



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 18 November 2014¹

Case C-146/13

Kingdom of Spain
v
European Parliament,

Council of the European Union

(Action for annulment — Implementation of enhanced cooperation — Creation of unitary patent protection — Regulation (EU) No 1257/2012 — Effective judicial review — Lack of legal basis — Misuse of powers — Principles of autonomy and uniformity — Review of legality — Application of EU law)

1. By its action, the Kingdom of Spain seeks the annulment of 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.²
2. This regulation was adopted following Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection.³
3. It forms part of the ‘unitary patent package’ with 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,⁴ and the Agreement on a Unified Patent Court signed on 19 February 2013.⁵

1 — Original language: French.

2 — OJ 2012 L 361, p. 1, the ‘contested regulation’.

3 — OJ 2011 L 76, p. 53, the ‘decision on enhanced cooperation’. This decision was the subject of two actions for annulment brought by the Kingdom of Spain and the Italian Republic which were dismissed by the Court by its judgment in *Spain and Italy v Council* (C-274/11 and C-295/11, EU:C:2013:240).

4 — OJ 2012 L 361, p. 89.

5 — OJ 2013 C 175, p. 1, the ‘UPC Agreement’.

I – Legal framework

A – *International law*

1. The European Patent Convention

4. Article 2 of the Convention on the Grant of European Patents (European Patent Convention), which was signed in Munich on 5 October 1973 and entered into force on 7 October 1977,⁶ under the heading ‘European patent’, states:

‘(1) Patents granted under this Convention shall be called European patents.

(2) The European patent shall, 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.’

5. Article 142 of the EPC, entitled ‘Unitary patent’, provides:

‘(1) Any group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States.

(2) Where any group of Contracting States has availed itself of the authorisation given in paragraph 1, the provisions of this Part shall apply.’

2. The UPC Agreement

6. Article 23 of the UPC Agreement provides:

‘Actions of the [Unified Patent] Court⁷ are directly attributable to each Contracting Member State individually, including for the purposes of Articles [258 TFEU to 260 TFEU], and to all Contracting Member States collectively.’

7. Article 89(1) of the UPC Agreement provides:

‘This Agreement shall enter into force on 1 January 2014 or on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place or on the first day of the fourth month after the date of entry into force of the amendments to Regulation (EU) No 1215/2012 [of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁸] concerning its relationship with this Agreement, whichever is the latest.’

6 — The ‘EPC’.

7 — The ‘UPC’.

8 — OJ 2012 L 351, p. 1 (‘the Brussels I Regulation’).

B – *EU law*

8. Recitals 24 and 25 in the preamble to the contested regulation are worded as follows:

‘(24) Jurisdiction in respect of European patents with unitary effect [⁹] should be established and governed by an instrument setting up a unified patent litigation system for [EPUEs].

(25) Establishing a UPC to hear cases concerning the EPUE is essential in order to ensure the proper functioning of that patent, consistency of case-law and hence legal certainty, and cost-effectiveness for patent proprietors. It is therefore of paramount importance that the participating Member States ratify the [UPC] Agreement in accordance with their national constitutional and parliamentary procedures and take the necessary steps for that Court to become operational as soon as possible.’

9. According to Article 1 of the contested regulation, the regulation implements enhanced cooperation in the area of the creation of unitary patent protection, and constitutes a special agreement within the meaning of Article 142 of the EPC.

10. Article 2(a) to (c) of the contested regulation provides:

‘For the purposes of this Regulation:

- (a) “Participating Member State” means a Member State which participates in enhanced cooperation in the area of the creation of unitary patent protection by virtue of the [decision on enhanced cooperation], or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) [TFEU], at the time the request for unitary effect as referred to in Article 9 is made;
- (b) “European patent” means a patent granted by the European Patent Office [¹⁰] under the rules and procedures laid down in the EPC;
- (c) “EPUE” means a European patent which benefits from unitary effect in the participating Member States by virtue of this Regulation.’

11. Article 3(1) of the contested regulation provides:

‘A European patent granted with the same set of claims in respect of all the participating Member States shall benefit from unitary effect in the participating Member States provided that its unitary effect has been registered in the Register for unitary patent protection.

A European patent granted with different sets of claims for different participating Member States shall not benefit from unitary effect.’

12. According to Article 5(1) and (2) of the contested regulation:

‘1. The [EPUE] shall confer 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 applicable limitations.

9 — ‘EPUE’.

10 — The ‘EPO’.

2. The scope of that right and its limitations shall be uniform in all participating Member States in which the patent has unitary effect.'

13. Article 9 of the contested regulation states:

'1. The participating Member States shall, within the meaning of Article 143 of the EPC, give the EPO the following tasks, to be carried out in accordance with the internal rules of the EPO:

- (a) to administer requests for unitary effect by proprietors of European patents;
- (b) to include the Register for unitary patent protection within the European Patent Register and to administer the Register for unitary patent protection;
- (c) to receive and register statements on licensing referred to in Article 8, their withdrawal and licensing commitments undertaken by the proprietor of the [EPUE] in international standardisation bodies;
- (d) to publish the translations referred to in Article 6 of Regulation ... No 1260/2012 during the transitional period referred to in that Article;
- (e) to collect and administer renewal fees for [EPUEs], in respect of the years following the year in which the mention of the grant is published in the *European Patent Bulletin*; to collect and administer additional fees for late payment of renewal fees where such late payment is made within six months of the due date, as well as to distribute part of the collected renewal fees to the participating Member States;
- (f) to administer the compensation scheme for the reimbursement of translation costs referred to in Article 5 of Regulation ... No 1260/2012;
- (g) to ensure that a request for unitary effect by a proprietor of a European patent is submitted in the language of the proceedings as defined in Article 14(3) of the EPC no later than one month after the mention of the grant is published in the *European Patent Bulletin*; and
- (h) to ensure that the unitary effect is indicated in the Register for unitary patent protection, where a request for unitary effect has been filed and, during the transitional period provided for in Article 6 of Regulation ... No 1260/2012, has been submitted together with the translations referred to in that Article, and that the EPO is informed of any limitations, licences, transfers or revocations of [EPUEs].

2. The participating Member States shall ensure compliance with this Regulation in fulfilling their international obligations undertaken in the EPC and shall cooperate to that end. In their capacity as Contracting States to the EPC, the participating Member States shall ensure the governance and supervision of the activities related to the tasks referred to in paragraph 1 of this Article and shall ensure the setting of the level of renewal fees in accordance with Article 12 of this Regulation and the setting of the share of distribution of the renewal fees in accordance with Article 13 of this Regulation.

To that end they shall set up a select committee of the Administrative Council of the European Patent Organisation ("Select Committee") within the meaning of Article 145 of the EPC.

The Select Committee shall consist of the representatives of the participating Member States and a representative of the Commission as an observer, as well as alternates who will represent them in their absence. The members of the Select Committee may be assisted by advisers or experts.

Decisions of the Select Committee shall be taken with due regard for the position of the Commission and in accordance with the rules laid down in Article 35(2) of the EPC.

3. The participating Member States shall ensure effective legal protection before a competent court of one or several participating Member States against the decisions of the EPO in carrying out the tasks referred to in paragraph 1.'

14. Article 18 of the contested regulation reads as follows:

'1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. It shall apply from 1 January 2014 or the date of entry into force of the [UPC] Agreement ..., whichever is the later.

