Cross-Border Enforcement of Patents in the European Union

- An analysis of the Brussels Regulation No 1215/2012 and the provisions on local jurisdiction in the Agreement on a Unified Patent Court

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Abstract
This thesis examines the difficulties in the current system for cross-border enforcement of patents in the EU, which is established by the Brussels Regulation. Moreover, it evaluates how the Unified Patent Package will change the enforcement regime of patents in the EU and which problems the new system could lead to. As a European patent is a bundle of rights validated in different states, the enforcement of a European patent today has to be national. This affects the possibility of consolidating claims against several infringers domiciled in different Member States and invalidity claims have to be brought to court in a state where the patent is protected. A plaintiff in an infringement or declaratory case has several different options according to the Brussels Regulation. The plaintiff in such cases can sue where the defendant is domiciled, has its establishment or where the harmful event occurs. The place where the harmful event occurs implies both the place of action and effect. It is likely that the place of effect is considered to be the place where the patent is protected. If the infringement occurred online it is likely that the place of action is the place where the infringer is established. In contrast to if the infringement occurred offline the place of action might be the place of disposal, manufacturing or sale of the patent protected product. Nevertheless, the current system has been criticised for being fragmented, costly and time consuming. A European patent with unitary effect will not need validation to be protected in a certain state. Instead the unitary effect implies a uniform protection and equal effect in all the participating Member States. This means that the patent can be enforced across borders but also revoked in all Member States. The scope of the decisions from the Unified Patent Court will cover all participating Member States, which gives the effect that also regular European patents can be enforced across borders but also be revoked by one judgment. Moreover, the local jurisdiction rules in the Agreement on a Unified Patent Court gives fairly the same possibilities for a plaintiff in an infringement case as with the Brussels Regulation. With the exception that it is easier to consolidate several infringement claims against different parties and infringement claims together with counterclaims on revocation or non-infringement. Moreover, the central division of the court will create a more specialised litigation for trying invalidity disputes. Hence, the Unified Patent Court will create a more centralised and specialised litigation. This is favourable in the light of procedural economy and fairness. However, plaintiff with considerable amount of resource might want to retrain the older system as it gives an opportunity to exhaust a smaller defendant. Moreover, some legal uncertainties may still arise with the Agreement on a Unified Patent Court.
**List of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUPC</td>
<td>Agreement on a Unified Patent Court</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>EIPR</td>
<td>European Intellectual Property Review</td>
</tr>
<tr>
<td>EPC</td>
<td>The European Patent Convention</td>
</tr>
<tr>
<td>EPO</td>
<td>European Patent Office</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>NIR</td>
<td>Nordic Intellectual Property Law Review</td>
</tr>
<tr>
<td>NJA</td>
<td>Nytt Juridiskt Arkiv</td>
</tr>
<tr>
<td>Paris Convention</td>
<td>Paris Convention for the Protection of Industrial Property</td>
</tr>
<tr>
<td>-------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>TEU</strong></td>
<td>Treaty on the European Union</td>
</tr>
<tr>
<td><strong>TFEU</strong></td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td><strong>TRIPS</strong></td>
<td>The Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
</tr>
<tr>
<td><strong>UK</strong></td>
<td>United Kingdom</td>
</tr>
<tr>
<td><strong>UPC</strong></td>
<td>Unified Patent Court</td>
</tr>
</tbody>
</table>
1. Introduction

1.1 Background to the Subject
Historically patent litigations have been dominated by the theory that territorial limitations of patents imply that patents have to be enforced in the state where they are protected. As a result, national courts have been unwilling to adjudicate cases concerning foreign patents. Due to the single market within the EU and today’s globalized world, the need for international enforcement of intellectual property rights has increased. Effective enforcement of patent rights is crucial for the value of innovations.¹ The increasingly international market has created a larger need for right holders to enforce their rights in states other than where they are domiciled.² An invention is likely to be protected by a bundle of rights spread over Europe. Therefore acts of infringement, for example, may not be consolidated to one territory.³ As a result of the increase in cross-border disputes new problems may arise, such as infringement actions in several countries and furthermore, several infringers may be domiciled in different countries. A common defence by an alleged infringer is a counterclaim contending that the patent is invalid. Consequently, the issue of where a counterclaim regarding invalidity shall be raised is important. In summary, the international market often creates multiple claims involving several parties with different nationalities. The root question is whether parallel patent rights or parallel infringement acts covering different countries can be adjudicated in one single national court.⁴

The Brussels Regulation establishes the current system of enforcement of European patents. Today there is no court that has exclusive jurisdiction on disputes regarding European patents. Instead national courts have to apply the Brussels Regulation when deciding the correct jurisdiction for a European patent dispute. The current system has been criticized for being fragmented, expensive and complicated.⁵ This is because European enforcement of patent rights gives a very scarce opportunity to consolidate infringement and invalidity cases. It is

⁴ Sender Pertegás Marta, p. 15.
further not possible to sue several infringers together if they are domiciled in different states and if they have acted in different states.⁶

The work to create a European patent with unitary effect and centralised jurisdiction for patents within the EU has been on going for several years. Even though EU countries and the European Parliament agreed on the Unified Patent Package in 2012 and signed the agreement for the Unified Patent Court in 2013, there are still ratifications needed.⁷ When the Unified Patent Package comes into force it will change the nature of the European patent system and European cross-border patent litigations. A granted European patent with unitary effect will have protection in all the participating Member States and can be enforced in one court for the entire area.⁸ The European patent system may therefore become less fragmented, expensive and complicated when the Unified Patent Package comes into force.

1.2 The Aim of the Thesis and Research Questions

The AUPC has been created to simplify the enforcement regime of patents in Europe. In the preamble to the agreement it is said that “the fragmented market for patents and the significant variations between national court systems are detrimental for innovation, in particular for small and medium sized enterprises which have difficulties to enforce their patents and to defend themselves against unfounded claims and claims relating to patents which should be revoked”.⁹ Hence, one of the reasons behind the creation of the UPC is to avoid the multiplicity of parallel litigations in Europe. The AUPC aims to improve the enforcement regime and the possibility to defend oneself against unfounded claims.¹⁰

The purpose of this thesis is to identify the problems in the current system for European cross-border enforcement of patents. Moreover, the thesis aims to examine how the AUPC will deal with such issues. Hence, the thesis tries to examine the possible effects of the local jurisdiction rules in the AUPC. In particular, the thesis aims to answer the following questions:

⁶ Case C-539/03 Roche Nederland BV and Others, v Frederick Primus and Milton Goldenberg and Case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbaubeteiligungs KG.
⁸ See article 3(2) in the Patent Regulation and article 34 AUPC.
⁹ See rectal 2 in the preamble to the AUPC.
¹⁰ See rectal 5 in the preamble to the AUPC.
1. Which difficulties has the current system for enforcement of European patents given rise to?
2. How will the rules of local jurisdiction in the AUPC differ from the current system?
3. Which difficulties in the current system will be solved by the AUPC and which new problems may arise?

1.3 Method and Disposition

To begin with, the method used in this thesis is a legal dogmatic method combined with a European legal method. The legal dogmatic method implies a technique to evaluate and structure legal sources for the purpose of reconstructing the applicable law, *lex lata*.\(^{11}\) To do so relevant legal sources have to be studied. As the thesis aims to examine the rules of enforcement of European patents according to the Brussels Regulation a European legal method is used.

EU law is a separate legal system which consists of its own legal sources. Moreover, primary Union law is the TEU and the TFEU, which lay down the functioning of the Union and its competence. Secondary sources of EU law consist of directives, regulations and international agreements.\(^{12}\) The CJEU has the primary responsibility to interpret EU law, through preliminary rulings.\(^{13}\) Additionally, the legal system of the EU has to be incorporated with domestic law in each Member State. Domestic law shall be interpreted and applied in accordance with EU law and moreover Union law is superior to the law in each Member State.\(^{14}\) The legislation used in this thesis is both govern by EU law and international agreements. The case law used in this thesis foremost regards the Brussels Regulation. The Brussels Regulation has been recast several times. The latest recast occurred in 2012. A considerable amount of the case law used in the thesis is from before the latest recast. However, few of the provisions regarding intellectual property litigations were changed in the recasts. If the provisions were changed after the ruling from the CJEU it is mentioned. Another source of law used in this thesis is Swedish and English national case law. This is used in order to show how EU law and case law from the CJEU are applied in the Member States. However, the thesis does not try to cover all case law from England and Sweden on

\(^{11}\) Jareborg Nils, *Rättsdogmatik som vetenskap*, SvJT 2004 s. 1 – 10, s. 4.
\(^{12}\) See Case C-286/90 Anklagemyndigheden v Poulsen and Diva Navigation.
\(^{14}\) Article 288 TEFU and Case C-6/64 Costa v E.N.E.L.
the subject. Legal doctrine is used to describe how other authors have reconstructed the applicable law in accordance with the legal dogmatic method.

The thesis compares the expected effects of the Brussels Regulation and the AUPC. By trying to do so a functionalist approach is taken. This means that the thesis tries to compare how the Brussels Regulation and AUPC would apply to different factual situations and what the outcome likely would be. The effects of the different provisions are evaluated by deciding which provision gives the best opportunity to enforce patent rights in Europe. To do so it is discussed what is the most preferable for the plaintiff but also from the view of procedural economy, time length of the proceeding and which provision gives the best opportunity to consolidate disputes in one court. These standards are chosen through observing case law from the CJEU and the jurisdictional issues that these judgments have created.

The disposition is as following. Chapter 2 describes the current system for granting European patents. Chapter 3 explains the Unitary Patent Package and how it will change the European patent system. Chapter 4 examine the current rules on cross-border patent litigations in the EU and compares it with the coming provisions on local jurisdiction in the AUPC. Chapter 2 and 3 are fundamental to later understanding the effects of the rules on jurisdiction described in chapter 4. Finally, chapter 5 gives a summary on applicable law and concludes how cross-border enforcement of patents within the EU will change when the AUPC comes in force.

1.4 Delimitations

The thesis will only focus on cross-border patents disputes in the EU. The Lugano Convention, governing disputes between parties domiciled in EU Member States and EFTA countries, is not analysed. Additionally, the Hague Choice of Court Convention is left out. Moreover, the thesis examines the possibility for enforcing European patents or European patents with unitary effect in different Member States of the EU. Hence, patents granted by national patent offices are left out.

The disputes discussed in the thesis are only those concerning infringement, invalidity and declaratory claims. Disputes regarding licensing and ownership of patents are left out. Interlocutory claims or agreements deciding the competent court are not dealt with in the

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15 See further Lundstedt Lydia, p. 16.
thesis. The thesis tries to cover the case law on registered intellectual property rights. Therefore, case law from the CJEU on for example copyright and personality rights are left out. Registered and unregistered intellectual property rights differ, as the registered rights are granted by a state and are more limited by territoriality.\textsuperscript{16}

Finally, the principal focus in the thesis is the local jurisdiction of the UPC. The international jurisdiction of the UPC is established in article 31 in the AUPC. The provision implies that the UPC has an overall jurisdiction if a Member State within the UPC system has jurisdiction according to the Brussels Regulation or the Lugano Convention. This is in contrast to the local jurisdiction which is laid down in article 33 AUPC, which decides which division of the first instance that should have jurisdiction in a certain case. The rules on international jurisdiction are not dealt with in any further extent in this thesis. This is because the rules on local jurisdiction in the AUPC make a better comparison to the Brussels Regulation.

\section*{2. The Current European Patent System}

\subsection*{2.1 The Territoriality Principle}

Registered intellectual property rights such as patents are granted by a state, or for example by the EPO, to individuals. A patent has to be granted to exist. A patent right holds many of the same features as other private rights. A basic rule regarding intellectual property law is that each state decides whether and in to what extent intellectual property should be protected. Moreover, there is an international consensus that patents are created to fulfil utilitarian goals.\textsuperscript{17} The territorial limitation of patents is double faceted. On the one hand, a patent has no operation beyond the territory of the state which has granted the patent and hence, is limited to the designated territory.\textsuperscript{18} Others can therefore, outside the territory of the state the patent is valid in, use the patented product. Hence, the patent holder cannot prevent others for doing otherwise restricted acts, outside the state where the patent is protected.\textsuperscript{19} However, a patent is often respected as property outside its territory. On the other hand, there is the principle of independence; parallel patents derived from the same application and protecting the same

\begin{flushleft}
\textsuperscript{16} Lundstedt Lydia, p. 94.
\textsuperscript{17} Ibid.
\textsuperscript{18} Sender Pertegás Marta, p. 21.
\textsuperscript{19} Lundstedt Lydia, p. 94.
\end{flushleft}
invention have an autonomous life. The territorial limitation of a patent is often specified in national patent law. A foreign national that holds an intellectual property right in the place where she is domiciled can obtain an intellectual property right in another country if it meets the national requirements for protection. The right holder obtains a bundle of independent national rights.

Intellectual property law is tied to international conventions. The Paris Convention applies to patents and its provisions can be categorised into three categories, rules regarding national treatment, right of priority and some common rules. The principle of national treatment is stated in article 2 in the Paris Convention and establishes that nationals of any country shall as nationals in another country "have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with”. Hence, foreign right holders shall be treated the same way as national right holders. National treatment is a standard principle in all conventions regarding intellectual property rights and it is also included in article 3(1) in TRIPS. The provision constrains the contracting states from granting less right to foreigners than to domestic right holders, under national law. Hence, it is a non-discrimination rule. It is important to keep in mind that the principle of national treatment does not establish which court has jurisdiction in a certain case. This is also recognized in article 2(3) in the Paris Convention.

