devised as a tool for progressive integration as a whole in the long term. Lamping (2011, p. 13) argues that *'even though differentiated integration denotes departure from the "one size fits all" concept of membership under the auspices of a mutual act of solidarity and good faith, the ultimate goal remains to be uniform rules and obligations for a fully integrated market'*.

With that rationale in mind, it is worthwhile to look at to what extent the current enhanced cooperation scheme in patent law was able to comply with these objectives and fulfills the conditions to enable a full integration in the future. As a first consideration one would have to keep in mind that the enhanced cooperation scheme the area of patent law was launched out of disagreement about the language regime applicable to the patent title to be created. The recourse to enhanced cooperation was contested by Spain and Italy on the basis that it was believed that the conditions to launch an enhanced cooperation were not fulfilled and it merely constitutes a means to circumvent the unanimity requirement that was necessary for the language arrangements. Despite the fact that the ECJ ruled that the recourse to enhanced cooperation was admissible, the disagreement about the language issue, as a matter of national interest, constitutes a severe challenge for a future cooperation. The objection of Spain and Italy regarding the applicable language arrangements concerns only this sub-issue of the entire patent project, but as such they share the same general objectives and agree that reform is necessary. According to Lamping (2011, p. 29), the disagreement with respect of the language arrangements are *'an immutable fact that will not cease to exist in the absence of further negotiation'* and consequently could lead to a lasting differentiation. For Ullrich (2012), the Member States even *'allowed'* the language issue to degenerate into a roadblock for the entire EU patent project and trigger the differentiated integration approach. For the enhanced cooperation scheme that was launched in the area of unitary patent protection, however, it would mean that it stands in conflict with the principle of solidarity, as it obliges the provisionally non-participating Member States to integrate in the area, despite insuperable differences in opinion about the language as a matter of national sovereignty, in order to fulfill the condition of temporariness.

According to Jaeger (2012), the ability for Spain and Italy to participate at a later stage is jeopardized by the fact that the language regime is implemented against their will. In that regard, both states are excluded permanently from participation *'unless they subject to the terms and conditions of the system which already gave rise to the non-participation at the outset'* (p.5). Accordingly, the enhanced cooperation scheme in the area of unitary patent protection negatively impacts the interest of Spain and Italy *'in terms of safeguard their participation rights in the legislative process, in terms of their prospects of adopting patent protection for their territories in the future and in terms of their economic positions in the internal market'* (Jaeger, 2012, p. 6). The features of the enhanced cooperation scheme that apply in this case stand in contrast to Article 20 (1) TEU that holds that the interests of the non-participating countries should not be jeopardized by the cooperation of others. Also Lamping (2011, p. 29) notes that the

predetermination of openness that applies to any enhanced cooperation is not satisfied in the field of unitary patent protection on the basis that the differentiated integration resulted from '*deeply rooted national interests*'. It is argued that although the requirement of openness does not create an obligation on part of the majority '*to address special wishes and interests of individual Member States*', it nevertheless presumes comprehensive negotiations so as to ensure sufficient reflection and consideration of all possible solutions to contentious issues (Lamping, 2011, p. 34). To put it blankly, a common approach would accordingly only be possible if the language issue could somehow be solved so as to achieve common agreement of all parties involved. Previous steps in this direction have been proposed before by the Spanish and Italian governments, who put forward the solution of using only English as the language for the administrative application process of the EU patent. Also a considerable part of the patent community showed great commitment to the use of English as the single language applicable to the EU patent, whereas the cost advantages claimed by the Commission would all the more apply with the use of only one language. As suchlike single language arrangement could nevertheless fail on the '*vanity of the French- and German-speaking Member States*' in the Union (Lamping, 2011, p. 35) and have until now not been considered by the Council as it met with resistance by the EPO (Ullrich, 2012). From this point of view, it is argued that '*the dissident behavior of Spain and Italy arises not so much from within the countries, but is prompted and aggravated by the insensitive behavior on part of the prevailing majority*' (Lamping, 2011, p. 35). It discloses once again that the obstacle to achieve a common approach does not lie in objective reasons for which the Member States cannot participate in the enhanced cooperation scheme right away, but rather that subjective, or better, political reasons, that stand in the way of finding agreement. The outcome, as elaborated earlier in this paper, may well reflect the greater bargaining power on side of the larger Member States, and more explicitly, Germany, France and UK, who happen to have the highest number of patent applications in their term.