By way of derogation from Articles 3(1), 3(2) and 4(1), a European patent for which unitary effect is registered in the Register for unitary patent protection shall have unitary effect only in those participating Member States in which the [UPC] has exclusive jurisdiction with regard to [EPUEs] at the date of registration.

3. Each participating Member State shall notify the Commission of its ratification of the Agreement at the time of deposit of its ratification instrument. The Commission shall publish in the *Official Journal of the European Union* the date of entry into force of the Agreement and a list of the Member States who have ratified the Agreement at the date of entry into force. The Commission shall thereafter regularly update the list of the participating Member States which have ratified the UPC Agreement and shall publish such updated list in the *Official Journal of the European Union*.

4. The participating Member States shall ensure that the measures referred to in Article 9 are in place by the date of application of this Regulation.

5. Each participating Member State shall ensure that the measures referred to in Article 4(2) are in place by the date of application of this Regulation or, in the case of a participating Member State in which the [UPC] does not have exclusive jurisdiction with regard to [EPUEs] on the date of application of this Regulation, by the date from which the [UPC] has such exclusive jurisdiction in that participating Member State.

6. Unitary patent protection may be requested for any European patent granted on or after the date of application of this Regulation.'

II – Procedure before the Court and forms of order sought

15. By application lodged at the Registry of the Court of Justice on 22 March 2013, the Kingdom of Spain brought the present action.

16. By orders of the President of the Court of 12 September 2013, the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the Commission were granted leave to intervene in support of the form of order sought by the European Parliament and the Council of the European Union, pursuant to Article 131(2) of the Rules of Procedure of the Court.

17. Written observations were submitted by all the interveners, except for the Grand Duchy of Luxembourg.

18. The Kingdom of Spain claims that the Court should:

- declare legally non-existent the contested regulation or, in the alternative, annul it in its entirety;
- in the further alternative, annul:
 - Article 9(1), in its entirety, and Article 9(2) of the contested regulation, in the terms set out in the fifth plea in law in support of this action,
 - Article 18(2) of the contested regulation in its entirety, and all references in this regulation to the UPC as the judicial regime for the EPUE and as the source of law for the EPUE,
- order the Parliament and the Council to pay the costs.

19. The Parliament and the Council contend that the Court should:

- dismiss the action;
- order the Kingdom of Spain to pay the costs.

III – The action

20. In support of its action, the Kingdom of Spain relies on seven main pleas.

21. The first plea alleges breach of the values of the rule of law as laid down in Article 2 TEU. The Kingdom of Spain claims that the contested regulation provides for protection based on the European patent, whereas the administrative procedure for the grant of such a patent is not subject to any form of judicial review which ensures the correct and uniform application of EU law and the protection of fundamental rights.

22. The second plea alleges lack of a legal basis. The Kingdom of Spain maintains that Article 118 TFEU was not the appropriate legal basis for adopting the contested regulation, as it does not establish measures to ensure the uniform protection provided for in that provision.

23. The third plea alleges misuse of power. In the Kingdom of Spain's view, the Parliament and the Council misused their powers in that the contested regulation did not conform to the objective of enhanced cooperation referred to in Article 20(1) TEU.

24. The fourth plea alleges infringement of Article 291(2) TFEU. In the first place, the Kingdom of Spain disputes the power assigned to the participating Member States in the Select Committee to set the level of renewal fees and determine the method of distribution thereof. According to that Member State, Article 291 TFEU does not allow the EU legislature to delegate such a power to the participating Member States. In the alternative, the Kingdom of Spain alleges infringement of the principles established in the judgment in *Meroni v High Authority*¹¹ in that the delegation of powers does not fulfil the conditions laid down in that judgment. The fifth plea alleges infringement of the same principles established in that judgment because certain administrative tasks relating to the EPUE are delegated to the EPO in Article 9(1) of the contested regulation. The Kingdom of Spain claims that the delegated powers imply a wide scope for discretion and, moreover, that the EPO's acts are not subject to judicial review.

¹¹ — 9/56, EU:C:1958:7.

25. The sixth and seventh pleas allege infringement of the principles of autonomy and uniformity of EU law. The Kingdom of Spain argues that the powers of the European Union and of its institutions have been undermined, as the first subparagraph of Article 18(2) of the contested regulation makes the regulation's applicability conditional on the date of entry into force of the UPC Agreement if it occurs after 1 January 2014, and states that the special judicial regime for the EPUE is provided for in that agreement and not in the contested regulation.

26. In the alternative, the Kingdom of Spain requests the partial annulment of the contested regulation as worded in point 18 of this Opinion.

A – The first plea, alleging breach of the values of the rule of law

1. Arguments of the parties

27. The Kingdom of Spain claims that the contested regulation, in that it establishes rules based on an intellectual property right granted by the EPO, whose measures are not subject to judicial review, should be annulled as it disregards the values of respect for the rule of law as laid down in Article 2 TEU.

28. In the view of that Member State, the administrative proceedings relating to the grant of a European patent are, in their entirety, not subject to any judicial review ensuring the correct and uniform application of EU law and the protection of fundamental rights.

29. The said Member State claims that it is unacceptable that the contested regulation should incorporate into the EU legal order measures emanating from an international body which is not subject to the aforementioned principles. First, the Boards of Appeal and the Enlarged Board of Appeal are bodies established within the EPO which are not independent of it and, second, their decisions are not subject to any form of judicial review.

30. The Parliament and the Council contend that the level of protection of individual rights afforded by the established system is compatible with the principles of the rule of law.

31. The Parliament states that, pursuant to Article 32 of the UPC Agreement, the validity, nullity and infringement of the unitary patent are subject to judicial review by the UPC, that the administrative decisions of the EPO relating to the grant of an EPUE may be the subject of administrative appeals before various bodies within the EPO, that the level of protection enjoyed by individuals under the EPC has been regarded as acceptable by the Member States, which are all parties to that convention, and that the judicial review of the EPO's decisions relating to the administrative tasks referred to in Article 9 of the contested regulation is provided for in paragraph 3 of that provision.

32. The Council, for its part, contends that the system established by the EPC is compatible with the fundamental right of access to a court. Although the European Patent Organisation¹² enjoys immunity from jurisdiction and enforcement, such immunity can be withdrawn in a specific case, and the Organisation may conclude additional agreements with one or more contracting parties for the purpose of implementing provisions relating to immunity. Moreover, there is nothing to prevent the Organisation from stating in an international agreement that its decisions are subject to review by a judicial authority.

12 — In its defence, the Council adheres to the same practice of using 'EPO' to refer both to the European Patent Organisation and to the European Patent Office.

33. The Council then argues that the matter of the compatibility of the immunity from jurisdiction of international organisations with the right of access to a court has been examined at national and international level. The European Court of Human Rights has also recognised the compatibility of the immunity from jurisdiction of international organisations with the fundamental right of access to a court in so far as the applicants have available to them reasonable alternative means to protect effectively their rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.¹³ That is the case here. The independence and judicial nature of the Boards of Appeal and Enlarged Board of Appeal were confirmed by the European Commission of Human Rights,¹⁴ and the European Court of Human Rights has held that the protection of fundamental rights in the EPO is, in general, equivalent to the levels of protection guaranteed by the German Constitution.