Fawcett & Torremans propose that if a state’s legislation would expand to another state’s legislation by deciding the validity of a foreign patent the rule of national treatment would be infringed. Therefore, the territorial scope of domestic intellectual property law and the rights granted under them are limited to its territory. The principle of territoriality can therefore be derived from the national treatment principle. Hence, the principle of national treatment

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20 Sender Pertegás Marta, p. 23.
21 For example see 1 § the Swedish Patent Act.
22 Lundstedt Lydia, p. 1 and 94.
24 Lundstedt Lydia, p. 89.
27 Ibid., p. 688.
supports the territoriality principle in intellectual property law, as the rights under each state’s law are limited to the protecting state.\textsuperscript{28}

Furthermore, article 4 in the Paris Convention establishes the right of priority, implying that the date for the first application filed for an invention in one of the contracting states shall be available for an application regarding the same invention filed in another contracting state, within a limited period of time. Moreover, in the light of the principle of territoriality article 4bis in the Paris Convention implies that patents in various countries shall be independent even though they are obtained for the same invention. Independence implies “as regards the grounds for nullity and forfeiture, and as regards their normal duration”. Hence, the different national patents connected to the same invention are a bundle of national rights and not connected to a sole right. It is important to underline that the provisions in article 4bis in the Paris Convention do not prohibit the contracting states from choosing to respect foreign patents, however, the creation of a bundle of rights is a consequence of the risk that states are unwilling to respect foreign patents. Furthermore, one could argue that the principle of independence confirms the principle of territoriality as each state grants independent patent rights to foreign applicants as they grant national applicants, which in turn creates bundles of different national patents.\textsuperscript{29}

\textbf{2.2 European Patents}

In general the EU legislator has been inactive in the patent law field. There is only one directive on patent law, the directive on legal protection of biotechnical inventions. Further, there are two regulations in force, a regulation on supplementary protection certificates, which extends the protection of some products that have been protected by patent rights, as some products need a longer time to obtain regulatory approval, and a regulation to promote the development of medical products for paediatric use.\textsuperscript{30} The current European patent system consists of national patent law and the EPC. Today one can therefore obtain patent protection both through national patent procedures and the EPC. The EPC was created in 1973 and it

\textsuperscript{28} Lundstedt Lydia, p. 97.
\textsuperscript{29} Ibid., p. 91.
\textsuperscript{30} Directive 98/44/EC on the legal protection of biotechnological inventions, Council Regulation 469/2009 concerning the supplementary protection certificate for medicinal products and Regulation 1901/2006 on medicinal products for paediatric use. These are the regulations today in force. The Patent Regulation, Translation Regulation and the AUPC will be discussed under chapter 3.
regulates the granting of European patents. It is important to underline that the EPC is an international agreement separate from the EU. However, all EU Member States and ten non-EU countries are part of the EPC system.

After a substantive examination of the patentability of the invention is examined the EPO grants a European patent for all contracting states. The granted patent has the same effect and is governed by the same regulations as national patents in each state. Hence, a European patent has the equivalent effect of a national patent. However, in article 64(2), article 67(2) and article 69 the EPC establishes some minimum protection for European patents, which domestic law in the contracting states have to comply with. Such minimum protection implies that the extent of the patent shall be determined by its claims. Moreover, it established that if the subject matter of the patent is a process, the protection of the process patent should also cover the product obtained by such a process. Finally, the minimum protection establishes that an applicant must have the opportunity to claim compensation from another person if she has used the invention and would be liable under national law for infringement of a patent. Moreover, article 138 EPC lays down the criteria for a national revocation of a European patent. The EPC has in some extent harmonised the rules in domestic law for national patents on patentability, the scope of the patent protection and the grounds for revocation. The national rules and the EPC are similar today.

European patents are often described as a bundle of national patents due to the fact that a granted European patent is only protected in the contracting states where the patent holder has validated it. A validation often consists of a translation of the patent claims into the relevant Member State’s language. A contracting state may also prescribe that the applicant has to pay a fee. It was decided by the CJEU if translation provisions were compatible with the EU rules regarding free movement of goods. The court established that the provision in the EC

33 See article 64(1) EPC and for example 81 § the Swedish Patent Act stating that a granted European patent has the same legal protection as a Swedish patent.
35 Lundstedt Lydia, p. 475.
37 See article 65 in the EPC and 82 § the Swedish Patent Act.
treaty does not hinder national provisions requesting the patent holder to translate the patent claims to the state’s official language.\textsuperscript{38}

As an international convention the EPC does not directly regulate the substantive national law on infringement. Instead, national law in each contracting state has to regulate acts constituting infringements.\textsuperscript{39} The EPC establishes the rules for granting European patents but not European patents’ national legal effect.\textsuperscript{40} All in all, the EPO does not grant an actual “European” patent, instead the EPC offers a unified application procedure for all contracting states.\textsuperscript{41} This purpose is laid down in article 1 in the EPC stating, “A system of law, common to the Contracting States, for the grant of patents for invention is established by this Convention”. Moreover, disputes regarding infringement or revocation of a European patent are only connected to the patent designated in a certain state. Hence the bundle of patents cannot be enforced together.\textsuperscript{42} The current European system has been criticised, as it is complicated and expensive for those who want to have their patent protected in several European countries.\textsuperscript{43}

\textbf{2.3 Opposition Proceedings before the EPO}

The EPC provides the opportunity for a natural or a legal person to oppose a granted European patent. According to article 99 in the EPC there is a possibility to give notice to the EPO of opposition to a European patent. The procedure allows European patents to be centrally opposed for nine months after the granting of the patent, in contrast to the otherwise required national invalidity proceedings. A granted European patent can only be challenged on a limited number of grounds specified in article 100 in the EPC. The grounds are firstly, that the subject matter of the patent is not patentable according to the EPC. Secondly, that the patent does not disclose the invention in a manner that is sufficiently clear and complete for it to be carried out by a person skilled in the art. Lastly, that the subject matter of the patent extends beyond the content of the application.

\textsuperscript{38} See Case C-44/98, BASF AG v Präsident des Deutschen Patentamts.
\textsuperscript{39} See article 64(3) in the EPC.
\textsuperscript{40} Levin Marianne, p. 159.
\textsuperscript{41} Granieri Massimiliano and Renda Andrea, p. 122.
\textsuperscript{42} Domeij Bengt, p. 17.
\textsuperscript{43} SOU 2013:48, Patentlagen och det enhetliga europeiska patentsystemet, p. 33.
Furthermore, it is possible that parallel to the opposition procedure in the EPO a national proceeding regarding infringement as well as revocation of the same patent is on going in a national court. The national court may then pause the national proceeding to await the outcome of the EPO proceeding or allow the national proceeding to go ahead without awaiting the outcome of the opposition proceeding. The rules and practice is different in different European countries. An effect of national courts pausing their proceeding on behalf of an EPO proceeding is that national proceedings become delayed. Some EPO proceedings take four to eight years and thus, cause a long delay in national proceedings. Nevertheless, as the EPO is supreme, the opposition applies in all contracting states. The resulting effect is that if the EPO revokes a European patent it becomes revoked in all contracting states.

3. The Unitary Patent Package

3.1 The European Patent with Unitary Effect
EU countries and the European Parliament agreed on a patent package in 2012. It consists of two regulations, the Patent Regulation and the Translation Regulation, and an international agreement for the UPC, AUPC. Through the new patent package, unitary protection will be available for European patents. The Regulations will be applied throughout the territory of all participating states within the EU giving the effect of uniform protection for European patents. The regulation also establishes a special agreement in accordance with article 142 EPC which states “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”.

The regulations took effect in February 2013. However, they will not be applicable until the AUPC has come into force. Moreover, The Unitary Patent Regulation and the Translation Regulation are binding for the Member States that are participating in the

44 In Sweden it is common to hold the national proceeding to wait the outcome of the opposition proceeding, see Stockholm district court’s decision 2011-04-02 in case T 2713-99, 2009-11-13 in case T 6069-01 and 2009-07-31 in case T 21839-07.
48 See also article 45(1) of the PCT and article 19 of the Paris Convention.
Unitary Patent protection collaboration. The regulations do not need to be implemented in national law.\textsuperscript{50}

In the forth recital of the Patent Regulation it is stated that “Unitary patent protection will foster scientific and technological advances and the functioning of the internal market by making access to the patent system easier, less costly and legally secure. It will also improve the level of patent protection by making it possible to obtain uniform patent protection in the participating Member States and eliminate costs and complexity for undertakings throughout the Union.” Hence, the purpose of the Patent Regulation is to ease the use of the patent system within the EU and strengthen its protection. Moreover, the Unitary patent will be an option in addition to regular European patents grated by the EPO and patents granted by national patent offices. In article 3(1) in the Unitary Patent Regulation it is stated that the unitary effect is a special effect conferred upon a European patent granted by the EPO provided that the patent has been entered into the Register for unitary patent protection.

To obtain a Unitary patent one does not need a new type of patent application. It is a regular European Patent granted by the EPO under the provisions of EPC but with the addition that it has been given a unitary effect. The Unitary patent protection is an optional system with no further complication, as the unitary effect is an add-on for an available European patent.\textsuperscript{51} Moreover, it is laid down in recital 26 of the Patent Regulation that the provisions shall be without prejudice to the right for the Member States to grant national patents and the regulations shall not replace domestic patent law. The applicants are therefore left with several options. One can obtain a national patent, a regular European patent validated in a number of EPO-countries, a European patent with unitary effect or a European patent with unitary effect also validated in EPC contracting states that are not part of the Unitary Patent Package collaboration.\textsuperscript{52} In the seventh recital in the preamble to the Patent Regulation it is laid down that unitary effect should take effect in the post-granting phase. The Unitary Patent Package gives the EPO and the EPC a continued central roll in the European patent system. The CJEU has expressed that the Patent Regulation is in no way intended to limit the EPO’s role of granting European patents which are exclusively decided by the EPC. Moreover, the regulation does not regulate the process for granting patents. Instead the Patent Regulation

\textsuperscript{50} Chalmers Damian, Davis Gareth and Monti Giorgio, p. 112.
\textsuperscript{51} Granieri Massimiliano and Renda Andrea, p. 141.
\textsuperscript{52} Ibid.
establishes provisions on how to obtain unitary effect and the definition of such effect. Conversely, this may also create difficulties, as some countries connected to the EPC will not participate in the Unitary Patent Package and as a result a parallel system will be created.

The only condition for requesting a unitary effect is that the patent has not been granted with a different set of claims in different Member States. This condition is stated in the second part of article 3(1) in the Unitary Patent Regulation. According to article 4 in the Unitary Patent Regulation a European patent with unitary effect takes effect on the date of publication by the EPO of the mention of the grant of the European patent in the European Patent Bulletin. The unitary effect purports to give uniform protection and equal effect in all the participating Member States. This means that a patent with a unitary effect can only be limited, transferred, revoked or laps in all contacting Member States. A unitary effect of a European patent cannot take effect if the patent has been limited or revoked.

Article 5(2) in the Unitary Patent Regulation establishes the territorial nature of the rights given in the regulation. The provision lays down that “The European patent with unitary effect 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”. Moreover, the rights and limitation of a unitary patent were initially established in the Patent Regulation. However, the UK and Germany opposed that the CJEU would have the ability to interpreted substantive patent law regarding infringements. Instead, the rights and limitations of a unitary patent were established in article 25 to 29 in the AUPC. The provisions establish that patent holder has the right to prevent direct and indirect use of the invention. Article 27 to 29 lays down the limitation of the unitary patent right which, inter alia, consist of others right to non-commercial use, acts done for experimental purposes, right based on prior use of the invention and exhaustion of rights. Article 5(3) in the Patent Regulation refers to national law applicable to European patents with unitary effect and the national law has been harmonized through the AUPC.

53 Case C-146/13, Kingdom of Spain v European Parliment and the Council of the European Union, paragraph 30.
54 Maunsbach Ulf, Enhetspatentet och domstolen för enhetspatent (UPC) i nordisk belysning, NIR 4/2015, p. 301-304, p. 301.
55 This is similar to article 64(1) in the EPC.
56 Lundstedt Lydia, p. 480.
3.1.1 The Translation Regulation

The EPO grants European patents in one of the three languages of the proceedings of the EPO, English, German or French. A request for unitary effect shall be submitted in the language of the proceedings according to article 3(2) in the Translation Regulation. When a European patent with unitary effect is published according to article 14(6) in the EPC, no further translations shall be required in accordance to article 3(1) in the Translation Regulation. Hence, the general principle in the Translation Regulation is that no translation is needed. Furthermore, the CJEU has expressed that the Translation Regulation’s purpose is to create a uniform and simple translation regime particularly for small and medium sized companies. Moreover, it is established in the fifth recital of the Translation Regulation that the provisions shall “make access to the European patent with unitary effect and to the patent system as a whole easier, less costly and legally secure” compared with today’s validation system.

Despite the general principle in article 3 in the Translation Regulation there are some exceptions which is laid down in article 4 in the same regulation. In an event of a dispute regarding an alleged infringement of a Unitary patent the patent proprietor shall provide, at the request of an alleged infringer, a full translation of the patent into an official language of the Member State were the alleged infringement took place or an official language of the Member State were the alleged infringer is domiciled. In other disputes relating to a European patent with unitary effect the patent holder shall at the request of the court provide a full translation of the patent into the language of the proceedings.