Given these considerations, the enhanced cooperation on unitary patent protection that will apply to 25 Member States may well reflect the most common approach that is possible for the moment, but one should not overlook the very reasons why Spain and Italy might consider the participation in unitary patent protection in the near future, despite the contentious language agreements that can be presumed to continue to exist. Next to the obvious advantages for businesses for both countries in the event of a future participation, is in the very nature of the enhanced cooperation scheme that the acts adopted under its framework do not form part of the *acquis communautaire*, but

rather form an *acquis* itself that is valid for the participating Member States only. In that regard, that Member States joining an established enhanced cooperation scheme will have to agree to this *acquis* established under the framework of the respective enhanced cooperation scheme. In the light of these provisions, a control gap arises for Spain and Italy insofar as they can deliberate together with other Member States on issue matters regarding patent law subject to enhanced cooperation, but they will have no voting rights on issues decided in the Council thereon. Consequently, they will have no influence on matters decided in the area as long as they do not participate in the enhanced cooperation scheme, but will have to accept all rules established by the other Member States since its inception if they ever joined at a later stage. Also Lamping (2011, p. 37) notes that *'even if cooperation does not expressly alter the acquis, the simple fact that some Member States take integration further may influence the relative position of those not participating'*. Therefore, a common approach might not seem achievable in the near future given the insurmountable differences between the Member States regarding the language arrangements, but it is nevertheless possible and potentially the only way to regain control over further integrative measures for Spain and Italy. A common approach would therefore be in the interest of both participating and non-participating Member States of the enhanced cooperation scheme.

Conclusion

Guided by the main research question and sub-questions, the research at hand sought to provide insights into the use of enhanced cooperation in the area of patent law and the feasibility of a common approach by looking at the bargaining processes that took place in the course of integration of this policy area. In the first part of this research an overview was provided on the patent system in general and how cooperation in the area of patent law developed. It was revealed that cooperation evolved outside the EU treaty framework in the form of Conventions and Agreements which, however, was marked by severe difficulties so as to achieve harmonization of patent protection among the EU Member States given the Member States' diverging interests. As a consequence, harmonization has until now been limited to a central granting procedure of European patents by the EPO, whereas patent protection suffered from fragmentation, high costs and insufficient legal certainty. In the year 2000 the European Commission launched a first proposal for a Community Patent Regulation under the framework of the EU treaties, however, with little success. A main stumbling block has been the ever contested translation arrangements applicable to the Community Patent.

After various attempts to find agreement on the issue to enable a common approach in the area, enhanced cooperation stood out as the only feasible solution to establish unitary patent protection in the 25 participating Member States. Enhanced cooperation is able to significantly reduce the cost for obtaining patent protection and enhance legal certainty for businesses, but fails to provide a long-lasting solution to the problem of fragmentation. In the second part of this research different theoretical frameworks on bargaining process within the context of European integration were elaborated upon in order to subsequently apply them to the integration process in the area of patent law. These theories hold different assumptions about the actors and mechanisms involved in the integration process and were applied to two different levels of decision-making: the super-systemic level of intergovernmental bargaining and the systemic level of inter-institutional bargaining. The application of different theoretical paradigms revealed that despite the fact that the policy area was governed by unanimity so as to ensure that Member States retain the ultimate control over the terms of cooperation, the institutional provisions of the enhanced cooperation scheme might incline the non-participating Member States to future cooperation. Neofunctionalist accounts showed the interrelatedness of the policy area with the internal market project and why cooperation in the policy area was sought by the Member States and promoted by the Commission accordingly. It was, however, further revealed that the contested language arrangements that inhibited the integration of the policy area for years touched closely upon national interests, which, in line with liberal intergovernmentalist theory, were sought to be protected in the course of bargaining between the Member States and therefore met with resistance by some Member States. From the perspective of new institutionalist assumptions, the result was a joint-decision trap that left the initiatives in the area characterized by inertia and institutional impasse, which was ultimately mitigated by the recourse to enhanced cooperation in the area.