34. The interveners agree with the arguments put forward by the Parliament and the Council. However, the Kingdom of Belgium, the Federal Republic of Germany, the French Republic and the Kingdom of Sweden maintain, first and foremost, that the first plea is inoperative in so far as the contested regulation does not aim to regulate the conditions for the grant or validity of a European patent. Its aim and effect is also not to incorporate the EPO measures or the EPC system into the EU legal order. The only EPO measures to be taken into account in the assessment of the validity of the contested regulation are those relating to recognition of the unitary effect of the European patent, which are consistent with EU law as regards the judicial review of the UPC. In any event, these Member States agree with the reasons stated by the Parliament and the Council why fundamental rights are satisfactorily guaranteed in the EPC system.

2. My assessment

35. First of all, I would point out that the Council, the French Republic and the Commission have emphasised the lack of clarity of the first plea, arguing that it is not based on the infringement of any fundamental right in particular, but on an alleged breach of the values of the European Union.

36. I note that, under the second paragraph of Article 263 TFEU, the Court, in the context of reviewing the legality of legislative acts, has jurisdiction *inter alia* in actions brought on grounds of infringement of any rule of law relating to the application of the Treaties.

37. Even if the parties cannot directly rely on the rule of law, as laid down in Article 2 TEU, in order to annul an EU act, the fact remains that it would be difficult to deny the Court of Justice the possibility of viewing the rule of law as a legal rule actionable before it,¹⁵ especially as the Kingdom of Spain makes reference, in its application, to the principle prohibiting arbitrary measures, to the right to an effective legal remedy and to the observance of uniformity of application of EU rules.¹⁶

38. The Court may therefore examine such a plea claiming a breach of the values of respect for the rule of law.

39. However, like the Kingdom of Belgium, the Federal Republic of Germany, the French Republic and the Kingdom of Sweden, I consider that this first plea, alleging that the regime for granting patents is inconsistent with Article 2 TEU, is inoperative, as it has no effect on the lawfulness of the contested regulation.

13 — See ECtHR, *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, and ECtHR, *Beer and Regan v. Germany* [GC], no. 28934/95, 18 February 1999.

14 — ECtHR, *Lenzing AG v. Germany* (dec.), no. 39025/97.

15 — See Pech, L., 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Paper 04/09, NYU School of Law, New York, 2012, pp. 58 to 60.

16 — See paragraph 36 of the Kingdom of Spain's application.

40. First, the EU legislature chose to accept the rules on the grant of the European patent before the contested regulation was enacted and in a very specific context and, second, the aim of the contested regulation is limited in scope.

a) The EU legislature's choice

41. The acceptance of the EPC rules on the grant of the European patent is to be viewed here in the context of enhanced cooperation and in the rational choice made by the EU legislature.

42. The Court has consistently allowed the EU legislature a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments.¹⁷

43. They include the area of intellectual property and more particularly that of patents.

44. I would point out that, since the beginning of the patent law harmonisation process in Europe, the EU legislature has always intended to establish an EU patent on the basis of the EPC system and the existing patent.¹⁸

45. Moreover, the EU legislature did not want to rule out the possibility of using that system as a basis in the context of enhanced cooperation. Such a system has the advantage of already being in place and of having proved its full effectiveness in its operation along with the quality and high degree of technicality and expertise which are features of it. Its rules are also binding on all EU Member States that are Contracting States of the EPC and, as the Council points out, the Member States have never considered their constitutional principles to have been infringed by the effects of the EPO's decisions on the grant of patents.

46. Thus, in the decision on enhanced cooperation which, I would point out, was the subject of two actions for annulment brought by the Kingdom of Spain and the Italian Republic which were dismissed, the objective stated in recital 7 in the preamble thereto refers to the creation of a unitary patent, explaining that it provides uniform protection throughout the territories of all the participating Member States, which would be 'granted in respect of all those Member States by the [EPO]'.

47. The Kingdom of Spain itself recognises the various options which the EU legislature had at its disposal when exercising its powers¹⁹ and does not call into question the legislature's choice as such. However, it considers that, by 'incorporating' into its rules an international system in which the constitutional principles of the Treaties are not respected, the contested regulation infringes the values of respect for the rule of law.

48. I consider that this analysis is erroneous even in the light of the purpose of the contested regulation.

17 — See, to this effect, judgment in *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraph 120).

18 — See p. 3 of the Proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection (COM(2010) 790 final).

19 — See paragraph 17 of the Kingdom of Spain's application.

b) Purpose of the contested regulation

49. I note that, according to Article 1(2) of the contested regulation, the regulation constitutes a special agreement within the meaning of Article 142 of the EPC,²⁰ under which '[a]ny group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States'.

50. Prior to the contested regulation, the EU legislature indeed intended to use as a basis the EPO's system for granting European patents without, for all that, incorporating that system into the contested regulation. The very purpose of the regulation indicates that it is concerned neither with regulating the conditions for the grant and validity of the European patent nor with providing, for that purpose, for a system such as that which has been established for review of the EPO's decisions relating to the tasks assigned to it under Article 9(2) of the contested regulation.

51. It is also clear that, if the contested regulation were to be annulled, the conditions for the grant or validity of the European patent would not be affected by such annulment.

52. In my view, the sole purpose of the contested regulation is to incorporate recognition of the unitary effect of a European patent already granted under the EPC.

53. As the Kingdom of Belgium, the Federal Republic of Germany, the French Republic and the Kingdom of Sweden remark, the EU legislature limited itself to stating the nature, conditions for grant and effects of unitary protection. The Kingdom of Spain also recognised this in paragraph 20 of its application.

54. In this regard, I refer to the wording of the contested regulation, which is unequivocal.

55. Thus, the wording of the title of the regulation leaves no room for doubt, stating that it is 'implementing enhanced cooperation *in the area of the creation of unitary patent protection*'.²¹

56. Moreover, Article 1 of the contested regulation, entitled 'Subject matter', states, in paragraph 1, that the regulation 'implements enhanced cooperation in the area of the *creation of unitary patent protection*, authorised by [the decision on enhanced cooperation]'.²²

57. Recital 7 in the preamble to the regulation also states when unitary effect will take effect, specifying that '[u]nitary patent protection should be achieved by attributing unitary effect to European patents *in the post-grant phase by virtue of this Regulation*',²³ which indeed means that the EU legislature intended to cover only the phase subsequent to the grant of the European patent in the contested regulation. Its intervention in the implementation of enhanced cooperation takes place at the precise time when unitary protection is achieved.

58. The unitary protection organised by the contested regulation therefore takes effect only after the European patent has been granted and for as long as it is kept in force. The regulation therefore only attributes to European patents an additional characteristic, namely unitary effect, without affecting the procedure regulated by the EPC,²⁴ which the EU Member States that are parties to that convention are required to observe.

20 — See also recital 6 in the preamble to the contested regulation.

21 — Emphasis added.

22 — *Idem*.

23 — *Idem*.

24 — See paragraph 9 of the Kingdom of Belgium's observations.

59. The protection conferred is no longer regulated by the national law of the various Member States under Article 64 of the EPC but by the uniform implementation provisions of the contested regulation.