3.2 The Unified Patent Court

Parallel to the regulations the UPC was established in 2013 by an international agreement. The AUPC is in contrast to the regulations not a result of an enhanced collaboration within the EU. It is not a EU legislative act. However, 25 EU Member States signed the agreement on the 19 of February 2013. Moreover, the AUPC will come into force four months after the

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58 See article 14 EPC.
59 See Case C-147/13 Kingdom of Spain v the Council of the European Union compare with recital 16 in the Translation Regulation.
thirteenth Member State ratifies the agreement.\textsuperscript{62} In December 2016, 11 Member States had ratified it.\textsuperscript{63} In order for the AUPC to come in force it is not enough that 13 Member States have ratified the agreement; Germany, France and the UK also have to have ratified it.\textsuperscript{64} The UK and Germany have not yet ratified the agreement. However, the government in the UK has confirmed that the UK will proceed with the preparation of ratifying the AUPC despite the British people vote to leave the EU in June 2016.\textsuperscript{65} Hence, when the UK and Germany have ratified the agreement the AUPC will come into force and the UPC will presumably and gradually handle most civil law litigations on patents with unitary effect and European patents.\textsuperscript{66} In recital 25 in the preamble of the Patent Regulation it is laid down that "establishing a Unified Patent Court to hear cases concerning the European patent with unitary effect 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 Agreement on a [UPC] in accordance with their national constitutional and parliamentary procedures and take the necessary steps for that Court to become operational as soon as possible".

Additionally, recital 9 in the preamble of the Patent Regulation it is established that “the European patent with unitary effect should confer on its proprietor the right to prevent any third party from committing acts against which the patent provides protection. This should be ensured through the establishment of a [UPC]”. The AUPC aims to improve the enforcement of patents within the EU.\textsuperscript{67} When drafting the agreement the contracting states have considered that variations between domestic court systems are disadvantageous for innovation and especially for small and medium sized enterprises trying to enforce the rights.\textsuperscript{68} The UPC is a common court to the contracting Member States and it is not possible for a non-Member

\textsuperscript{62} See recital 14 in the preamble to the AUPC.
\textsuperscript{66} See article 32 AUPC.
\textsuperscript{67} See recital 5 in the preamble to the AUPC.
\textsuperscript{68} See recital 2 in the preamble to the AUPC.
State to enter the agreement.\(^69\) This may create difficulties when the UK leaves the EU after they have ratified the agreement and the court has come into force. The UK then may have to leave the collaboration or the form for the UPC will have to be changed. Moreover, the court has a supranational character as it has its own forum rules and rules of procedure. The UPC shall have legal personality in all contracting Member States. According to article 4(1) AUPC the UPC shall have the most extensive legal capacity conferred to legal persons under every Member States national law.

According to article 20 AUPC the court shall apply EU law and respect its primacy.\(^70\) Article 24 in the AUPC regulates the sources of law relevant to the court. The UPC shall base its decision on Union law, the AUPC, the EPC, other international agreement applicable to patents and binding to all the contracting Member States and lastly, national law. Furthermore, the CJEU has laid down that the UPC has the power to apply and interpret the Patent Regulation and other Union law by depriving national courts’ power of doing so.\(^71\) Moreover, the sources of law will have equal weight which will give the result that the UPC will have a plural approach, which in turn will balance different legal orders and instruments.\(^72\) Furthermore, the UPC, as a common court to the Contacting Member States, shall cooperate with CJEU. This means that the UPC shall, as the national courts, apply article 267 in TFEU.\(^73\) Article 267 in the TFEU stipulates that the CJEU shall have jurisdiction to give preliminary rulings. Hence, the UPC is obliged to refer questions to the CJEU. One could argue that this also implies that earlier case law from the CJEU is binding to the UPC. Unlike the courts in several Member State the UPC will not be subject to an instance which carries out a legal review.\(^74\)

The structure of the UPC is atypical. According to article 7 and 9 in the AUPC the Court consists of a Court of First Instance and a Court of Appeal. The first instance shall comprise local and regional divisions as well as central divisions. It is important to underline that the local, regional and central division are acting on the same level of jurisdiction. Hence, there is no hierarchy between them and they are all considered as the first instance of UPC. However,

\(^69\) See recital 4 in the preamble to the AUPC compare with Callens Peter and Granata Sam, *Introduction to the Unitary Patent and the Unified Patent Court*, Kluwer Law International, 2013, p. 51 and p. 53. Moreover, see the recital 7 in the preamble to the AUPC.

\(^70\) See also recital 8 and 13 in the preamble to the AUPC.

\(^71\) Callens Peter and Granata Sam, p. 55.

\(^72\) Chalmers Damion, Davis Gareth and Monti Giorgio, p. 177.

\(^73\) See article 21 in the AUPC.

\(^74\) Callens Peter and Granata Sam, p. 63.
the central division has in some situations exclusive jurisdiction. Furthermore, in the AUPC there are rules giving each division its own competence. The main difference between the divisions in the first instance is their different location. As regarding the central division it shall be divided and situated in Paris, London and Munich. According to Annex II to the AUPC the London section shall deal with cases concerning human necessities and chemistry. Furthermore, the Paris section have jurisdiction in cases regarding performing operations, textiles, paper, fixed construction, physics and electricity. Lastly, the section in Munich is responsible for mechanical engineering, lighting, heating, weapons and blasting. The division is based on the patent classification of the World Intellectual Property Organisation. Each Member State can request to set up a local division of the Court of First Instance according to article 7(3) in the AUPC. A regional division can be set up if two or more Member States request it according to article 7(5) in the AUPC. Furthermore, the Court of Appeal should only have one seat and it is located in Luxembourg in accordance with article 9 in the AUPC.

4. Jurisdiction for Cross-border Patent Litigations in the EU

4.1 The Brussels Regulation

As a patent right is a private right, the enforcement of it relies on the patent holder bringing an action before a court. Moreover, there is no court today in force that has exclusive jurisdiction over disputes regarding European patents. Furthermore, as a result of the fact that a European patent is a bundle of national patents the enforcement of a European patent has to be national. This will change when the AUPC comes in force. However, today national courts have the competence to deal with European cross-border patent litigations. The EPC does not cover rules regarding jurisdiction. Instead national courts have to apply the Brussels Regulation when a defendant is domiciled in a Member State of the EU. When the AUPC comes into force European cross-border litigation will by default be centralised to UPC but there will be a possibility to opt out from the AUPC system.

75 Callens Peter and Granata Sam, p. 59.
77 Lundstedt Lydia, p. 8.
78 Rodriguez Victor, p. 402.
79 See article 83(3) the AUPC.
The aim of the Brussels Regulation is “maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters”.\textsuperscript{80} Furthermore, differences between national rules regarding jurisdiction and recognition of judgments obstruct the internal market in the EU. Therefore, the Brussels Regulation is created to codify the rules of conflict of jurisdiction in civil and commercial matters.\textsuperscript{81} The provisions in the Brussels regulation consists of predictable jurisdiction rules so that parties within the EU can forecast where one can sue and be sued. This also strengthens the EU’s legal protection of persons.\textsuperscript{82} The principle of predictability developed in early CJEU case law can be interpreted as a rule that means that a normal well-informed defendant shall have the ability to predict in which jurisdictions she may be sued. Hence, if the jurisdiction is conferred on entirely unforeseeable places predictability is not met.\textsuperscript{83} For the Brussels Regulation to work it is required that the Member States have a mutual trust in the administration of justice among them.\textsuperscript{84} Hence, the rules in the Brussels Regulation are created to support the sound administration of justice and maintaining mutual trust between the states.\textsuperscript{85} Moreover, the Brussels Regulation is only applicable when the dispute has connection to the EU. The primary connection is that the defendant is domiciled in the EU according to article 4 in the regulation. Disputes may also have connection to third states and in general non-EU parties shall be treated the same way under the regulation as parties domiciled within the EU.\textsuperscript{86}

A recast of the Brussels Regulation was amended to the Brussels Regulation in 2014 to regulate the relationship with AUPC. In the recast it is laid down that the UPC shall be a court common to several Member States. Furthermore, it is regulated that jurisdiction for a certain

\textsuperscript{80} Recital 3 in the Brussels Regulation.
\textsuperscript{81} Recital 4 in the Brussels Regulation.
\textsuperscript{82} Recital 14 in the Brussels Regulation, Case C-533/07, Falco Privatstiftung and Rabitsch, paragraph 22 and Case C-281/02, Owusu, paragraph 39.
\textsuperscript{84} Recital 26 in the Brussels Regulation.
\textsuperscript{85} Lundstedt Lydia, p. 283.
\textsuperscript{86} Case C-412/98, Group Josi.
matter can be conferred on the common court if a Member State can be considered having the jurisdiction in a matter according to the Brussels Regulation.  

4.2 The Jurisdiction Rules in the AUPC

In accordance with recital 6 the UPC shall ensure high quality decisions, striking a fair balance and take into account the need for proportionality and flexibility. The rules concerning the jurisdiction of the UPC are found in chapter six in the AUPC. Article 31 in the AUPC lays down the international jurisdiction of the UPC and is to be considered as the jurisdictional framework of the UPC. The purpose of the provision is to activate the overall jurisdiction of the UPC. According to article 31 the UPC has jurisdiction when a court in a contracting Member State would have jurisdiction according to the Brussels Regulation or the Lugano Convention. However, the Brussels Regulation or the Lugano Convention is not applicable when deciding which division of the first instance that has jurisdiction over a certain case. Instead article 33 in the AUPC decides which division that has jurisdiction in a case when the UPC in general has jurisdiction according to the Brussels regulation or the Lugano Convention. Hence, article 33 lays down the local jurisdiction of the UPC.

Moreover, according to article 3 in the AUPC the court has competence to rule in disputes regarding Unitary patents as well as European patents that have not lapsed before the AUPC entry into force. The court is also competent to judge in cases regarding supplementary protection certificates issued for a product that has been protected by a patent. Lastly, the UPC also has competence over disputes regarding European patent applications which are pending when the AUPC comes into force. During a transitional period holders of a European patent or applicants for a European patent can choose to bring an action before a national court or before the UPC. Such holders and applicants can also opt-out of the exclusive jurisdiction of the UPC before the end of the transitional period. However, holders of a Unitary patent cannot choose to opt-out. Article 32 in the AUPC consists of a list of all the actions that the UPC has competence over. The competence is extensive. However, the contracting states retain competence over disputes regarding compulsory licencing,

87 Regulation No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice.
89 Callens Peter and Granata Sam, p. 86.
inventorship, and patents as object of property. Naturally, national courts will still have competence over national patents. Lastly, national courts will have competence over disputes where the holder of a European patent has opted out from the AUPC.\textsuperscript{90}

\section*{4.3 Territorial Scope of Decisions}

In the following, beyond the jurisdiction rules, the extent of the jurisdiction conferred to a Member State’s court will be examined. In other words, the territorial scope of a decision of a court will be discussed. To specify this, the terms ‘unlimited full jurisdiction’ and ‘limited forum jurisdiction’ will be used.\textsuperscript{91} Unlimited full jurisdiction implies that the court can rule over all claims connected to a certain dispute and the decision is not limited by territory. Hence, there is no restriction in the content of the claim or that it is connected to an action in a different state other than the state where the relevant court is situated. An example of provisions that establish unlimited full jurisdiction is the general rule in article 4 in the Brussels Regulation. Another example is article 34 in the AUPC stating that, “Decision of the Court shall cover, in case of a European patent, the territory of those Contracting Member States which the European patent has effect”. Hence, the UPC has under the provision of article 34 in the AUPC unlimited full jurisdiction.

On the other hand, limited forum jurisdiction implies that the court that has been conferred jurisdiction can only take a decision limited to a certain territory. An example of a provision that is subject to limited forum jurisdiction is article 24(4) in the Brussels Regulation which implies that a court has exclusive jurisdiction in a matter of a intellectual property right’s validity. The territorial scope of a court’s decision is an important factor when the plaintiff chooses in which state she will sue and moreover it is crucial in the analysis of the effect of a certain jurisdiction rule.

\section*{4.4 Infringement}

The patent holder has several options when choosing jurisdiction under the Brussels Regulation and the AUPC for an infringement proceeding. Two aspects generally define the patent holders litigation strategy. Those are the options for \textit{forum shopping} and the possibility

\textsuperscript{90} Callens Peter and Granata Sam, p. 88.
\textsuperscript{91} The terms are found in Larsen Torsten Bjørn\textsuperscript{1}. 

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to concentrate the litigation to one jurisdiction. As regarding the Brussels Regulation generally, the rules on jurisdiction applicable to intellectual property infringement litigations are those that are applicable in other civil law litigations. For instance the general rule in article 4 in the Brussels Regulation establish that the defendants shall be sued in their state of domicile and applies in litigations regarding European patents. Additionally, there is a rule in article 7(5) that gives the plaintiff a possibility to sue a defendant where she has her establishment. Moreover, the rule regarding jurisdiction in the place where the harmful event occurred or may occur relating to tort, delict or quasi-delict in article 7(2) in the Brussels Regulation is also applicable. In the following section different alternatives for a plaintiff in an infringement case will be examined. First the current rules in the Brussels Regulation will be analysed. Subsequently, the coming rules in the AUPC will be compared to the rules described in the Brussels Regulation and their difference will be discussed.