It was revealed that enhanced cooperation as such serves to reinforce the integration process in the long-term, which, in the light of the events surrounding the integration process in this policy area, seems to be rather a delicate undertaking. It was highlighted that a common approach in the area of patent law would have considerable advantages as regards fragmentation, legal certainty and cost-effectiveness, which would speak for continuing efforts for the currently non-participating Member States to join the cooperation in the future. However, the analysis also exhibited that the use of enhanced cooperation has left the excluded countries in an ambiguous situation. While it can be assumed that Spain and Italy continue to oppose the applicable language regime for the European patent with unitary effect, which entails that a common approach would

not take place, both states find themselves under the constraints of the actions undertaken by the other Member States. In that regard, both states would have to accept the *acquis* established under the framework of the enhanced cooperation scheme in the area in the event of a future accession, while the longer they remain outside of this cooperation, the more they lose control over the acts adopted therein until their eventual accession. While it is not within the limits of this research to provide a reliable prediction that Spain and Italy will join the cooperation under all circumstances, it can nevertheless be assumed that both states have incentives to do so in order to regain control on acts adopted in the policy area. Concerns about the enhanced cooperation scheme on the Unitary Patent remains to the extent that the European institutions do not appear to be overcautious regarding the application of the requirements on competition and non-distortion of the internal market as explicitly postulated by the treaty provisions on enhanced cooperation. If Spain and Italy chose not to join the cooperation in this policy area, the European patent system will remain fragmented and should accordingly not be in the interest of the Union. Given these considerations, further research should be dedicated to the legality of the enhanced cooperation approach in the area of unitary patent protection in the light of the common internal market. As enhanced cooperation in the area of unitary patent protection is the second of three enhanced cooperation schemes launched so far – next to divorce law and financial transaction tax, reference is missing as to whether these forms of cooperation will eventually lead to a commonly integrated policy area among the EU Member States. Further developments in the area should be subject to closest scrutiny so as to keep track on the direction the enhanced cooperation scheme takes. It is beyond doubt that the Member States should continue their efforts to reach a solution on the issue and not let political obstacles jeopardize the internal market project and cause long-lasting differentiation in the area. Furthermore, the litigation system, set up on the basis of an international treaty and touched superficially in the course in the thesis, should be subject to further study in order to identify its compatibility of the EU legal system and its implications for the patent system. Given its impact on the national legal systems of the Member States and the loss of sovereignty Member States have themselves committed to, this issue deserves special attention. However, given the limitations of the thesis, an elaboration on this would have been too extensive so as to cover it in this research.

References

- Aspinwall, M. D., Schneider, G. (2000). *Same menu, separate tables: The institutionalist turn in political science and the study of European Integration*. European Journal of Political Research 38, Vol. 1, pp. 1-36.
- Bender, G. A. (2000). *Clash of the Titans: The Territoriality of Patent Law vs. the European Union*, 40 IDEA 49, Issue 52.
- Bordignon, M., Brusco, S. (2006). *On enhanced cooperation*. Journal of Public Economics 90, pp. 2063-2090.
- Börzel, T. (2006) (Ed.). *The Disparity of European Integration. Revisiting Neofunctionalism in Honour of Ernst B. Haas*. Routledge.
- Cantore, C. M. (2011). *We're one, but we're not the same: Enhanced cooperation and the Tension between Unity and Asymmetry in the EU. Perspectives on Federalism*, Vol. 3, Issue 3.
- Caporaso, J. (1998). *Regional integration theory: understanding our past and anticipating the future*. Journal of European Public Policy Volume 5, Issue 1, March 1998, pp. 1-16.
- Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A. (2006). *European Union Law*. Text and Materials. Cambridge University Press.
- Craig, P. (2010). *The Lisbon Treaty – Law, Politics and Treaty Reform*. Oxford University Press.
- Garrett, G., Tsebelis G. (1996). *An institutionalist critique of intergovernmentalism*. International Organization Volume 50, Issue 2 (Spring), pp. 269-299.
- Gomez de Andrade, N. N. (2005). *Enhanced cooperation: the ultimate challenge of managing diversity in Europe*. Intereconomics. July/August, pp. 201-216.
- Haas, E. B. (1958). *The Uniting of Europe: Political, Social and Economic Forces 1950-57*. Stanford, CA: Stanford University Press.
- Hilty, R. M., Jaeger, T., Lamping, M., Ullrich, H. (2012). *The Unitary Patent Package. Twelve Reasons for Concern*. Max Planck Institute for Intellectual Property and Competition Law, 17 October 2012.
- Jaeger, T. (2012). *All back to square one? – An assessment of the latest proposals for a patent and court for the internal market and possible alternatives*. Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 12-01. Electronic copy available at: <http://ssrn.com/abstract=1973518>.
- Lamping, M. (2011). *Enhanced cooperation. A proper Approach to Market Integration in the Field of Unitary Patent Protection?* IIC- International review of Intellectual Property and Competition Law, Issue No 8/2011, pp. 879-925, Max Planck Institute for Intellectual Property and Competition Law, Munich.
- Langeheine, B. (1984). *Rechtliche und institutionelle Probleme einer abgestuften Integration in der Europäischen Gemeinschaft*. In: Eberhard Grabitz und Fritz Franzmeyer (Hg): *Abgestufte Integration. Eine Alternative zum herkömmlichen Integrationskonzept?* 1. Auflage (S. 47-123) Kehl am Rhein: Engel (Schriftenreihe Europaforschung, Bd. 8).
- Lindberg, L N., Scheingold, S. A. (1970). *Europe's Would-Be Policy: Patterns of Change in the European Community*. Englewood Cliffs, NJ: Prentice Hall.