60. The contested regulation supplies a definition of the EPUE, states when it will take effect and states the rights that it confers and their scope. It also lays down financial provisions on the fees generated by the EPUE and institutional provisions on its management, including administrative tasks assigned to the EPO, whose decisions are, in this case, the only decisions which may be called into question in assessing the lawfulness of the contested regulation.

61. In the light of the foregoing considerations, I propose that the Court should reject the Kingdom of Spain's first plea as inoperative, since it does not affect the lawfulness of the contested regulation, as its legality cannot depend on the compatibility of the EPO's decisions on the grant of European patents with EU law.

B – The second plea, alleging the non-existence of the contested regulation owing to its lack of a legal basis

1. Arguments of the parties

62. By its second plea, the Kingdom of Spain claims that Article 118 TFEU was not the appropriate legal basis for adopting the contested regulation and that the regulation must be deemed non-existent.

63. It maintains that the contested regulation is devoid of any substantial content, in particular as it does not state the acts against which the EPUE provides protection. The subject-matter and purpose of the contested regulation do not therefore correspond to the legal basis on which it is founded.

64. In the Kingdom of Spain's view, the reference to the national legislation of the participating Member States on the basis of Article 5(3) of the contested regulation does not guarantee uniform protection of the Union's intellectual and industrial property rights and that regulation does not bring about an approximation of the laws of the Member States for that purpose.

65. The Parliament and the Council contend that Article 118 TFEU is the appropriate legal basis. That provision, which provides for the establishment of measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting-up of centralised Union-wide authorisation, coordination and supervision arrangements, does not require complete harmonisation of national laws in so far as it creates intellectual or industrial property rights affording uniform protection in the participating Member States.

66. In view of its purpose and content, the contested regulation satisfies the aforementioned requirement, as it establishes the EPUE, which affords uniform protection in the territories of the participating Member States, and defines its nature, scope and effects.

67. All the interveners concur with the observations of the Parliament and the Council, and the Kingdom of the Netherlands also points out that the Court has already held, in *Spain and Italy v Council*,²⁵ that Article 118 TFEU is an appropriate basis for achieving the unitary effect of the European patent.

25 — EU:C:2013:240.

2. My assessment

68. The Kingdom of Spain considers that the legal basis conferred by Article 118 TFEU is inappropriate for the adoption of the contested regulation in that it considers that the regulation is legislation devoid of content, the ultimate purpose of which is that the powers conferred on the Union by the Treaty may be exercised by an international body, and that the reference to national legislation is not such as to guarantee uniform protection in the European Union.

69. I disagree with that analysis for the following reasons.

70. I would point out that, according to settled case-law, ‘the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure’.²⁶

71. The aim of the contested regulation is, it should be noted, to confer uniform protection in the territories of all the participating Member States.²⁷

72. This is reflected in the first subparagraph of Article 3(2) of the contested regulation, which provides that ‘[an] [EPUE] shall have a unitary character [and that] [i]t shall provide uniform protection and shall have equal effect in all the participating Member States’.

73. Such protection brings real benefit in terms of uniformity and hence of integration compared with the situation resulting from the implementation of the rules laid down by the EPC, which, in every one of its Contracting States, guarantee protection whose extent is defined by national law.²⁸

74. Indeed, under Article 64(1) of the EPC, the effects of the European patent are determined by the national legislation of ‘each Contracting State in respect of which it is granted’. The proprietor of the European patent was therefore obliged to apply for registration of his European patent in each State which was a party to the EPC in which he wished to receive protection.

75. This meant that, for the same offence committed in a number of Member States, there were as many different procedures and laws applicable to the settlement of disputes, which caused considerable legal uncertainty.

76. As to the content of the contested regulation, I cannot concur with the Kingdom of Spain’s analysis, which claims that the regulation is an ‘empty shell’, when the provisions made by it are sufficient and the EU legislature’s competence is shared with the Member States.

77. First, Article 3(1) of the contested regulation lays down the conditions for the grant of unitary effect, stating that the European patent will benefit from unitary effect only if it has been granted with the same set of claims in respect of all the participating Member States and its unitary effect has been registered in the Register for unitary patent protection.

78. Article 4 of the contested regulation concerns the date of effect of the EPUE, namely the date of publication by the EPO of the mention of the grant of the European patent in the *European Patent Bulletin*, such that it is deemed not to have taken effect as a national patent in the territory of the participating Member States on that date.

26 — See judgment in *United Kingdom v Council* (C-431/11, EU:C:2013:589, paragraph 44 and the case-law cited).

27 — A consequence which follows necessarily from Article 20 TEU, paragraph 4 of which states that ‘[a]cts adopted in the framework of enhanced cooperation shall bind only participating Member States’ (see judgment in *Spain and Italy v Council* (EU:C:2013:240, paragraph 68)).

28 — See judgment in *Spain and Italy v Council* (EU:C:2013:240, paragraph 62).

79. Article 5 of the contested regulation, on uniform protection, defines the effects of unitary character and the manner of ensuring uniform protection in all the participating Member States.

80. Paragraph 1 of that article provides that the EPUE will confer 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 applicable limitations.

81. Paragraph 2 of that article provides that the scope of that right and its limitations will be uniform in all participating Member States in which the patent has unitary effect.

82. Moreover, since the Treaty of Lisbon, Article 118 TFEU has supplied an appropriate legal basis for the creation of intellectual property rights and that provision refers expressly to the establishment and functioning of the internal market, an area which comes within the competence shared between the Union and the Member States within the meaning of Article 4(2) TFEU.²⁹

83. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area, as laid down in Article 2(2) TFEU, which adds that '[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence'.

84. Furthermore, Article 118 TFEU provides that the EU legislature will 'establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the *setting up of centralised Union-wide authorisation, coordination and supervision arrangements*'.³⁰

85. We must not lose sight of the fact that the powers conferred by Article 118 TFEU are, in the present case, exercised in connection with implementation of enhanced cooperation and that the EU legislature, exercising its broad scope for discretion, chose to have recourse to several legal instruments derived from international law, EU law and national law for the purpose of that implementation, which is not disputed by the Kingdom of Spain.

86. As a result of this, the EU legislature was able, in my view, to make reference to national law by providing, in Article 5(3) of the contested regulation in conjunction with Article 7 thereof, that the acts against which the patent provides protection and the applicable limitations will be those defined by the law applied to EPUEs in the participating Member State whose national law is applicable to the EPUE as an object of property.

87. In this regard, recital 9 in the preamble to the contested regulation makes it possible to interpret that provision in that it states that '[i]n matters not covered by this Regulation ..., the provisions of the EPC, the [UPC] Agreement, including its provisions defining the scope [and limitations of the right to prevent any third person from committing acts against which the patent provides protection], and national law, including rules of private international law, should apply'.

88. Articles 25 to 27 of the UPC Agreement define the acts against which an EPUE provides protection and the limitations of the effects of such a patent. The participating Member States will have to transpose the provisions of those articles into their national law.

29 — Ibid. (paragraph 25).

30 — Emphasis added. See, in respect of the wording 'Union-wide', judgment in *Spain and Italy v Council* (EU:C:2013:240, paragraph 68).

89. Moreover, Article 118 TFEU, which forms part of Chapter 3 of Title VII of the FEU Treaty on ‘Approximation of laws’, does not necessarily require the EU legislature to completely harmonise all aspects of intellectual property law by establishing an exhaustive set of rules on its operation or content. The Kingdom of Spain itself recognised this in its reply.³¹

90. In my view, therefore, there is nothing in the wording of Article 118 TFEU which precludes the Union act by which the right is established from referring to national law, as that act guarantees that the right provides uniform protection in the territory of the participating Member States.