4.4.1 Defendant’s Domicile Rule and Establishment Rule

As already mentioned the general rule in article 4 in the Brussels Regulation is applicable regarding infringement actions. Consequently, a defendant that is domiciled in a Member State can be sued in the court of that Member State, for infringement of patents registered either in that Member State or in other Member States. The purpose of this rule is to protect the defendant, as it is usually more difficult to defend oneself before a foreign state’s court than before a court in the state where one is domiciled. Another purpose of the rule is to give the plaintiff an unrestricted possibility to bring up all claims in one jurisdiction as the provision is subject to unlimited full jurisdiction. The courts in several Member States have taken jurisdiction under article 4 in the Brussels Regulation over infringement cases where the defendant has allegedly infringed a patent abroad. Furthermore, the provision applies when the defendant is domiciled in the EU regardless of her nationality and where in the EU the plaintiff is domiciled. Moreover, article 4 does not point out a specific court within the legal

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92 Sender Pertegás Marta, p. 83.
93 Lundstedt Lydia and Manusbach Ulf, p. 212.
95 Lundstedt Lydia and Manusbach Ulf, p. 214.
96 Larsen Torsten Bjørn’ p. 122.
97 Sender Pertegás Marta, p. 84.
98 ‘Larsen Torsten Bjørn’, p. 121-122.
system of a Member State. Hence, the internal rules in each Member State specify the
competent court within the jurisdiction.99

Regarding the AUPC the defendant’s domicile rule is established in article 33(1)(b) in the
agreement. The article provides that an infringement action can be brought at “the local
division hosted by the Contracting Member States where the defendant […] has its residence
or principal place of business […] or the regional division in which that Contracting Member
State participates […]”. One example of how this rule would apply is if the defendant in an
infringement case has her residence in Italy, an infringement action against her has to be
brought at the local division in Italy seated in Milan.100 If the concerned Member State does
not have local or regional division actions shall be brought at the central division.101
Additionally, if the defendant has her residence, principal place of business or her place of
business outside the territory actions can be brought before the central division.102

One of the differences between the defendant’s domicile rule in article 4 in the Brussels
Regulation and in article 33(1)(b) in the AUPC is that jurisdiction conferred by the AUPC has
to be conferred on a contracting Member State whereas jurisdiction conferred by the Brussels
Regulation can be conferred to any Member State of the EU. The difference exists, as not all
EU Member States are part of the AUPC. A similarity between the provisions is that both are
subject to unlimited full jurisdiction. One further difference is that the Brussels Regulation
points out the defendant’s domicile in contrast to AUPC that refers to residence or principal
place of business of the defendant.

In order to decide where a natural or a legal person is domiciled according to the Brussels
Regulation one can use two different methods. The domicile for a natural person is not
defined in the Brussels Regulation. Instead the court where the action is brought shall apply
its own internal law to determine where the defendant is domiciled. This is according to
article 62(1) in the Brussels Regulation. In contrary, the domicile for legal persons is defined
in article 63 in the Brussels Regulation. Article 63 consists of three exhaustive and non-
hierarchical alternatives. The first alternative is the statutory seat in the Member State where
the legal person is incorporated. The second alternative is the central administration located

99 Sender Pertegás Marta, p. 84.
101 See article 33(1) forth sentence.
102 See article 33(1) third sentence.
where the primary functions of the legal person exist. Lastly, the principal place of business which is the place where the main business activities are located. If only one of the places is located in the Member States the legal person can be sued there. Moreover, if all three places are located in the same Member State the legal person can be sued in all three. Additionally, if all three places are located in different Member States the plaintiff can choose between all of those Member States when suing a legal person.\textsuperscript{103}

Furthermore, the expressions ‘residence’ and ‘principal place of business’ are not defined in the AUPC. The term residence is not used in any other existing European intellectual property law today. Larsen argues that in respect of natural persons, article 33(1)(b) in the AUPC may be interpreted together with article 62(1) in the Brussels Regulation. If one does so the court in the division where the action is brought shall apply national law to determine whether the defendant is to be considered having her residence in the Member State. However, Larsen contend that it is unlikely that the UPC will apply domestic law, as it is a supranational court.\textsuperscript{104} Although it is stated in article 24(e) in the AUPC that the court shall base its decision on, inter alia, national law. Nevertheless, the UPC’s rules of procedure refer to a natural person’s usual or last known place of residence.\textsuperscript{105} Hence, the term ‘residence’ may be considered the place where the natural person lives. A legal persons residence may be interpreted in line with article 63 in the Brussels Regulation giving the result that an infringement action against a legal person shall be brought at the place of the defendant’s statutory seat, central administration or principal place of business. These three places are also established in the UPC’s rules of procedure when referring to a legal person’s residence.\textsuperscript{106}

As article 33(1)(b) in the AUPC refers to both the place of residence and principal place of business one has to investigate whether the principal place of business also applies to natural persons. Regarding legal person it is already clear that the term ‘residence’ comprises the legal person’s place of business. An argument for the proposition that the term should apply to both natural and legal persons is that article 33(1)(b) does not differentiate between them. However, the court’s rules of procedure do not mention the place of business for a natural person when establishing where the service of the Registry shall be effected. It is therefore

\textsuperscript{103} Larsen Torsten Bjørn\textsuperscript{1}, p. 123-124.
\textsuperscript{104} Opinion 1/09 of 8 March 2011 of the CJEU, paragraph 71 stating that “[It] is an organization with a distinct legal personality under international law”.
\textsuperscript{105} Larsen Torsten Bjørn\textsuperscript{1}, p. 135 compare with the rules of procedure article 271(5)(b) and 278(3)(b).
\textsuperscript{106} Ibid., p. 136 compare with the rules of procedure article 271(5)(b) and 278(3)(b).
likely but not self-evident that the term principal place of business does not apply to natural persons.\textsuperscript{107}

The major advantage of the provisions in article 4 in the Brussels Regulation is that several claims can be consolidated in one Member State and as a result litigations centralised. The main disadvantage is that the plaintiff does not have the possibility or obligation to sue several infringers domiciled in different Member States, in one of those Member States under article 4.\textsuperscript{108} The provisions in article 33(1)(b) AUPC and in the Brussels Regulation are alike. One major advantage of article 33(1)(b) is that the definition of residence for a natural person is broad. The possibility to sue several infringers under the provision in the AUPC will be further explained later. However in short, article 33(1)(b) establishes that in the case of multiple defendants they can be sued at the place where one of them has its residence. This is a great advantage in comparison to article 4 in the Brussels Regulation which fragmentises litigations. Hence, article 33(1)(b) in the AUPC provides for a more centralized litigation than article 4 in the Brussels Regulation.

According to article 7(5) in the Brussels Regulation there is an additional possibility for the right holder to sue an alleged infringer where a branch, agency or other establishments (hereinafter establishment) is situated under the condition that the dispute arises out of such establishment. The provision applies if the situation meets two requirements. The first requirement is that the defendant must have an establishment in a EU Member State which is different from where she is domiciled. Such establishments have been defined by the CJEU.\textsuperscript{109} An establishment under the provisions of article 7(5) in the Brussels Regulation must have a permanent place of business, be controlled by the parent but still have certain autonomy and, furthermore, bind its parent company.\textsuperscript{110} The second requirement is, as already mentioned, that the dispute must arise out of the operations of that establishment. Hence, there must be a connection between the dispute and the establishment. The CJEU case law in the area is scarce and as an effect the scope of the provision is uncertain. One could therefore argue that article 7(5) can be applied on both a close and a more distant connection. However, when considering the principle of proximity in recital 16 in the Brussels Regulation and that

\textsuperscript{107} Larsen Torsten Bjørn\textsuperscript{1}, p. 137.
\textsuperscript{108} Fawcett J. James and Torremans Paul, p. 144-145.
\textsuperscript{109} See Case C-14/76 A. De Bloos, SPRL v Société en commandite par actions Bouyer, Case 33/78 Somafer SA v Saar-Ferngas AG, Case 139/80 Blankcaert and Willems v Trost, Case 218/86 Sar Schotte GmbH v Parfums Rothschild SARL and Case C-439/93 Lloyd’s Register of Shipping v Soc Campenon Bernard.
\textsuperscript{110} Fawcett J. James and Torremans Paul, p. 175.
the CJEU has expressed that article 7(5) is an exception to article 4 and therefore should be interpreted strictly, one can reach the conclusion that there must be a close connection to the dispute to invoke article 7(5) when choosing jurisdiction.\textsuperscript{111} Also, the CJEU has laid down that interpretation of article 7(5) “must show without difficulty the special link”.\textsuperscript{112} Furthermore, it is likely that article 7(5) is subject to unlimited full jurisdiction despite the lack of case law on the subject from the CJEU.\textsuperscript{113}

Fawcett and Torremans argue that article 7(5) in the Brussels Regulation is a useful provision in an infringement case. For example an action can be brought in the UK against a French manufacturing company that infringes a patent in the UK through its branch office. The branch office itself cannot be sued in the UK, as it is not a separate legal entity. However, the French company can be sued in the UK under the provisions in the article under the circumstances that the dispute arises out of the branch in the UK.\textsuperscript{114} However, article 7(5) in the Brussels Regulation does not apply when a subsidiary company infringes a patent as a subsidiary company often acts by itself and cannot be regarded as an establishment according to article 7(5). Nevertheless, if a subsidiary company acts on behalf of the parent company, article 7(5) will apply.\textsuperscript{115} To conclude, one may argue that article 7(5) is an extension of the general rule in article 4 as it is similar to it but gives the plaintiff further opportunities.

Similar to article 7(5) in the Brussels Regulation, article 33(1)(b) in the AUPC gives the plaintiff an opportunity to sue the defendant at its place of business if the defendant lacks residence or principal place of business. The term place of business is often used as a synonym to establishment. It is therefore likely that article 33(1)(b) AUPC can be considered constituting an establishment rule.\textsuperscript{116} Article 7(5) in the Brussels Regulation is an option for the plaintiff in contrast to the provision pointing out the place of business in article 33(1)(b) which is not an option as it requires the other places suggested in the provision to be exhausted. A further difference is that article 7(5) in the Brussels Regulation requires that the

\textsuperscript{111} Case 33/78 Somafer SA v Saar-Ferngas AG, paragraph 7. Moreover, The CJEU referred to article 2 and 5(5) in the Brussels Convention from 1968.

\textsuperscript{112} Case 33/78 Somafer SA v Saar-Ferngas AG, paragraph 11.

\textsuperscript{113} See IBS Technologies (PVT) Ltd v APM Technologies SA, unreported, 7 April 2003 ALL ER (D) 105, Fawcett J. James and Torremans Paul, p. 176 and Larsen Torsten Bjørn\textsuperscript{1}, p. 146.

\textsuperscript{114} Fawcett J. James and Torremans Paul, p. 176.

\textsuperscript{115} See Case 218/86 Sar Schotte GmbH v Parfums Rothschild SARL (The CJEU referred to article 5(5) in the Brussels Convention from 1968) and Fawcett J. James and Torremans Paul, p. 176.

\textsuperscript{116} Case 218/86 Sar Schotte GmbH v Parfums Rothschild SARL, paragraph 15-17 compare with Larsen Torsten Bjørn\textsuperscript{1}, p. 163.
dispute arise from the operation of the establishment, which article 33(1)(b) AUPC does not require. Hence, article 7(5) in the Brussels Regulation demands proximity between the dispute and the establishment which article 33(1)(b), as far as we know, does not require. The limits of the interpretation of the term the “place of business” are not defined in the AUPC. However, the rules of procedure establish that when serving the statement of written pleadings it can be made where the legal person has a place of business in accordance with rule 278(3)(a). Therefore, the interpretation of the provision may be broad. Like article 7(5), article 33(1)(b) is subject to unlimited full jurisdiction according to article 34 in the AUPC. In conclusion, the term ‘place of business’ may not be as broad alternative as article 7(5) in the Brussels Regulation. However, AUPC still constitutes an alternative to sue a defendant at its establishment when other places are not an option.

4.4.2 Forum Delicti Rule
The third alternative in the Brussels Regulation for actions of infringement is that they can also be brought before the court in the jurisdiction where the infringement occurred or may occur according to the forum delicti rule in article 7(2) in the Brussels Regulation. The provision provides that in matters regarding tort the plaintiff has the possibility to sue the defendant in the courts at the place where the harmful event occurred or may occur. The rule is an alternative to the defendant’s domicile rule. Moreover, there are a large number of important CJEU cases regarding interpretation of the forum delicti rule. Furthermore, article 33(1)(a) provides that actions for infringement shall be brought before the local division hosted by the contracting Member State where the infringement has occurred or in the regional division in which the Member State participates. This rule may be compared to the rule regarding where the harmful event occurred in article 7(2) in the Brussels Regulation. In the following section different interpretations of article 7(2) in the Brussels Regulation will be discussed. Subsequently, article 33(1)(a) AUPC will be compared to article 7(2) and different solutions to how one can interpreted the provisions will be suggested.

4.4.2.1 Forum Delicti Rule in General Civil Law Litigations
One of the most important rules one can deduce from the CJEU’s case law is that article 7(2) in the Brussels Regulation both applies to a “place of action(s)” and a “place of effect(s)”.