- Lindberg, L. N. (1963). *The Political Dynamics of European Economic Integration*. Oxford: Oxford University Press.
- Lloyd, I. J. (1998). *Protecting Innovation through Patents. The European Commission' Green Paper on the Community Patent*. Computer Law & Security Report Vol. 14, Issue No. 2.
- Marks, G., Hooghe, L., Black, K. (1996). *European Integration from the 1980's: State-centric v Multi-level Governance*. Journal of Common Market Studies Volume 34, Issue 3, pp. 341-78.
- Moravcsik, A. (1998). *The Choice for Europe*. Ithaca, New York: Cornell University Press.
- Moravcsik, A. (1993). *Preferences and Power in the European Community: a liberal intergovernmentalist approach*. Journal of Common Market Studies Volume 31, Issue 4, pp. 473-524.
- Niemann, A., Schmitter, P. C. (2009). *Neofunctionalism*. In: Wiener, A., Diez, T. (2009). *European Integration Theory*. Oxford University Press. Second Edition.
- Nugent, N. (2006). *The Government and Politics of the European Union*. Palgrave Macmillan. Sixth Edition.
- Painter, M., Pierre, J. (eds.) (2005). *Challenges to State Policy Capacity*. Basingstoke: Palgrave. In: Wiener, A., Dietz, T. (2009). *European Integration Theory*. Oxford University Press. Second Edition.
- Peterson, J. (2001). *The choice for EU theorists: Establishing a common framework for analysis*. European Journal of Political Research Volume 39, pp. 289-318.
- Peterson, J., Bomberg, E. (1999). *Decision-making in the European Union*. MacMillan Press Ltd., Houndsmills.
- Pierson, P. (1996). *The Path to European Integration. A Historical Institutional Analysis*. Comparative Political Studies Volume 29, Issue 123.
- Pollack, M. A. (2008). *The New Institutionalism and European Integration*. In: Wiener, A., Diez, T. (2009). *European Integration Theory*. Oxford University Press. Second Edition.
- Pollack, M. A. (2003). *The Engines of European Integration: Delegation, Agency, and Agenda-Setting in the EU*. New York: Oxford University Press.
- Richardson, J. (2004). *European Union: Power and Policy –making*. London (Routledge). In: Wiener, A., Diez, T. (2009). *European Integration Theory*. Oxford University Press. Second Edition.
- Richardson, J. (1996). *Eroding EU policies: Implementation Gaps, Cheating and Re-steering*. In: J. Richardson (ed.) *European Union: Power and Policy-making*, London: Routledge.
- Ross, G. (1995). *Jacques Delors and European Integration*. New York and London: Polity Press.
- Sandholtz, W. (1996). *Membership matters: Limits of the Functional Approach to European Institutions*. Journal of Common Market Studies Volume 34, Issue 3, pp. 403-429.
- Scharpf, F. W. (1999). *Governing in Europe: Effective and Democratic?* Oxford and New York: Oxford University Press.