91. The guarantee of such protection is also called into question by the Kingdom of Spain in this case.

92. However, if the EU legislature refers to national law, this does not mean, for all that, that the uniform protection referred to in Article 118 TFEU will not be guaranteed.

93. It is clear from a combined reading of Articles 5(3) and 7 of the contested regulation and from recital 9 in the preamble thereto that only one national legislation will define the acts against which the EPUE provides protection. In other words, each EPUE will be subject to the national law of a single Member State and that legislation will apply throughout the territory of the participating Member States.

94. Therefore, by referring to the national law applicable in each case, the contested regulation guarantees uniform protection in that that reference will also cover any international agreement to which the Member States are party, including the UPC Agreement, which the Member States are bound to ratify in accordance with the principle of sincere cooperation referred to in Article 4(3) TEU.³²

95. In the light of the foregoing, I propose that the Court should reject the Kingdom of Spain’s second plea as unfounded.

C – The third plea, alleging a misuse of power

1. Arguments of the parties

96. The Kingdom of Spain alleges that the Parliament and the Council have committed a misuse of power in that the contested regulation does not conform to the objective of enhanced cooperation referred to in Article 20(1) TEU. Since the effects of the EPUE are stated in the UPC Agreement, the sole purpose of the contested regulation is to create the appearance of a concept and of rules specific to the European Union when, in reality, it is departing from EU law and from the controls exercised by it. Contrary to the Parliament’s assertion, this matter was not settled by the Court in *Spain and Italy v Council*.³³

97. The Parliament and the Council contend that this plea should be rejected.

31 — See paragraph 21 of the Kingdom of Spain’s reply.

32 — See recital 25 in the preamble to the contested regulation.

33 — EU:C:2013:240.

98. The Parliament points out that the Court, in its judgment, rejected the allegations of misuse of power in establishing unitary patent protection. The Council adds that the contested regulation and the creation of the EPUE further the achievement of the Union's objectives, since a proprietor of a European patent who wishes to obtain protection in the 25 participating Member States would be required, without the unitary effect of such a patent, to validate that patent separately in each of the 25 Member States, and the said patent would have to be confirmed and, in the event of a dispute, defended separately in each of the 25 Member States.

99. The interveners concur with the arguments of the Parliament and of the Council.

2. My assessment

100. By its third plea, the Kingdom of Spain claims that the contested regulation is vitiated by a misuse of power in that it uses enhanced cooperation for purposes other than those assigned to it by the Treaties.

101. In its view, the contested regulation is an 'empty shell' and does not therefore guarantee uniform protection, which is the purpose of the decision on enhanced cooperation.

102. The Court has consistently held that a measure is vitiated by misuse of power only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case.³⁴

103. Although the Kingdom of Spain argues that this plea is presented in the context of enhanced cooperation and not with reference to the contested regulation as such, which is the subject of the second plea, the fact remains that it is submitting the same argument that the contested regulation is devoid of content in that it does not contain any legal rules guaranteeing uniform protection.

104. As this argument has been rejected in the course of examination of the second plea, the evidence on which the Kingdom of Spain relies is therefore irrelevant. Consequently, I consider that the third plea must be rejected as unfounded.

D – The fourth and fifth pleas, alleging infringement of Article 291(2) TFEU and of the principles laid down in Meroni v High Authority

1. Arguments of the parties

105. By its fourth plea, the Kingdom of Spain contests the assignment, in Article 9(2) of the contested regulation, to the participating Member States acting in the Select Committee, of the power to set the level of renewal fees and determine the share of distribution of those fees. The assignment of such implementing powers to the participating Member States constitutes, principally, an infringement of Article 291(2) TFEU and, in the alternative, if the Court found that that provision had not been infringed, an infringement of the principles laid down in *Meroni v High Authority*,³⁵ on the delegation of powers.

³⁴ — Ibid. (paragraph 33 and the case-law cited).

³⁵ — EU:C:1958:7.

106. The Parliament contends that the assignment of certain powers to agencies has always been an exception to the Treaty rules on implementation of EU law which is legally acceptable in certain circumstances. It also questions the relevance of that judgment where powers are assigned to an international body such as the Select Committee.

107. The Council considers that, under Article 291(1) TFEU, where the EU institutions adopt legally binding Union acts, the responsibility for adopting appropriate implementing measures lies with the Member States. Under paragraph 2 of that article, implementing measures are adopted by the Commission or, where appropriate, the Council, only where the application of those acts necessitates uniform conditions. In this regard, the Council argues, the Kingdom of Spain does not demonstrate why the setting of renewal fees and the determination of the share of distribution of those fees must be implemented uniformly EU-wide. It follows that the judgment in *Meroni v High Authority*³⁶ is irrelevant in the present case.

108. In any event, the Parliament and the Council consider that the conditions imposed by that judgment have been met, while the Parliament states that that case-law must be examined in the light of Article 118 TFEU, which requires the establishment of ‘centralised’ arrangements for the EPUE.

109. The interveners concur with the observations of the Parliament and of the Council. A number of those parties consider that the principles stated in that judgment are not applicable. They are, in any event, respected.

110. By its fifth plea, the Kingdom of Spain claims that Article 9(1) of the contested regulation, which delegates certain administrative tasks to the EPO, infringes the principles laid down in *Meroni v High Authority*.³⁷ The powers being delegated are not those of the Member States but of the European Union.

111. The Parliament and the Council contend that that case-law is inapplicable.

112. The interveners concur with the observations of the Parliament and of the Council.

2. My assessment

113. It is common ground that, pursuant to Article 9(2) of the contested regulation, it is for the participating Member States, in the context of the Select Committee established by them, to ensure the setting of the level of renewal fees and the determination of the share of distribution of those fees.

114. The Kingdom of Spain maintains, however, that uniform conditions of implementation were necessary in this case, that, therefore, the implementing powers should, pursuant to Article 291(2) TFEU, have been conferred on the Commission or, in specific cases, on the Council, and that, consequently, that provision has been infringed.

115. I cannot agree with that argument.

116. The Kingdom of Spain relies on a provision which, in my view, cannot be applied here.

117. Under Article 291(2) TFEU, ‘[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 [TEU] and 26 [TEU], on the Council’.

³⁶ — *Idem*.

³⁷ — *Idem*.

118. According to the case-law of the Court, Article 291 TFEU does not provide a definition of the concept of an implementing act, but simply refers, in paragraph 2 thereof, to the need for such an act to be adopted by the Commission or, in certain specific cases, by the Council, in order to ensure that a legally binding EU act is implemented under uniform conditions in the European Union.³⁸

119. The Court has stated that it is, moreover, apparent from Article 291(2) TFEU that it is only '[w]here uniform conditions for implementing legally binding Union acts are needed [that] those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 [TEU] and 26 [TEU], on the Council'.³⁹

120. The Court added that the implementing act 'is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States'.⁴⁰

121. In the present case, I consider that the exercise by the participating Member States of the power conferred on them by Article 9(2) of the contested regulation takes place within a legislative framework established and clarified by the EU legislature which does not need to be implemented under uniform conditions in all the Member States.