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117 Franzosi Mario, p. 188.
“Place of action” is the place where the action took place which gave rise to the damage. Furthermore, ‘the place of effect’ means the place where the damage arose.\textsuperscript{119} The court has laid down that where the harmful event occurred is an autonomous concept governed by EU law and does not need to coincide with national law.\textsuperscript{120} The plaintiff is free, with her own discretion, to choose to sue the defendant in one of these places. Moreover, the defendant may reject the existence of damage. This does not itself withdraw a certain court’s jurisdiction under article 7(2). The court where the action has been brought then has to investigate whether the defendant did or did not commit an action that confers jurisdiction under the article.\textsuperscript{121}

There are several reasons for the CJEU’s interpretation of the \textit{forum delicti rule} and the limitation of it. To begin with, the reason for assigning jurisdiction to both the place of action and effect is because both places have connecting factors to the dispute.\textsuperscript{122} It is appropriate in relation to the creation of a sound administration of justice and foreseeability to confer jurisdiction on both the place of action and effect. In the recital 16 in the Brussels Regulation it is laid down, concerning special jurisdiction rules, that “in addition to the defendant’s domicile, jurisdiction can be based on a close connection between the court and the action or in order to facilitate the sound administration of justice”. When deciding and localising the act that gave rise to damage, the CJEU has stated that one should take into account the proximity to the evidence, the conduct of the proceeding and the jurisdiction shall be conferred on foreseeable places.\textsuperscript{123} Further, ‘the place of action’ may overlap with the defendant’s domicile. Because of this, the rule also covers the place of effect as otherwise would article 7(2) be ruled out by the defendant domicile rule in article 4. Moreover, by allowing jurisdiction to be conferred to the place of effect the effectiveness of the enforcement of article 7(2) is preserved.\textsuperscript{124}

\textsuperscript{119} See case C-21/76, Handelskwekerij G.J. Bier BV v Mines de potasse d’Alsace SA (The CJEU referred to article 5(3) in the Brussels Convention from 1968).

\textsuperscript{120} Case C-68/93 Shevill v Presse Alliance (The CJEU referred to article 5(3) in the Brussels Convention from 1968).

\textsuperscript{121} Case C-68/93 Shevill v Presse Alliance compare with Fawcett J. James and Torremans Paul, p. 152.

\textsuperscript{122} Case C-21/76, Handelskwekerij G.J. Bier BV v Mines de potasse d’Alsace SA, 11, case C-133/11 Folien Fischer AG, Fofitec AG v Ritrama SpA, paragraph 38 and Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH, paragraph 30. (At that time it was article 5(3) in the Brussels Regulation No 44/2001).

\textsuperscript{123} Case C-45/13, Kainz, paragraph 27. (The CJEU referred to article 5(3) in the Brussels Regulation No 44/2001).

\textsuperscript{124} Larsen Torsten Bjørn\textsuperscript{1}, p. 108 and Sener Pertegás Marta, p. 112.
Furthermore, the place of effect might be situated where the plaintiff is domiciled. According to the CJEU, jurisdiction cannot be conferred to where the plaintiff is domiciled for several reasons. Firstly, if article 7(2) would apply to the plaintiff’s domicile it would not meet the principle of proximity. Secondly, it would limit the defendant’s domicile rule. Thirdly, there are other provisions in the Brussels Regulation that exclusively confer jurisdiction on the plaintiff’s domicile. Fourthly, according to international private law the plaintiff has the option of suing the defendant simultaneously in several states. Hence, the principle of *lis pendens* does not apply. This procedure is ineffective and expensive. Therefore the plaintiff often chooses one country where it is most advantageous to carry out the proceeding in. This is called *forum shopping*. Some *forum shopping* is considered acceptable and some is not. When the plaintiff can shop between different forum rules, it is considered acceptable. In contrast to when the plaintiff has the possibility to shop between different jurisdictions within the same forum rule, it is considered unacceptable. The CJEU has expressed that it must be avoided as far as possible since otherwise the risk of irreconcilable judgments would increase which in turn could affect the predictability. If article 7(2) gave the plaintiff the possibility to choose her own domicile as jurisdiction it would enable *forum shopping*, as it would be easy to change country after preference. Therefore the CJEU has rejected jurisdictions that fall within the plaintiff’s domicile under the provisions in article 7(2) in Brussels Regulation.

Concerning general civil law proceedings, the case law from the CJEU provides two further rules regarding the provisions in article 7(2) in the Brussels Regulation. Firstly, the courts in the place of effect can only have jurisdiction if the claim concerns direct damage. Hence, the jurisdiction in the place of effect does not cover consequential damage. Moreover, a third part’s damage does not give rise to jurisdiction according to the rule. One can argue that

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125 Case C-364/93, Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company and case C-51/97, Réunion européenne SA and Others v Spleithoff’s Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002 (The CJEU referred to article 5(3) in the Brussels Convention from 1968).
127 Larsen Torsten Bjørn, p. 116.
128 Case C-14/76 A. De Bloos, SPRL v Société en commandite par actions Bouyer, Case C-220/88 Dumez France SA and Tracoba SARL v Hessische Landesbank and others, Case C-256/00, Besix SA v Wasserreinigungsanstalt Alfred Kretzschmar GmbH & Co. KG and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG.
129 Case C-364/93, Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company and case C-51/97, Réunion européenne SA and Others v Spleithoff’s Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002.
130 Case C-220/88 Dumez France SA and Tracoba SARL v Hessische Landesbank and others, Case C-364/93, Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company, Case C-168/02 Kronhofer v Maier compare
this limitation is coherent with the principle of proximity. Secondly, the CJEU has laid down in the important case Shevill that regarding the place of effect the jurisdiction becomes limited to the damage that has occurred in the current Member State’s jurisdiction even though the alleged damage is spread in several Member States. Hence, the place of effect is subject to limited forum jurisdiction. The reason for the limitation is that the court where the damage arose is the best place to determine the harm within its own territory and not within others.

4.4.2.2 Forum Delicti Rule in Infringement Litigations

In cases regarding registered intellectual property rights, such as European patents, the regular case law and principles concerning article 7(2) in the Brussels Regulation do not always apply. If someone hurts another person by firing a gun from one state over to another state, the harmful act is consolidated to one state and the effect to another. Together they create a single tort. However, regarding registered intellectual property the situation may be different. If an act involving an intellectual property right in one state creates an effect on another intellectual property right in another state it might create two different torts; one in the state where the action occurred and one where the effect arose. This is under the condition that the intellectual property right is protected in both states and moreover that the action taken in the first state can constitute an infringement in both states under respective national law. If this being the case, to confer jurisdiction for both infringements in the court where that action took place one has to examine whether the state where the action occurred has a close connection to the place where the effect arose. Moreover, infringement cases are not created on material damage. Neither is it required to have evidence of financial loss to bring an action before a court. This creates a further difference between infringement cases and regular civil law proceedings concerning damage.

Furthermore, the identification of a sole harmful event to allocate jurisdiction to a Member State does not decide that intellectual property infringement has occurred. This has to be decided by applicable domestic law. Additionally, even though there are several actions that

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131 Case C-68/93 Shevill v Presse Alliance.
132 Ibid., paragraph 31.
134 Fawcett J. James and Torremans Paul, p. 163
are to be considered as infringement, it does not prevent the selection of a sole action to allocate jurisdiction.\textsuperscript{135} Hence, as already mentioned, the place where the harmful event occurred or may occur is an autonomous concept of EU law. Nevertheless, to allocate jurisdiction under article 7(2) in the Brussels Regulation in a case regarding infringement of registered intellectual property rights and furthermore, the limitation of that jurisdiction, one has to begin with drawing a distinction between online and offline infringements.\textsuperscript{136} To begin with one has to establish that there exist an opportunity for the plaintiff in an infringement case to \textit{forum shop} under the provisions of article 7(2).\textsuperscript{137}

An important case from the CJEU concerning online infringement of a trademark is \textit{Wintersteiger}.\textsuperscript{138} The case is about Wintersteiger which is an undertaking established in Austria and the proprietor of the Austrian trademark called Wintersteiger. It sells and manufactures ski and snowboard servicing tools, replacement parts and accessories. Wintersteiger brought an action of injunction in the Austrian courts against Products 4U which is established in Germany. Products 4U also sell ski and snowboard servicing products. Products 4U had reserved the keyword ‘Wintersteiger’ in the advertising system for Google. The reservation gave the effect that an internet user that entered ‘Wintersteiger’ into the search engine on ‘google.de’ got on the right-hand side of the webpage an advertisement connected to Products 4U’s website. Wintersteiger relied on article 7(2) when suing Products 4U and argued that ‘google.de’ can be accessed in Austria.\textsuperscript{139} Furthermore, it argued that the referencing system was in German which both Austrian and German consumers can understand. Products 4U on the other hand contested the international jurisdiction in Austrian courts. It argued that ‘google.de’ is intended only for German users. Therefore, the advertisement’s target group is German customers. The Austrian Supreme Court, Oberster Gerichtshof, decided to temporarily stop the proceeding and to refer the question to the CJEU of, in short, correct jurisdiction under the provisions in article 7(2) in the Brussels regulation regarding the place where the harmful event occurred in situation of online infringements of trademarks.

\textsuperscript{135} Sender Pertegás Marta, p. 115.  
\textsuperscript{136} Larsen Torsten Bjørn, p. 113.  
\textsuperscript{137} Fawcett J. James and Torremans Paul, p. 222.  
\textsuperscript{138} Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH. There is no preliminary ruling concerning the same question and patent litigations.  
\textsuperscript{139} At that time it was article 5(3) in the Brussels Regulation No 44/2001.
The CJEU argued that in essence the national court asked what criteria are to be used when determining jurisdiction under article 7(2) to hear an action regarding an alleged infringement of a trademark registered in a Member State through the use of a keyword identical to that trademark on the website under a top-level domain different from the domain in the Member State where the trademark is registered. To answer the question, the CJEU referred to earlier case law regarding the Brussels Regulation implying that rules regarding special jurisdiction are derogations from the principle of the defendant’s domicile. Consequently there must be a close connecting factor between the dispute and the courts where the harmful event occurred.\textsuperscript{140} Furthermore, the court confirmed that the place where the harmful event occurred covers both the place of effect and the place of action.\textsuperscript{141} The CJEU also made an important comparison to earlier case law regarding online infringement of personality rights.\textsuperscript{142} The court underlined that personality rights are not subject to territorial limitations as intellectual property rights are.\textsuperscript{143}

With reference to the principle of territoriality and article 7(2) that cover the place where the damage occurred and where the event giving rise to it occurred, the court laid down some additional important rules. The first rule is that the place of effect in cases with registered intellectual property rights is the place of registration.\textsuperscript{144} Furthermore, even though a trademark is territorially limited there is still the possibility of suing alleged infringers in a court in a Member State where the trademark is not registered. The place of action can constitute an important connecting factor in the dispute. It can also be helpful in providing evidence and in the conduct of the proceeding. The CJEU also laid down that it is the activation of the technical process for the online advertisement by the defendant which should be considered to be the event giving rise to an alleged infringement and not the display of the advertisement. However, as the location of the server was uncertain in the case, the court considered the place of action in the current situation should be the place where the decision of the activation took place, hence, the establishment of the advertiser.\textsuperscript{145} Furthermore, one

\textsuperscript{140} Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH, paragraph 18 compare to recital 16 in the Brussels regulation.
\textsuperscript{141} Ibid., paragraph 19, the CJEU referred to case C-509/09 and C-161/10 eDate Advertising and Others.
\textsuperscript{142} Case C-509/09 and C-161/10 eDate Advertising and Others (The CJEU referred to article 5(3) in the Brussels Regulation No 44/2001).
\textsuperscript{143} Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH, paragraph 25.
\textsuperscript{144} Ibid., paragraph 29.
\textsuperscript{145} Ibid., see paragraph 32, 34 and 38.
could argue that the location of the server is not a place that is foreseeable for neither the plaintiff nor the defender.146

The CJEU has not defined what is meant with establishment under the provisions of article 7(2) in the Brussels Regulation. However, the court has in other case law stated that an establishment is the “actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period”.147 This shall also be compared to the definition of a legal person’s domicile in article 63 of the Brussels regulation where place of establishment overlaps with the principal place of business. Furthermore, this shall also be compared to the establishment rule in article 7(5). As an effect one could argue that the need for suing a legal person at its establishment under the provision in the forum delicti rule can be considered limited.