Scharpf, F.W. (1988). *The Joint Decision Trap: Lessons from German Federalism and European Integration*. Public Administration, Volume 66, Issues 3, pp. 239-278. DOI: 10.1111/j. 1467-9299.1988.tb00694.x

Schovsbo, J. (2011). *Constructing an Efficient and Balanced European Patent System: 'MuddlingThrough'*. Available at SSRN: <http://ssrn.com/abstract=1932690> or <http://dx.doi.org/10.2139/ssrn.1932690>

Sugden, A. (1991). *The Community Patent – The Luxembourg Agreement of 1989*. World Patent Information, Vol. 13, Issue 1, pp. 5-8.

Szysczak, E., Cygan, A. (2005). *Understanding EU Law*. London: Sweet & Maxwell, First Edition.

Tekin, F., Wessels, W. (2008). *Flexibility within the Lisbon Treaty: Trademark or empty promise?* EIPASCOPE 2008/01.

Ullrich, H. (2002). *Patent protection in Europe: Integrating Europe into the Community or the Community into Europe?* European Law Journal Volume 8, Issue 4, pp. 433-491.

Ullrich, H. (2006). *National, European and Community Patent Protection: Time for Re-consideration*. European University Institute, Department of Law. EUI Working Paper LAW No. 2006/41.

Ullrich, H. (2012). *Harmonizing Patent law: The Untamable Union Patent*. Max Planck Institute for Intellectual Property and Competition Law Research Paper, No. 12-03.

Van Pottelsberghe, B. (2009). *Lost Property: The European Patent System and why it doesn't work*. Bruegel Blueprint Series, Volume IX, Brussels.

Van Pottelsberghe de la Potterie, B., Mejer, M. (2008). *The London Agreement and the cost of patenting in Europe*. ECARES Working Paper 2008, 032. Electronic Version available at: http://www.ecares.org/index2.php?option=com_docman&task=doc_view&gid=46&Itemid=204

Verdun, A. (2002). *Merging Neofunctionalism and Intergovernmentalism: Lessons from EMU*. In: Lanham, Md. (u.a.) *The Euro: European Integration theory and economic and monetary union*. Rowman & Littlefield.

Wiener, A., Diez, T. (2009). *European Integration Theory*. Oxford University Press. Second Edition.

Xenos, D. (2013). *The European Unified Patent Court: Assessment and Implications of the Federalisation of the Patent System in Europe*. SCRIPTed- Journal of Law, Technology & Society Volume 10, Issue 2, pp. 246-277.

Official EU Documentation

Agreement on the Application of Article 65 of the Agreement Concerning the Grant of European Patents (London Agreement). OJ EPO 12/2001, 550.

Agreement Relating to Community Patents (2nd Community Patent Convention) of 15 December 1989 (89/695/EEC). OJ 1989 L 401/1.

Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973. Electronic version available at: http://www.cep.eu/fileadmin/user_upload/Kurzanalysen/EU-Patent/European_Patent_Convention.pdf

Convention 76/76/EEC for the European Patent for the Common Market (Community Patent Convention) of 15 December 1975. OJ 1976, L 17/1.

Council of Ministers of the European Union (2003). Community Patent – Common Political Approach. Council Doc. No 7159/03 of 7 March 2003.

Council of Ministers of the European Union (2003). Preparation of the Meeting of the Council on 26 and 27 November, document partially accessible to the public. Council Doc. No 15086/03 of 21 November 2003.

Council of Ministers of the European Union (2003). Council Press Release database, Memo/03/47, http://europa.eu/rapid/press-release_MEMO-03-47_en.htm, visited November 2013

Council of Ministers of the European Union (2003). Proposal for a Council Regulation on the Community patent – Text revised by the Presidency. Council Doc. 10404/03 (PI 53).

Council of Ministers of the European Union (2004). Press Release database, Memo/04/58, http://europa.eu/rapid/press-release_MEMO-04-58_en.htm?locale=fr, visited November 2013

Council of Ministers of the European Union (2004). Amendments to the Community Patent Regulation. Council Doc. 711904 of 08 March 2004.

Council of Ministers of the European Union (2009). Council Conclusions on an enhanced patent system in Europe, Council Doc. 17229/09 of 7 December 2009.