122. First, in Article 11 of the contested regulation, the EU legislature defines the renewal fees for EPUEs as being due in respect of the years following the year in which the mention of the grant of the European patent which benefits from unitary effect is published in the *European Patent Bulletin* and makes the existence of the EPUE conditional on payment of those fees.

123. Then, in Article 12 of the contested regulation, the EU legislature states the level of the fees, which are to be progressive throughout the term of the unitary patent protection, sufficient to cover all costs associated with the grant of the European patent and the administration of the unitary patent protection, and sufficient to ensure a balanced budget of the European Patent Organisation. The level of the renewal fees must also take into account, among others, various parameters relating to small and medium-sized enterprises. The EU legislature accordingly states the aim pursued in considering these parameters, namely, to facilitate innovation and foster the competitiveness of European businesses, reflect the size of the market covered by the patent and be similar to the level of the national renewal fees for an average European patent taking effect in the participating Member States at the time the level of the renewal fees is first set.

124. Finally, Article 13 of the contested regulation lists the fair, equitable and relevant criteria on which the share of distribution of renewal fees among the participating Member States must be based.

125. Article 9(2) of the contested regulation is also unequivocal in its drafting where it assigns to the Member States the power to ensure the setting of the level of renewal fees '*in accordance with Article 12 of this Regulation*'⁴¹ and the setting of the share of distribution of the renewal fees '*in accordance with Article 13 of this Regulation*'.⁴²

126. The EU legislature therefore does not leave any discretion to the participating Member States in this regard.

38 — See judgment in *Commission v Parliament and Council* (C-427/12, EU:C:2014:170, paragraph 33).

39 — Ibid. (paragraph 34).

40 — Ibid. (paragraph 39).

41 — Emphasis added.

42 — Idem.

127. Moreover, the regulation has general application, is binding in its entirety and is directly applicable in all the Member States. This provision, laid down in the second paragraph of Article 288 TFEU, is also stated at the end of the contested regulation with express reference to the participating Member States.

128. I consider that Article 9(2) of the contested regulation falls within the scope, on the other hand, of Article 291(1) TFEU, under which Member States must adopt all measures of national law necessary to implement legally binding Union acts.

129. In my view, this is not called into question by the fact that the participating Member States ensure the setting of the level of renewal fees in accordance with Article 12 of the regulation and the setting of the share of distribution of the renewal fees in accordance with Article 13 of the regulation in their capacity as States party to the EPC.

130. This capacity does not, for all that, absolve the Member States of their duty to take any appropriate measure, general or particular, to ensure fulfilment of the obligations resulting from the acts of the institutions of the Union.⁴³

131. As the first sentence of the first subparagraph of Article 9(2) of the contested regulation states, '[t]he participating Member States shall ensure compliance [with the regulation] in fulfilling their international obligations undertaken in the EPC and shall cooperate to that end'.⁴⁴

132. It follows from the foregoing that it is not necessary to examine the arguments relating to the *Meroni v High Authority* case-law,⁴⁵ which is inapplicable here, or the *United Kingdom v Parliament and Council*⁴⁶ case-law, which clarifies the principles laid down in the first judgment.

133. That case-law only provides for the possibility for an EU institution of delegating some of its powers to an EU body or agency or to a body outside the Union and for the possibility for the EU legislature of entrusting implementing measures to an EU body or agency or to a body outside the Union, instead of entrusting such powers to the Commission or the Council.

134. In fact, in *Meroni v High Authority*,⁴⁷ the High Authority had entrusted powers to bodies governed by private law which it had been assigned by the Treaties, and, in *United Kingdom v Parliament and Council*,⁴⁸ the EU legislature had provided that the EU body created would act under the powers conferred on it by the regulation at issue and in the area of application of any binding EU measure conferring tasks on that body.

135. In the light of the foregoing, the fourth plea, in that it alleges infringement of Article 291(2) TFEU, must be rejected as unfounded.

136. As to the fifth plea, which raises the question whether, in entrusting certain administrative tasks to the EPO, the conditions laid down in the *Meroni v High Authority*⁴⁹ case-law for delegation of powers to bodies outside the Union have been fulfilled, it should be noted that, in the present case, administrative tasks are being entrusted to the entity governed by international law, the EPO, not by the EU legislature but by the participating Member States.

43 — See the second subparagraph of Article 4(3) TEU.

44 — Emphasis added.

45 — EU:C:1958:7.

46 — C-270/12, EU:C:2014:18.

47 — EU:C:1958:7.

48 — EU:C:2014:18.

49 — EU:C:1958:7.

137. I would point out that the contested regulation is a special agreement within the meaning of Article 142 of the EPC and that the participating Member States have entrusted to the EPO the administrative tasks stated in Article 9(1) of the contested regulation on the basis of Article 143(1) of the EPC, under which a group of Contracting States may entrust additional tasks to the EPO.

138. In such a case, the *Meroni v High Authority*⁵⁰ case-law cannot be applied either.

139. In the light of the foregoing considerations, the fifth plea must also be rejected as unfounded.

E – The sixth and seventh pleas, alleging breach of the principles of autonomy and uniformity of EU law

1. Arguments of the parties

140. By its sixth plea, the Kingdom of Spain claims that preservation of the autonomy of the EU legal order implies that the powers of the Union and of its institutions must not be undermined by any international treaty. However, they have been undermined in the present case, as the first subparagraph of Article 18(2) of the contested regulation provides that the regulation is applicable from 1 January 2014 or the date of entry into force of the UPC Agreement, whichever is the later. Moreover, the contested regulation provides for a specific judicial regime for the EPUE which is not contained in that regulation but in the UPC Agreement. The Kingdom of Spain claims that the content of that agreement affects the Union's powers and that the said agreement confers the power to unilaterally determine the application of the contested regulation on a third person.

141. The Parliament contends that the link between the contested regulation and the UPC Agreement is the essential condition for the functioning of the uniform patent protection system by means of the unitary patent and does not breach EU law. The UPC Agreement fulfils the two essential conditions required to preserve the autonomy of the EU legal order because, first, the nature of the powers of the Union and of its institutions is not altered and, second, this agreement does not impose any particular interpretation of the EU legal provisions contained in the said agreement on the Union and its institutions in the exercise of their internal powers.

142. Moreover, Parliament argues, the creation of the UPC does not affect any of the Union's powers. First, the power to create a common patent court and determine the scope of its powers still falls to the Member States and has not been entrusted exclusively to the Union. Second, the contested regulation expressly requires Member States to grant the UPC exclusive jurisdiction. The contested regulation, based on Article 118 TFEU, explicitly allows the Member States to adopt provisions in respect of patents which provide for derogations from the Brussels I Regulation. The EU legislature requires the entry into force of the UPC Agreement to be conditional on necessary changes made by the EU legislature to the Brussels I Regulation relating to the link between that regulation and the said agreement. Finally, a number of provisions of the FEU Treaty make the entry into force of a legal act derived from EU law subject to its approval by the Member States.

143. The Council contends that the arguments relied on in support of this plea are inadmissible in that they are directed against the UPC Agreement. In any event, it states that the EU legislature's policy choice was to link the EPUE to the functioning of a distinct judicial body, the UPC, thereby ensuring consistency of case-law and legal certainty. There is no legal obstacle to the creation of a link between the EPUE and the UPC as stated in recitals 24 and 25 in the preamble to the contested regulation. There are also a number of examples in legislative practice of cases where the applicability of a Union act has been conditional on an event outside the scope of that act.