In conclusion, the right holder of a registered intellectual property right can sue an alleged infringer according to the Wintersteiger judgment and article 7(2) in the Brussels Regulation where the right is registered or where the defendant is established. Hence, the decision regarding jurisdiction in accordance with article 7(2) is not dependent on the intellectual property being registered in a certain state because other states may also constitute a connecting factor to the dispute. Therefore, the principle of territoriality does not limit a Member State’s jurisdiction in the light of article 7(2) in the Brussels Regulation.148 In other words, the territorial link between the state that granted the intellectual property right and the court that has the jurisdiction over the dispute is not crucial.149

After deciding the correct jurisdiction the courts have to sort out the extent of their jurisdiction, hence if the jurisdiction in question is subject to unlimited full jurisdiction or limited forum jurisdiction. As previously mentioned the CJEU laid down in Shevill that the courts situated in the place of action is subject to unlimited full jurisdiction in contrast to the courts that are situated in the place of effect which is only subject to limited forum jurisdiction. The extent of the jurisdiction in place of effect is called the mosaic rule. The rule exists to stop the plaintiff from choosing the jurisdiction where she is domiciled and thereby

146 Lundstedt Lydia, p. 163.
147 Case C-221/89, The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others, paragraph 20.
148 Lundstedt Lydia, p. 162.
limit the risk of *forum shopping*. Conversely, the rule has been criticized for being too burdensome for the plaintiff in cases regarding personality rights.\(^{150}\)

However, the regular rules regarding the extent of jurisdiction do not fully apply to cases regarding registered intellectual property. Furthermore, the CJEU did not explicitly discuss the extent of the jurisdiction in the place of action or effect in *Wintersteiger*. The question is therefore if one can make an analogy with *Shevill* regarding the extent of jurisdictions in cases of registered intellectual property rights.\(^{151}\)

There are several factors that support both unlimited full jurisdiction and limited forum jurisdiction regarding the place where the alleged infringer is established. Full unlimited jurisdiction is in line with some earlier case law from CJEU.\(^ {152}\) Furthermore, it would fragmentise the enforcement of registered intellectual property rights and devaluate the *forum delicti rule* if the jurisdiction was only subject to limited forum jurisdiction. Unlimited full jurisdiction leads to effective enforcement and is preferable in perspective of procedural economy.\(^ {153}\) However, in the perspective of that the *forum delicti rule* is an exception to the general rule in article 4 and therefore should be interpreted narrowly, unlimited full jurisdiction might be inconsistent with principles within intellectual property law and private international law. The CJEU stated in *Kalfelis* that article 7(2), inter alia, “constitute[s] degeneration from the principle that jurisdiction is vested in the courts of a State where the defendant is domiciled and as such must be interpreted restrictively”.\(^ {154}\) Furthermore, limited forum jurisdiction rule is consistent with the principle of territoriality. Additionally, there is no possibility to consolidate claims under the provision in article 7(2).\(^ {155}\) One may further claim that it is unlikely that article 7(2) will have the same wide application as article 4 and make it possible to have a more effective enforcement in infringement cases. Balancing the factors such as the application of the general rule in article 4, the fact that article 7(2) is an exception to article 4 and the principle of territoriality one must probably reach the conclusion

\(^{150}\) Larsen Torsten Bjørn\(^1\), p. 216-217.

\(^{151}\) Ibid., 217.

\(^{152}\) See Case C-68/93 Shevill v Presses All, cases C-509/09 and C-161/10 eDate Advertising and Others and Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmBH in paragraph 30.

\(^{153}\) Sender Pertegás Marta, p. 126.

\(^{154}\) Case C-189/87, Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others, paragraph 19. The court refers to article 5 in the Brussels Convention of 27 September 1968. See further Case C-364/93, Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company, paragraph 14; Case C-168/02, Rudolf Kronhofer v Marianne Maier and Others, paragraph 14 and case C-189/08, Zuid-Chemie BV v Philippo’s Mineralenfabriek NV/SA, paragraph 22.

\(^{155}\) Fawcett J. James and Torremans Paul, p. 165.
that the courts where the alleged infringer is established are subject to limited forum 
jurisdiction.\textsuperscript{156}

The factors that speak for the place of registration being subject to unlimited full jurisdiction 
are that the term “all damage” has been used in \textit{Wintersteiger}.\textsuperscript{157} Furthermore, it would make 
article 7(2) a real alternative to the general rule in article 4. Additionally it would further 
create an effective enforcement of intellectual property rights and improve the procedural 
economy.\textsuperscript{158} It would also create a single area of justice in contrast to the \textit{mosaic rule}.\textsuperscript{159}

However, when it comes to registered intellectual property rights, the courts in the Member 
States where the right is registered may not be the best courts to rule on damages elsewhere. 
This is because intellectual property rights are territorially limited to the state that protects 
it.\textsuperscript{160} Limited forum jurisdiction is also coherent with the rules of choice of law in article 8(1) 
in Rome II regulation, stating that applicable law is the law in the protecting country.\textsuperscript{161}

Therefore, as regarding the place where the alleged infringer is established one must reach the 
conclusion that there is only limited forum jurisdiction. This is because of, as previously 
mentioned, one shall strictly interpret special jurisdiction rules in comparison to the general 
rule in article 4. A further argument is that consolidation of claims is not possible under the 
provisions of article 7(2).\textsuperscript{162} Ultimately, under case law regarding regular civil law 
proceedings the place of effect is subject to limited forum jurisdiction.\textsuperscript{163}

There should not be a problem to make an analogy between what the CJEU has stated 
regarding online infringement of trademarks and cases regarding online infringement of 
patents. Typical online infringement of patents is similar to trademark infringements as they 
often consist of advertising and marketing patented products online.\textsuperscript{164} In summary, the 
previous examination of the rules regarding jurisdiction of online infringements implies that 
actions regarding online infringements can be brought in the court according to article 7(2) 
where the right is registered or where the alleged infringer is established. The jurisdiction in 
the relevant court is subject to limited forum jurisdiction.

\textsuperscript{156}Larsen Torsten Bjørn\textsuperscript{1}, p. 226.
\textsuperscript{157} Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH, paragraph 28.
\textsuperscript{158} Sender Pertegás Marta, p. 126-127.
\textsuperscript{159} See also recital 26 in Rome II regulation.
\textsuperscript{160} Case C-68/93 Shevill v Presse Alliance.
\textsuperscript{161} Lundstedt Lydia, p. 196.
\textsuperscript{162} See for example 3 § in the Swedish Patent Act.
As regarding offline infringement of patents there is not yet any relevant case law from the CJEU on the subject of interpretation of article 7(2) and the extent of the jurisdiction conferred under it. However, it is considered self-evident that suits can be brought at the place of action.\textsuperscript{165} Some claim that there is normally no difficulty in deciding where the act of offline infringement occurred. A typical act of infringement of a patent is to produce the patented product. For instance, if a German company produces a patented product in Sweden, Swedish courts will have the jurisdiction over the infringement according to article 7(2). In a case where a Swedish company offered a product patented by another company in Sweden, to a Finnish company and delivered the product via England to Finland, the Swedish Court of Appeal found that the offer constituted an infringement in Sweden.\textsuperscript{166} Furthermore, another typical infringement of patent is disposal or offering to dispose of patented product. The disposal is naturally confined to one state, as a half disposal cannot occur in one state and the other half in another.\textsuperscript{167}

However, taking Wintersteiger into account, the place of action may be the place where the alleged infringer is established.\textsuperscript{168} This might create obstacles in cases regarding infringement of patents, as it is not always certain that the harmful act is located at the place where the alleged infringer has its establishment. For example an infringement of a process patent might be at the place of manufacture. Another argument against considers the place of action to be the place establishment is that an infringement might be preceded by a number of acts such as decision making, manufacturing, transporting and disposing in different Member States.\textsuperscript{169} Furthermore, an additional place where damage may occur is at the place where a defendant sells an infringing product which in turn creates a loss of sale for the patent holder.\textsuperscript{170} A further factor to take into account is the territorial nature of European patents. One can claim that only actions taken in states where the patent is valid are relevant when allocating jurisdiction.\textsuperscript{171} Hence, there must be a possibility for the right holder to sue the alleged infringer where the right is registered under the \textit{forum delicti rule}.

\textsuperscript{165} Larsen Torsten Bjørn\textsuperscript{3}, p. 114.
\textsuperscript{166} See T 1253-89, Court of Appeal, Svea Hovrätt’s Judgment of 12 December 1990.
\textsuperscript{167} Fawcett J. James and Torremans Paul, p. 159.
\textsuperscript{168} Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH.
\textsuperscript{169} Lundstedt Lydia, p. 165.
\textsuperscript{170} Fawcett J. James and Torremans Paul, p. 166.
\textsuperscript{171} Sender Pertegás Marta, p. 115.
Moreover, it could be suggested that the place of effect is where the patent holder is domiciled. This because an infringing product in a market can decrease the market share for the patent holder and hence create an economic damage for the patent holder where she is domiciled.\textsuperscript{172} However, as earlier mentioned, the CJEU has rejected that jurisdiction can be conferred to the place where the plaintiff is domiciled.\textsuperscript{173} The major flaw in conferring jurisdiction to the place of economic loss as the loss of market share or the loss of sale is that in some cases there will not be any economic loss for the patent holder. Some infringement claims will be brought prior to economic loss in order to prevent damage. Furthermore, many patent holders will suffer indirect loss of profit. Such indirect loss is often sustained where the patent holder has its seat.\textsuperscript{174} However, the CJEU has established that indirect damage can only be raised in the jurisdiction where the action has taken place.\textsuperscript{175}

Another alternative is therefore as already mentioned that one considers that the place of effect is where the patent is protected. Hence, the damage consists of the threatened effect in the patent holder’s monopoly position in the state where the patent is protected.\textsuperscript{176} This has also been suggested by both the CJEU in Wintersteiger and by the Swedish Supreme Court which held in NJA 2007 s. 287 that the direct damage caused by an infringement of a trademark is situated in the state where the trademark is protected.\textsuperscript{177} However, problems might arise if the patent is protected and infringed in several countries, as this solution does not create a possibility to consolidate claims. The Swedish Supreme Court came to the conclusion in NJA 2007 s. 287 that Swedish courts have jurisdiction in relation to the trademark that is registered in Sweden. However, the courts in Sweden do not, according to the Supreme Court, have jurisdiction over foreign registered intellectual property. Therefore, using article 7(2) in the Brussels Regulation creates a fragmentised litigation. Nevertheless, the plaintiff has the possibility to sue the alleged infringer where the infringer is domiciled according to article 4 which gives a chance to consolidate all infringement actions made by one infringer.\textsuperscript{178}

\textsuperscript{172} Sender Pertegás Marta, p. 119-120.
\textsuperscript{173} Case C-51/97, Réunion européenne SA and Others v Spliethoff’s Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002, paragraph 34.
\textsuperscript{174} Fawcett J. James and Torremans Paul, p. 166.
\textsuperscript{175} Case C-364/93, Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company.
\textsuperscript{176} Sender Pertegás Marta, p. 121 compare with case C-68/93 Shevill v Presse Alliance were the CJEU established that the court in the place of effect is subject to limited forum jurisdiction.
\textsuperscript{177} Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH and the Swedish Supreme Courts judgment in NJA 2007 p. 287.
\textsuperscript{178} Fawcett J. James and Torremans Paul, p. 165.
To summarize, the legal situation is uncertain regarding offline infringement of patents and the scope of article 7(2) in the Brussels Regulation. On the one hand, one can make an analogy to Shevill and Bier and argue that a patent holder can sue the alleged infringer where the action has taken place such as manufacturing of the patented good or place of effect where the patent is protected.\textsuperscript{179} On the other hand, one can make an analogy to Wintersteiger and argue that a patent holder can raise an action where the alleged infringer is established or at the place where the patent is protected.\textsuperscript{180} In conclusion one can claim that the rules concerning registered intellectual property rights, such as trademarks, should also regard other rights such as patents. Furthermore, the difference in the application of article 7(2) in the Brussels Regulation may be dependent on whether the infringement has occurred online or offline.

There will soon be a provision applying exclusively to infringement of a European patent or a Unitary patent. Article 33(1)(a) in the AUPC lays down that infringement action shall be brought before “the local division hosted by the Contracting Member State where the actual or threatened infringement has occurred or may occur or in the regional division which the Contracting Member State participates”. Hence, the plaintiff can, when suing within the UPC’s system, choose between suing the defendant where the infringement has occurred or where she has her residence or place of business. The major issue when interpreting the new infringement rule in the AUPC is to decide how to define the place where the infringement occurred. The question is also if earlier case law from the CJEU on article 7(2) Brussels Regulation will also apply to the interpretation of article 33(1)(a) AUPC.

One alternative is that jurisdiction can be conferred to the local division where the action as well as the effect occurred in accordance with the earlier judgment from the CJEU.\textsuperscript{181} This application is suitable for regular European patents, as they will generally not be protected in all contracting Member States to the AUPC. However, European patents with unitary effect will be protected in all contracting Member States. Hence, one can argue that the place of effect will be in the entire area, as the CJEU earlier established in Wintersteiger that the place

\textsuperscript{179} Case C-68/93 Shevill v Presse Alliance and case C-21/76, Handelskwekerij G.J. Bier BV v Mines de potasse d’Alsace SA.
\textsuperscript{180} Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH.
\textsuperscript{181} Case C-21/76, Handelskwekerij G.J. Bier BV v Mines de potasse d’Alsace SA.
of effect regarding trademark is the place where it is registered. Therefore, one has to discuss if the term ‘infringement has occurred or may occur’ is only to be interpreted as the place of the action of the defendant. Such interpretation would meet both proximity to the dispute and predictability for the defendant. However, it would also create a smaller opportunity to choose jurisdiction under article 33(1)(a) AUPC than under article 7(2) in the Brussels Regulation. Such a result is not coherent with the fifth recital in the AUPC stating that the contracting Member State “wishing to improve the enforcement of patents and the defence against unfounded claims and patents which should be revoked and to enhance legal certainty by setting up a UPC for litigation relating to the infringement and validity of patents”. Hence, one of the goals of the UPC is to create a more appealing system than the current Brussels Regulation. Therefore, article 33(1)(a) AUPC cannot be interpreted more narrowly than article 7(2) in the Brussels Regulation. A further argument against jurisdiction only be conferred to the place of action is that the place of action often coincides with the defendant’s residence. An effect would therefore be that article 33(1)(b) would rule out article 33(1)(a) in the AUPC. It is therefore not likely that jurisdiction only can be conferred to the place where the defendant acted. It is more likely that jurisdiction can be conferred to both place of action and effect under the provision in article 33(1)(a). However, one can consider it unlikely that jurisdiction in a specific case can be conferred on all contracting Member States.