Council of Ministers of the European Union (2009). General Approach on a Draft Regulation on the EU Patent, Council Doc. 16113/09 ADD 1.

Council of Ministers of the European Union (2010). Draft Regulation on the translation arrangements applicable to the EU patent. Council Doc. 11805/10.

Council of Ministers of the European Union (2010). Council Press Release of 10 November 2010, Extraordinary Council Meetings, Competitiveness (Internal Market, Industry, Research and Space). Council Doc. 16041/10.

Council of Ministers of the EU (2011). Council Doc. No 11328/11 of 23 June 2011. Proposal for a Regulation of the Council and the European Parliament implementing enhanced cooperation in the area of the creation of unitary patent protection and Proposal for a Council Regulation implementing enhanced cooperation in the area of unitary patent protection with regard to applicable translation arrangements – General Approach.

Council of Ministers of the EU (2011). Council Working Document of 11 November 2011, Doc No. 16741/11, Draft Agreement on a Unified Patent Court and draft Statute – Revised Presidency text.

Council of Ministers of the EU (2011). Council Decision of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection, (2011/167/EU), OJ L 2011 076, 0053-0055.

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 2012 L 361/89.

Council of Ministers of the European Union (2013). Council Agreement on a Unified Patent Court (2013/C 175/01), OJ C 2013 175 0001-0040.

Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. OJ L 213, 30.07.1998, p. 13-21.

European Commission (1985). White Paper of 14 June 1985. Completing the Internal Market. [COM (1985) 310 final].

European Commission (1997). Green Paper of 24 June 1997. Promoting Innovation through Patents- Green Paper on the Community Patent and the Patent System in Europe. [COM (1997) 314 final].

European Commission (1999). Communication from the Commission of 5 February 1999. Promoting Innovation through Patents – The follow-up to the green paper on the Community Patent and the Patent system in Europe. COM (1999) 42 final.

European Commission (2000). Proposal for a Council Regulation on the Community Patent. [COM (2000) 412 final], OJ 377E.

European Commission (2003), Proposal for a Council Decision Conferring Jurisdiction on the Court of Justice in disputes relating to the Community Patent. [COM (2003) 827 final].

European Commission (2003), proposal for a Council Decision establishing the European Patent Court and concerning appeals before the Court of First Instance. [COM (2003) 828 final].

European Commission (2007). Communication from the Commission on 3 April 2007. Enhancing the patent system in Europe. [COM (2007) 165 final].

European Commission (2010). Proposal for a Council Regulation on the translation arrangements for the EU patent. (COM (2010) 350 Final).

European Commission (2010). Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 27 October 2010. Towards a Single Market Act. For a highly competitive social market economy. 50 Proposals for improving our work, business and exchanges with another. [COM (2010) 608 final].

European Commission (2010). Proposal for a Council Decision authorizing enhanced cooperation in the area of creation of unitary patent protection of 14 December 2010. [COM (2010) 790 final].

European Commission (2011), Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection on 13 April 2011. [COM (2011) 215 final].

European Commission (2011). Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to applicable translation arrangements on 13 April 2011. [COM (2011) 216 final].

European Commission (2011). Commission Staff Working Paper of 14 April 2011, 'Impact Assessment. Accompanying document to the Proposal for a Regulation of the European

Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection and Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements', [SEC(2011) 482 final].

European Council (2012). Press Release of 29 June 2012, EU unitary patent – a historical breakthrough, <http://www.european-council.europa.eu/home-page/highlights/eu-unitary-patent-%E2%80%93-a-historical-breakthrough?lang=en>, visited November 2013

European Court of Justice (1994). Opinion 1/94 of the Court of Justice of 15 November 1994.

European Parliament (2012). European Parliament Press Release of 11 December 2012, 'Parliament approves EU unitary patent rules', <http://www.europarl.europa.eu/news/en/news-room/content/20121210IPR04506/html/Parliament-approves-EU-unitary-patent-rules>, visited November 2013.

European Union (2000). Press Release Database. IP/00/714 available at: http://europa.eu/rapid/press-release_IP-00-714_en.htm, visited December 2013.

Protocol on the Settlement of Litigation Concerning the Infringement and Validity of Community Patents (Protocol on Litigation), OJ 1989, L 401/34.

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, OJ L 2012 L 361/1.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (2007/C 306/01), Electronic version available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>