⁵⁰ — *Idem*.

144. The interveners support the position of the Parliament and of the Council.

145. By its seventh plea, the Kingdom of Spain claims that the second subparagraph of Article 18(2) of the contested regulation assigns to Member States the capacity to decide unilaterally whether it is to apply to them. Thus, if a Member State were to decide not to ratify the UPC Agreement, the contested regulation would not be applicable to it and the UPC would not acquire exclusive jurisdiction over its territory to decide on EPUE cases, so that the EPUE would not have unitary effect in that Member State. This breaches the principles of autonomy and uniformity of EU law.

146. The Parliament considers that a Member State's refusal to ratify the UPC Agreement, which effectively results in the inapplicability of the contested regulation in its territory, would constitute a failure to fulfil its obligations under Article 4(3) TEU. Even assuming that there is a risk involved in uniformly applying the contested regulation, such a risk is justified in view of the need to provide effective legal protection and respect the principle of legal certainty.

147. The Council contends that Article 18(2) of the contested regulation provides for derogation only from Articles 3(1) and (2) and 4(1) of the regulation, so that the unitary effect of a European patent is limited to Member States which have ratified the UPC Agreement, while the other provisions of the said regulation apply to all the participating Member States. In view of the importance of the link between the contested regulation and the UPC Agreement, it was considered that this would additionally ensure that the link operates effectively. It is clear from the case-law of the Court that it is legally possible to allow an exception to the applicability of a Union act only if the derogating measure is objectively justified and limited in time. That is the case here.

148. The interveners support the position of the Parliament and of the Council.

2. My assessment

149. I will examine together the sixth and seventh pleas relied on by the Kingdom of Spain in so far as they concern the link between the contested regulation and the UPC Agreement.

150. First, I will examine the first and second parts of the sixth plea, then, second, I will examine the last part of the sixth plea and the seventh plea.

151. I would point out straightaway that the Kingdom of Spain does not dispute the fact that there can be a separate judicial system. In this regard, the Court stated in Opinion 1/09⁵¹ that Article 262 TFEU provides for the option of extending the jurisdiction of the European Union courts to disputes relating to the application of acts of the European Union which create European intellectual property rights and that, consequently, that article does not establish a monopoly for the Court in the field concerned and does not predetermine the choice of judicial structure which may be established for disputes between individuals relating to intellectual property rights.⁵²

51 — EU:C:2011:123.

52 — Paragraph 62. The Court also held that it was for the Member States, having recourse to the institutions of the Union following the procedures laid down in the FEU Treaty, to set up the unitary patent and to lay down the rules attaching to it, including, if necessary, specific rules in the judicial sphere (see judgment in *Spain and Italy v Council* (EU:C:2013:240, paragraph 92)).

a) The first and second parts of the sixth plea

152. In the first part of its sixth plea, the Kingdom of Spain argues that there is no substantial difference between the UPC Agreement and the draft agreement creating a court with jurisdiction to hear actions related to European and Community patents, which the Court held to be incompatible with the provisions of the Treaties.⁵³

153. That Member State considers, first, that the UPC does not form part of the institutional and judicial system of the European Union and, second, that the UPC Agreement does not lay down any guarantees for the preservation of EU law. The direct, individual and collective assignment to the contracting Member States, including for the purposes of Articles 258 TFEU to 260 TFEU, provided for in Article 23 of the UPC Agreement, even assuming that it is compatible with the Treaties, is insufficient in this regard.

154. As to the second part of the sixth plea, the Kingdom of Spain seeks to demonstrate that the Member States cannot ratify the UPC Agreement without failing to fulfil their obligations under EU law.

155. It argues that the UPC Agreement should have been concluded by the Union under Article 3(2) TFEU in that it affects common rules, in particular those of the Brussels I Regulation. As a result of having adopted the Brussels I Regulation, the Union has sole jurisdiction in the area that it covers.⁵⁴

156. For this purpose, the Kingdom of Spain examined the content of the UPC Agreement and the provisions on jurisdiction to hear actions assigned to the UPC, concluding that the Member States which are party to the UPC Agreement exercised a power which they no longer had and that, therefore, this constituted a breach of the principle of the autonomy of EU law.

157. These two parts of the sixth plea are somewhat obscure in that it is difficult to determine which text is actually being called into question by the Kingdom of Spain when it asks the Court whether, by making the application of the contested regulation conditional on the entry into force of the UPC Agreement, Article 18(2) of the regulation undermines the powers of the European Union and its institutions.

158. I consider, as do various parties to the dispute, that the Kingdom of Spain appears, in reality, to be seeking through these parts of the plea to contest the legality of the UPC Agreement in the light of EU law and to show that that agreement does not comply with Opinion 1/09.⁵⁵

159. The question here is whether the Court has jurisdiction to review the content of the UPC Agreement relied on by the Kingdom of Spain in its action for annulment of the contested regulation, in view of the link which exists between these two legal instruments in the implementation of enhanced cooperation.

160. In my view, that question must be answered in the negative.

161. The Kingdom of Spain could not, of course, have requested an opinion under Article 218(11) TFEU on the envisaged UPC Agreement. That procedure could not have been applied for such an agreement between the Member States in so far as the Court's opinion can be obtained only on the compatibility with the Treaties of an envisaged agreement to which the European Union is party.

⁵³ — Opinion 1/09 (EU:C:2011:123).

⁵⁴ — See judgment in *TNT Express Nederland* (C-533/08, EU:C:2010:243, paragraph 38).

⁵⁵ — EU:C:2011:123.

162. Moreover, the Kingdom of Spain cannot directly request the EU Courts to annul the UPC Agreement on the basis of the first paragraph of Article 263 TFEU, under which the Court ‘shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties’.

163. It cannot do so because the UPC Agreement does not fall within any of the categories referred to in the FEU Treaty. It is an intergovernmental agreement negotiated and signed only by certain Member States on the basis of international law.

164. I also consider that the link which exists between the contested regulation and the UPC Agreement cannot form the basis of the Kingdom of Spain’s argument that the analysis of the contested regulation requires examination of the content of the UPC Agreement.

165. The arguments relied on by the Kingdom of Spain in its reply in order to show that the Court has jurisdiction to review the content of the UPC Agreement cannot cast doubt on my response.

166. The Kingdom of Spain refers to case-law of the Court which, in my view, is inapplicable in the present case.

167. Thus, in *Kadi and Al Barakaat International Foundation v Council and Commission*,⁵⁶ the review of legality to be conducted by the EU Courts concerned the act of the European Union designed to implement the international agreement at issue, namely a United Nations Security Council resolution, and not the latter as such.

168. The Court based its decision on its case-law, which had already annulled a Council decision approving an international agreement after examining the internal legality of that decision in the light of the agreement at issue.⁵⁷

169. However, the context of our case is totally different, since the contested regulation does not approve an international agreement or implement such an agreement, but is intended to implement enhanced cooperation in the area of creation of unitary patent protection.

170. It should also be noted that, if the contested regulation were to be annulled, this would not cast any doubt on the validity of the UPC Agreement.