If infringement action can be brought at both the place of action and effect under article 33(1)(a) one has to discuss if a connecting factor is needed between the Member State and the dispute when conferring jurisdiction. Larsen argues that one has to separate offline and online infringements when deciding if a connecting factor is needed. Moreover, Larsen argues that connecting factors have to be required when conferring jurisdiction to place of action in an offline infringement case but not in a case on online infringement. Furthermore, in the Wintersteiger case, which concerned online infringement, the CJEU did not require connecting factors when conferring jurisdiction to the place where the trademark was registered.

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182 Article 3(2) in the Patent Regulation, Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH and Larsen Torsten Bjørn 1, p. 261.
183 Larsen Torsten Bjørn 1 p. 262.
184 Ibid., p. 264.
185 Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH, paragraph 29.
To limit the number of contracting Member States that will have jurisdiction if the plaintiff could sue at the place of effect, it is preferable to require connecting factors. However, this may be inconsistent with Wintersteiger and the fifth recital in AUPC as it would give lesser possibilities than article 7(2) in the Brussels Regulation. However, requiring a connecting factor between the dispute and the Member State in a case regarding offline infringement might be consistent with article 7(2). Moreover, as the wording in article 33(1)(a) AUPC speaks of the place where the infringement occurred or may occur one could argue that for local jurisdiction to be conferred to the place of effect it must be required that the place of effect is connected to the case more than that the patent is protected there, especially since a Unitary patent will have effect in the entire area.\(^{186}\) In conclusion one could argue that the legal situation is uncertain however, as the provision establishes that the claim has to be brought at the place of infringement one can claim that the place where jurisdiction is conferred has to have a more connecting factor to the infringement then that the patent is protected there. However, the connecting factor may be that damage has arisen there.

Lastly, one has to investigate whether article 33(1)(a) AUPC is subject to limited forum or unlimited full jurisdiction. As article 34 AUPC, which applies to all local jurisdiction rules in the AUPC, explicitly establishes that the territorial scope of the court’s decisions is subject to the entire area of all contracting Member State one has to draw the conclusion that article 33(1)(a) is subject to unlimited full jurisdiction, despite the fact that it is in consistent with the Shevill case.\(^{187}\)

To conclude, article 33(1)(a) in the AUPC giving the plaintiff an opportunity to bring an action where the infringement occurred or may occur is similar to the forum delicti rule in article 7(2) in the Brussels Regulation. However, how to confer jurisdiction under the both provisions is uncertain. The complexity may give the result that European patent disputes become divided in several countries. One could argue that it would not be hard to confer jurisdiction under both provisions if the action and effect had taken place in the same state. It is further difficult to evaluate how article 33(1)(a) AUPC will differ from the current system. However, one advantage of article 33(1)(a) is that it will be subject to unlimited full jurisdiction in contrast to article 7(2) in the Brussels Regulation which in an infringement litigation is subject to limited forum jurisdiction. Furthermore, article 33(1)(a) AUPC is

\(^{186}\) See article 3(2) in the Patent Regulation.
\(^{187}\) Case C-68/93 Shevill v Presse Alliance.
specified to patent infringements which the Brussels Regulation is not. Hence, the coming interpretation of article 33(1)(a) might be more suitable for patent infringement actions than the CJEU’s interpretation of article 7(2) in the Brussels Regulation.

4.4.3 Joint infringers

Particular issues may arise sorting out the correct jurisdiction when the dispute consists of joint infringers which are acting in different states. There is a provision in article 8(1) in the Brussels Regulation that gives the plaintiff the opportunity to sue a defendant domiciled in a Member State in another Member State where another defendant in the same dispute is domiciled. Article 8(1) is a derogation from the general rule in article 4 in the Brussels Regulation. Therefore, it should be interpreted restrictively.\(^\text{188}\)

There is one important case on article 8(1) Brussels Regulation from the CJEU that concerns the standards for consolidation of claims and the possibility for joining cases regarding infringement of patents with several infringers.\(^\text{189}\) The case concerned the patent holders Primus and Goldenberg. The patent holders brought an action before a court in Netherlands against Roche Netherland BV, a company established in the Netherlands, and eight other companies in the Roche group established in different Member States. The plaintiffs argued that all those companies had infringed their patent by placing their patented product on the market where the defendants’ were established. The companies that were not established in the Netherlands contested the jurisdiction of the court. The Supreme Court, Hogue Raad, temporary stayed the proceedings and referred the question of whether article 8(1) in the Brussels Regulation can be interpreted as it could be applied to a number of companies established in various states in respect of infringement acts committed in several states where those companies, which belong to the same group, have acted in a similar manner in accordance with a policy conducted by one of them.\(^\text{190}\)

The CJEU had in earlier case law ruled that there must exist a connection that makes it advantageous to adjudicate several actions together. The purpose of ruling over several defendants must be to avoid the risk of irreconcilable judgement which otherwise separate

\(^{188}\) Sender Pertegás Marta, p. 90.
\(^{189}\) Case C-539/03 Roche Nederland BV and Others, v Frederick Primus and Milton Goldenberg.
\(^{190}\) At the time the court referred to article 6(1) in the Brussels regulation No 44/2001.
proceedings would lead to.\textsuperscript{191} The degree of connection that will make article 8(1) applicable depends on the context in each case and is decided by each court in the Member States.\textsuperscript{192} The CJEU laid down in \textit{Roche} that for judgments to be contradictive it is not enough that there is a divergence in the outcome of the disputes. The disputes must also arise in the context of the same situation of law and fact.\textsuperscript{193}

The CJEU laid down that in cases of infringement of European patents involving a number of defendants established in different states that have committed infringement acts in one or more of those states, the same facts do not exist, as both the defendants and their actions are different. Furthermore, according to the provisions in article 64(3) in the EPC national law in force in each state in which the patent has been validated in should deal with infringement actions. A conclusion can be drawn that in the situation of several alleged infringers domiciled and acting in different states the same legal situation does not exist. Hence, diverging decisions cannot be treated as contradictory as neither the same fact nor legal situation exists.\textsuperscript{194} Therefore, the CJEU ruled that article 8(1) in the Brussels Regulation does not apply in cases regarding infringement of European patents involving several companies established in a number of Member States even if those companies belong to the same group and act in a similar manner in accordance with a joint policy.

The CJEU also rejected the so-called \textit{Spider in the web rule} in the \textit{Roche} case. The rule implies that if companies are connected in the same group and act in an identical manner in a coordinated common policy constructed by one of them, they can be sued together in the state where the principal office has its seat.\textsuperscript{195} The CJEU stated that even in this situation article 8(1) does not apply. The facts may be the same but the legal situation is not the same because the defendants have each infringed different patents.

The CJEU’s rejection of the \textit{Spider in the web rule} has been criticised. One argument against the court’s rejection is that defendants would not be surprised by being sued in a court where the “spider” is domiciled. Furthermore, the CJEU acknowledged that from the perspective of procedural economy it is more favourable to consolidate claims in one Member State against

\textsuperscript{191} Case 189/87 Kalfeli.
\textsuperscript{192} Sender Pertegáš Marta, p. 90.
\textsuperscript{193} Case C-539/03 Roche Nederland BV and Others, v Frederick Primus and Milton Goldenberg, paragraph 26-27.
\textsuperscript{194} Ibid., paragraph 30-32.
\textsuperscript{195} Fawcett J. James and Torremans Paul, p. 183.
several defendants domiciled in different places. Conversely, the court stated that such possibility would risk the sound administration of justice.\textsuperscript{196} A conclusion may be that CJEU decided to prioritise the sound administration of justice before the procedural economy.

One can argue that the \textit{Roche} judgement is in line with the fact that European patents are a bundle of national patents and as a result they have to be enforced nationally. As the CJEU stated, the same legal situation does not exist when the infringers are domiciled and act in different Member States. Some claim that the \textit{Roche} judgment has reduced the possibility to \textit{forum shop}. If article 8(1) in the Brussels Regulation would apply the plaintiff in an infringement case with several infringers domiciled in different Member States, could choose one state where the plaintiff could sue all defendants. The \textit{Roche} decision establishes that this is not possible, as the plaintiff has to sue all the defendants in their respective states or in their state of action or effect.\textsuperscript{197} However, the \textit{Roche} decision has also been criticized as it creates an obstacle for patent holders to enforce their rights in a centralized and effective way.\textsuperscript{198} Furthermore, the CJEU stated in \textit{Roche} that every national patent in a bundle of European patents is independent of each other. Some claim that that is not in accordance with article 69 in the EPC which lays down that the extent of the protection of every national part in a European patent is the same.\textsuperscript{199} However, the \textit{Roche} judgment is coherent with the independence rule in article 4bis in the Paris Convention.

In article 33(1)(b) in the AUPC it is laid down that in the case of multiple defendants in an infringement case, the action against them shall be brought at a place where one of the defendants has its residence or principal place of business or in absence of principal place of business at their place of business. Moreover, it is stated, “An action may be brought against multiple defendants only where the defendants have a commercial relationship and where the action relates to the same alleged infringement”. In a case where the infringement has occurred in the territories of three or more regional divisions the case should be referred to the central division in accordance with article 33(2) AUPC. Furthermore, it is written in Rule 303 in the Rules of Procedure that “proceeding may be started against a plurality of defendants if the Court has competence in respect of all of them” and moreover, “the court may separate the proceedings into two or more separate proceedings against different defendants”.

\textsuperscript{196} Fawcett J. James and Torremans Paul, p. 613.
\textsuperscript{197} Ibid., p. 222.
\textsuperscript{198} Ibid., p. 181-183.
\textsuperscript{199} Ibid., p. 612.
The question is therefore whether the new provision in the AUPC will make it easier to sue several infringers having their residence spread over the EU in one contacting Member State in comparison to article 8(1) in the Brussels Regulation. Hence, will the spider in the web rule apply? A further question is if article 33(1)(b) will apply differently to European patents and European patents with unitary effect? The Roche judgment is based on the independence of the different designated patents in Europe which are connected to the same European patent. The CJEU stated “It follows that, where infringement proceedings are brought before a number of courts in different Contracting States in respect of a European patent granted in each of those States, against defendants domiciled in those States in respect of acts allegedly committed in their territory, any divergences between the decisions given by the courts concerned would not arise in the context of the same legal situation. Any diverging decisions could not, therefore, be treated as contradictory”. However, one could argue that the same legal situation may exist when the UPC comes to force as the UPC will have jurisdiction over European patents that have not opted out from the system and furthermore, actions constituting an infringement are established in article 25 and 26 in the AUPC. Moreover, one could argue that article 33(1)(b) in the AUPC constitutes the spider in the web rule as it is requesting that the defendants shall have a commercial relationship and their actions shall relate to the same infringement. Furthermore, in the light of recital 5 in the AUPC stating that AUPC will improve the enforcement of patents one might reach the conclusion that the AUPC will give a wider opportunity to sue joint infringers together than what article 8(1) in the Brussels Regulation has given.

To summarize, article 8(1) in the Brussels Regulation applies when the defendant companies belong to the same group, act in a similar manner according to a common policy conducted by one of them under the condition that the factual situation is the same and that they are infringing the same intellectual property right. This means that they have to infringe the same designate patent in one certain Member State. Hence, is not enough that they infringe the same European bundle of patents. The AUPC also gives an opportunity to sue several infringers together under the circumstances that the defendants have a commercial connection and their actions are contented to the same infringement. It is unclear but likely that AUPC

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200 Case C-539/03 Roche Nederland BV and Others, v Frederick Primus and Milton Goldenberg, paragraph 31-32.
201 Fawcett J. James and Torremans Paul, p. 185.
will strengthen the opportunity for joining cases. Either by reducing the requirements for joining cases or by considering that the same legal and factual situations exist when different defendant infringe the same bundle of European patents or a European patent with unitary effect.

4.4.4 Concluding Comments Regarding Jurisdiction Rules in Infringement Litigations

The jurisdiction rules in the Brussels Regulation give the plaintiff in an infringement case several different alternatives. The plaintiff can both sue the defendant where she is domiciled and where she has her establishment. Furthermore, there is an opportunity to sue an alleged infringer where the alleged infringement action occurred or where the damage arose according to the *forum delicti rule*. The local jurisdiction rules in the AUPC give the plaintiff almost the same opportunity. The plaintiff has under the provisions in AUPC the possibility to choose to sue the defendant at its residence, principal place of business or in lack of such place at the place of business. Furthermore, the plaintiff may also sue the defendant at the place where the infringement occurred or may occur according to the AUPC.

The provisions of the *forum delicti rule* in article 7(2) Brussels Regulation is complex. Firstly, one has to decide where the action or damage occurred. Secondly, one has to sort out the extent of the jurisdiction where the action is brought. The case law regarding the *forum delicti rule* and infringements of patents is scarce. As a result of this one has to make an analogy to the CJEU’s case law regarding infringement of trademarks. The existing case law regarding trademarks and the *forum delicti rule* concerns online infringement of trademarks. Therefore, one has to discuss if it would make any difference if the infringement occurred offline. Hence, the legal situation regarding infringement of patents and the scope of the *forum delicti rule* is uncertain. Balancing the case law and legal scholars’ written work in the area may give the conclusion that plaintiffs in a dispute on online infringement can sue the alleged infringer where it is established or where the patent is protected in accordance with the *Wintersteiger* case. Regarding offline infringement one could argue that the place of action is the place where the infringer manufactured, market or disposed the infringing product and the place of effect is the place of protection. The interpretation of the provision regarding the possibility to sue where the infringement occurred according article 33(1)(a) AUPC may also be complex. First one has to sort out whether the provision both applies to the place of action and effect. Further, one has to establish what is to be considered the place of action and effect. The earlier case law from the CJEU on the Brussels Regulation may be guiding. However, it is
likely that the UPC’s application of AUPC will aspire to ease and make the enforcement of European Patents more effective than what the Brussels Regulation has done.