171. In the light of the foregoing, I consider that the first and second parts of the sixth plea must be declared inadmissible.

b) The last part of the sixth plea and the seventh plea

172. As to the last part of the sixth plea, the Kingdom of Spain claims that it follows from the first subparagraph of Article 18(2) of the contested regulation that the application of the regulation is absolutely dependent on the entry into force of the UPC Agreement. It follows that the effectiveness of the power exercised by the European Union through the contested regulation depends on the will of the Member States which are party to the UPC Agreement.

⁵⁶ — C-402/05 P and C-415/05 P, EU:C:2008:461.

⁵⁷ — See judgment in *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461, paragraph 289). See also Opinion 3/94 (EU:C:1995:436, paragraph 22), and judgment in *Germany v Council* (C-122/95, EU:C:1998:94, paragraph 42).

173. As to the seventh plea, the Kingdom of Spain complains that Article 18(2) of the contested regulation assigns to the Member States the capacity to decide unilaterally whether the regulation is to apply to them.

174. I cannot agree with the Kingdom of Spain's analysis.

175. The EU legislature stated that jurisdiction in respect of EPUEs should be established and governed by an instrument setting up a unified patent litigation system for European patents and EPUEs.⁵⁸

176. It added that the establishment of such jurisdiction was essential in order to ensure the proper functioning of the EPUE, consistency of case-law and hence legal certainty.⁵⁹

177. The objective of the contested regulation is to ensure such proper functioning. It would, indeed, be contrary to such principles to apply the contested regulation when the UPC has not yet been established.

178. I cannot agree with the Kingdom of Spain when it maintains that the Member States decide when the contested regulation enters into force.

179. I consider that, pursuant to the principle of sincere cooperation laid down in Article 4(3) TEU, the participating Member States must take all appropriate measures to implement enhanced cooperation, including ratification of the UPC Agreement, as such ratification is necessary for its implementation. Under that provision, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union.

180. By refraining from ratifying the UPC Agreement, the participating Member States would infringe the principle of sincere cooperation in that they would be jeopardising the attainment of the Union's harmonisation and uniform protection objectives.⁶⁰

181. It was with this in mind that, in recital 25 in the preamble to the contested regulation, the EU legislature stated that it was 'therefore of *paramount* importance that the participating Member States ratify the [UPC] Agreement in accordance with their national constitutional and parliamentary procedures and take the necessary steps for that Court to become operational as soon as possible'.⁶¹

182. The said recital 25 explains why, in Article 18(2) of the contested regulation, the EU legislature makes the applicability of the regulation conditional on the entry into force of the UPC Agreement if this occurs after 1 January 2014.

183. If it were accepted that certain national courts could continue to have jurisdiction in certain participating Member States where the unitary effect of the European patent is recognised, the harmonisation and uniform protection objectives which the unitary effect of the European patents is designed to achieve would be jeopardised.

184. The link between the contested regulation and the UPC Agreement is such that it would have been inconsistent on the part of the EU legislature not to make the application of the contested regulation conditional on the entry into force of that agreement in the interest of legal certainty.

⁵⁸ — See recital 24 in the preamble to the contested regulation.

⁵⁹ — See recital 25 in the preamble to the contested regulation.

⁶⁰ — See last subparagraph of Article 4(3) TEU.

⁶¹ — Emphasis added.

185. In the light of the foregoing, I propose that the Court should reject the last part of the sixth plea and the seventh plea as unfounded.

F – *The application, in the alternative, for partial annulment of the contested regulation*

1. Arguments of the parties

186. The Parliament, the Council, the Federal Republic of Germany and Hungary consider that the application, in the alternative, for partial annulment of the contested regulation cannot be admitted, as the provisions whose annulment is sought form an essential part of the legislative framework established by that regulation such that they cannot be severed from it without altering its substance.

187. The Kingdom of Spain claims that Article 9 of the contested regulation can readily be severed from the remaining provisions of the regulation.⁶² As regards Article 18(2) of the regulation, it considers that, in the light of the last subparagraph of Article 297(1) TFEU,⁶³ the contested regulation does not need to contain a provision on its applicability.

2. My assessment

188. I would point out that, according to the settled case-law of the Court, partial annulment of an act of the European Union is possible only in so far as the elements whose annulment is sought may be severed from the remainder of the act. The Court has repeatedly held that the requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance.⁶⁴

189. It should be noted in the present case that the objective of the contested regulation is the creation of unitary patent protection. The EU legislature has established a regulatory framework in order to achieve this objective.

190. In this regard, Article 3(1) of the contested regulation provides that '[a] European patent granted with the same set of claims in respect of all the participating Member States shall benefit from unitary effect in the participating Member States *provided that its unitary effect has been registered in the Register for unitary patent protection*'.⁶⁵

191. This condition requires the EU legislature to take into consideration a number of administrative measures adopted before and after such registration which are necessary for it take effect.

192. The legislature has provided for such measures in Article 9(1) of the contested regulation, entitled 'Administrative tasks in the framework of the European Patent Organisation'.

193. This provision contains an exhaustive list of the tasks which the EPO is responsible for performing.

62 — In paragraph 17 of its reply to the statements in intervention, the Kingdom of Spain relies, in this regard, on point 19 of the Opinion of Advocate General Cruz Villalón in *Commission v Parliament and Council* (C-427/12, EU:C:2013:871).

63 — This provision provides that legislative acts will enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication in the *Official Journal of the European Union*.

64 — See *Commission v Parliament and Council* (EU:C:2014:170, paragraph 16 and the case-law cited).

65 — Emphasis added.

194. Without the performance of these tasks, which are clearly essential to the proper functioning of the system establishing the EPUE, it is inconceivable that the EU legislature would achieve the objective set by the contested regulation.

195. Consequently, I do not see how, by abolishing Article 9(1) of the contested regulation, the substance of the regulation would not be affected.

196. As to Article 9(2) of the contested regulation, in so far as that provision concerns the setting of renewal fees and the determination of the share of distribution of those fees which are the subject of the Kingdom of Spain's fifth plea, I consider it inconceivable that a financial mechanism, such as that stated in Chapter V of the contested regulation, should be provided for without reference to the persons or entities which will be responsible for establishing the framework for the setting of, and the determination of the share of distribution, of those fees.

197. It follows therefore, in my view, that Article 9(1), in its entirety, and (2) of the contested regulation, in the terms stated in the fifth plea of this action, does not concern an aspect which is severable from the regulatory framework established by the regulation and that, consequently, any annulment of it would affect the substance of the regulation.

198. As to Article 18(2) of the contested regulation, which regulates the application of the regulation, making it conditional on the entry into force of the UPC Agreement, I consider that, for the reasons stated in my assessment of the last part of the sixth plea and the seventh plea, that that provision cannot be severed from the remainder of the contested regulation.

199. I therefore consider that the application for partial annulment of the contested regulation submitted in the alternative by the Kingdom of Spain is inadmissible.

200. In the light of the foregoing considerations, as none of the pleas relied on by the Kingdom of Spain in support of its action can be upheld, they must be rejected.

IV – Conclusion

201. In the light of all the foregoing considerations, I propose that the Court should:

- dismiss the action and
- order the Kingdom of Spain to bear its own costs, and the European Parliament, the Council of the European Union and the interveners to bear their own costs.