Even though the rules regarding infringement in the Brussels Regulation give the plaintiff several options when choosing jurisdiction it gives the plaintiff a limited possibility to sue several defendants that are domiciled in different Member States in one of those Member States. The disputes between the plaintiff and the different defendants must arise from the same fact and legal situation. If the defendants are domiciled in different states but have acted together in the same way and in the same state there might be a possibility to sue them in that state.\(^{202}\) However, if they did not act in the same state but in the same way, they cannot be sued together in any of those states as they actually have been infringing different patents. The AUPC may create further possibilities to sue joint infringers, however the requirements for the rule to apply are uncertain.

To conclude, when deciding the correct jurisdiction for an infringement litigation several questions arise. One has to locate different important places and moreover sort out if these places have full unlimited jurisdiction or only limited forum jurisdiction. When answering these questions regarding the provisions in the Brussels Regulation one should always keep the principle of territoriality in mind. The territorial limitation gives the result that European patent can only be enforced nationally according to the Brussels Regulation. Furthermore, one could claim, that the principle of territoriality is the reason why the interpretation of \textit{forum delicti rule} in the Brussels Regulation becomes complex and why the possibility of consolidating claims is scarce. With the Unitary Patent Package the territorial limit for patents within the EU will decrease and in turn further possibilities to enforce European patents across borders may be created.

\section*{4.5 Declaration Claims}

The patent holder or license holder can, if national law permits, bring an action of declaration regarding whether the patent is protected against another product. Furthermore, others can bring an action of declaration regarding the question if a patent is an obstacle to producing a certain product.\(^{203}\) The general rule in article 4 in the Brussels Regulation applies in these

\begin{footnotesize}
\begin{enumerate}
\item[202] Compare with case C-616/10 Solvay SA v Honeywell Fluotine Products Europe BV and others, paragraph 30 and Fawcett J. James and Torremans Paul, p. 185-186.
\end{enumerate}
\end{footnotesize}
situations. It does not necessarily follows from the establishment rule in article 7(5) that it covers declaration claims. However, a systematic interpretation of the rule can give the conclusion that article 7(5) also covers declaration claims.\textsuperscript{204}

The CJEU laid down in the case \textit{Folien Fischer} that article 7(2) in the Brussels regulation also covers declaration claims.\textsuperscript{205} The case was about a declaration claim regarding a non-violation of competition law. However, the CJEU expressed that the judgement was deemed to “seeking to establish the absence of liability in tort” which gives the conclusion that the case also is relevant in cases regarding registered intellectual property.\textsuperscript{206} The CJEU laid down that a court that would have the jurisdiction in an infringement case between the relevant parties should also have the jurisdiction in a case regarding non-infringement.\textsuperscript{207} This is because the relevant national court has a close link to the dispute which in turn is helpful for on conducting the proceeding. The fact that the roles of the plaintiff and the defendant are reversed in a negative declaratory action in comparison to an infringement action does not affect the jurisdiction. This means, in practice, that the plaintiff in a negative declaratory case can raise an action in the court where she is domiciled.\textsuperscript{208}

Prior to the \textit{Folien Fischer} judgment the Swedish Supreme Court, Högsta Domstolen, ruled in \textit{Flootek} that article 5(3) in the Lugano Convention, which has the same provisions as article 7(2) in the Brussels regulation, is not applicable in a declaratory action. The Swedish Supreme Court referred to earlier case law form the CJEU and argued that as article 5(3) shall be interpreted narrowly and, furthermore, to avoid jurisdiction to be conferred to the plaintiff’s domicile article 5(3) should not apply to declaratory actions. If article 5(3) in the Lugano Convention would apply to declaratory actions it would enable a race to be the first party to sue in a dispute, which is not preferable. Furthermore, the Supreme Court argued that as the claim in the relevant case did not regard any damage, article 5(3) could not apply.\textsuperscript{209}

One can argue that the Swedish Supreme Court made some important remarks in the \textit{Flootek} judgment. However, even though declaratory claims are not based on damage the court that will be conferred jurisdiction according to article 7(2) in a declaratory case will have a close

\textsuperscript{204} Larsen Torsten Bjørn\textsuperscript{1}, p. 152.
\textsuperscript{205} Case C-133/11 Folien Fischer AG, Fofitec AG v Ritrama SpA.
\textsuperscript{206} Ibid., paragraph 56.
\textsuperscript{207} Ibid., paragraph 43-44.
\textsuperscript{208} Lundstedt Lydia, p. 166.
\textsuperscript{209} See NJA 2000 s. 273.
connection to the case which will ease proceedings. Furthermore, the CJEU has suggested that for the purposes of *lis pendens* the objective of declaratory claims shall be seen as the same as the objective of a damage claim.\(^{210}\) Moreover, the English High Court held, also prior to *Folien Fischer*, that it was common ground that article 7(2) applies to declaratory claims of non-infringement under the conditions that if an infringement would have occurred it would have occur in England.\(^{211}\)

Furthermore, declaratory claims are sometimes used to delay an infringement proceeding. In fear of an infringement action in a state, one launches a pre-emptive action for a negative declaration of non-infringement in another state which does not have jurisdiction, such as Italy where it is common that there is a significant delay between the start of the proceeding and an eventual trial. Because of the rules on *lis pendens* in the Brussels Regulation the court that should try the infringement case has to stop the proceeding and await the Italian court declaration that it has no jurisdiction. This may take many months or even years. This is called the *Italian torpedo*. In the *Gasser* case the CJEU had the opportunity to stop a situation of an *Italian torpedo* but chosen not to.\(^{212}\)

When bringing declaratory action of non-infringement within the UPC system, one shall sue the defendant at the central division in accordance with article 33(4) AUPC. The central division is more specialised than the local or regional divisions.\(^{213}\) However, if there is an on-going infringement case between the same parties relating to the same patent in a local or regional division the action of non-infringement shall be brought there. Such procedure limits the possibility for an alleged infringer to use *torpedoes* and delay a coming infringement case.\(^{214}\) Further it is favourable for procedural economy. Finally, as every other jurisdiction rule in the AUPC, article 33(4) is subject to unlimited forum jurisdiction.

To conclude, the Brussels Regulation lies down that action of declaration can be brought before the courts where the defendant is domiciled, has its establishment or in the place of action or effect in accordance with the definition laid down in *Wintersteiger*. However, in the

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\(^{210}\) Case C-144/86 Gubisch Maschinenfabrik KG v Palumbo compare with Fawcett J. James and Torremans Paul, p. 153.


\(^{212}\) See Case C-116/02 Erich Gasser GmbH v MISAT Srl see also Fawcett J. James and Torremans Paul, p. 209 and article 29 in the Brussels Regulation.

\(^{213}\) Larsen Torsten Bjørn', p. 273.

\(^{214}\) Ibid.
Folien Fischer case the CJEU did not address the extent of the jurisdiction based on article 7(2). It is therefore uncertain to what extent the jurisdiction in such cases would have. In conclusion, one could argue that the rules in the Brussels Regulation that apply in infringement cases also apply regarding declaration claims. The provisions in the AUPC regarding declaratory actions differ from the Brussels Regulation. The general rule is that actions should be brought before the central division. However, if there is an on-going infringement case between the parties there is a possibility to bring a declaratory action at the court dealing with the infringement action. The AUPC provision has three advantages; it limits the possibility for the alleged infringer to delay a potential infringement case, it is favourable for procedural economy and the central division is a specialised court. Conversely, the Brussels Regulation creates several different alternatives for the plaintiff which also can be considered an advantage.

4.6 Invalidity

In accordance with the Brussels Regulation the plaintiff in an invalidly case does not have the same amount of options as a plaintiff in an infringement case as article 24(4) in the Brussels Regulation deals exclusively with intellectual property invalidity litigations. This rule sets forth that litigations regarding the registration or validity of patents among other intellectual property rights fall within the exclusive jurisdiction of a court in the state where the right is registered. The provision is an exception to the general rules in the Brussels Regulation, as the general rules require that the defendant must be domiciled in a Member State. One could argue that the provision in article 24(4) is connected to the property, hence the patent, and not the defendant as other rules in the Brussels Regulation are.

The reason behind the exclusive jurisdiction rule regarding revocation of patents in the Brussels Regulation is that the validity of registered patents involves national sovereignty. This also applies to European patents as they are a bundle of national patents which are validated in the contracting states. This theme is also established in the independence principle in conventions on intellectual property rights. As a result a national court in one

215 Lundstedt Lydia and Manusbach Ulf, p. 220.
216 Fawcett J. James and Torremans Paul, p. 17.
218 See article 4bis in the Paris Convention and Fawcett J. James and Torremans Paul, p.16.
Member State cannot decide over the validity of a patent registered in another Member State. Hence, the courts are under the provisions of article 24(4) reduced to limited forum jurisdiction. For example an English court cannot invalidate a European patent validated in Italy. Today it is only the EPO that during the opposition period has the ability to revoke an entire European patent because of the EPO’s supremacy.

In a situation where a bundle of patents connected to the same invention get contested in a number of countries it would be preferable from a procedural economy perspective to consolidate the invalidity actions to one court. However, the Brussels Regulation rejects any such solutions. The parallel national patents are independent of each other. This means that what happens to one national patent does not affect another parallel patent in another Member State. A consequence of this is that a product protected by a bundle of patent rights in different Member States can be considered valid in some and invalid in others. Hence, under article 24(4) in the Brussels Regulation there is a risk of inconsistent judgments between different Member States. This also affects the legal certainty and it is inadequate from the point of view of the procedural economy.

In practice it is common that the issue of a patent’s validity is raised as a counterclaim to an infringement claim. The alleged patent infringer seeks to have the plaintiff in the infringement case denied the right on which she relies. The action brought against the alleged infringer would then be dismissed. The issue can also be invoked in cases regarding declaratory claims. In the wordings of article 24(4) it is laid down that the article concerns both independent invalidly actions and invalidity actions raised as a defence. The CJEU has in the important case Gat v LuK laid down the principles which are relevant in the situation of a counterclaim regarding invalidity of patent. The principles were later incorporated in the provisions about exclusive jurisdiction in the Brussels Regulation. The CJEU laid down that the provision in article 24(4) should apply in whatever forms of proceeding as long as the issue of a patent invalidity is raised. Hence, if there is an on going infringement case in a

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219 Larsen Torsten Bjørn, p. 278.
221 See article 99 EPC.
222 Fawcett J. James and Torremans Paul, p. 23 compare with article 4bis in the Paris Convention.
223 Ibid. (At the time the court referred to article 16(4) in the Brussels regulation No 44/2001).
224 Ibid.
225 Case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG, paragraph 17.
226 Ibid.
court and the defendant raises an invalidity action the infringement and invalidity claims cannot be brought together unless the infringement court also has jurisdiction over the invalidity claim according to article 24(4). The CJEU motivated the ruling by holding that exclusive jurisdiction aims to protect the sound administration of justice by ensuring that jurisdiction is exclusively conferred to the court with the closest link to the law and facts in the dispute.\textsuperscript{227} Moreover, the judgment is consistent with the principle of predictability which is laid down in the recital of the Brussels Regulation.\textsuperscript{228} In other words patent holders can predict that their patent might only be challenged in the states where it is protected.

The outcome of *Gat v LuK* leads to the question of how a court that deals with an infringement case should act if it lacks competence over the invalidity question. There are several solutions to this issue. One option is that a court declines jurisdiction in an infringement case due to the risk that invalidity later can be raised in the same dispute. A second option is to consider the court with infringement jurisdiction being competent until an invalidity action has been raised. The third option is that the court that has the infringement proceeding stays the proceedings until the court with competence over the invalidity case reaches a final judgement. The CJEU has not ruled in the question.\textsuperscript{229} However, in one particular case one of the questions referred to the court was regarding how the infringement court should act. Conversely, the CJEU did not answer the referred question as article 24(4) did not apply in the case.\textsuperscript{230} Additionally, a widely held opinion is that the third alternative is the preferred option.\textsuperscript{231} The European Commission has also taken this opinion.\textsuperscript{232} The plaintiff always has an option to sue the defendant in an infringement case in the state that also has jurisdiction in an invalidity case regarding the same patent provided that the state has jurisdiction in the infringement case.\textsuperscript{233}

\textsuperscript{227} Case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG, paragraph 21.

\textsuperscript{228} Recital 14 in the Brussels Regulation.

\textsuperscript{229} Larsen Torsten Bjørn\textsuperscript{1}, p. 281-282 however see further Opinion of L.A. Geelhoed, delivered on September 16, 2004 in case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG, paragraph 46.

\textsuperscript{230} Case C-616/10 Solvay v Honeywell.

\textsuperscript{231} Larsen Torsten Bjørn\textsuperscript{'}, p. 282 and Lundstedt Lydia, p. 237.


\textsuperscript{233} Fawcett J. James and Torremans Paul, p. 343.
The *Gat v. LuK* judgement creates a further obstacle to centralising a dispute to a particular Member State and on this basis the judgement has been criticized. Some argue that it is difficult to understand why the CJEU proclaim that the court of registration would have better access to the knowledge of whether the patent is valid or not; i.e. the knowledge of the state of the art at the relevant priority date. It could be considered as global knowledge even though the assessment of a patent validity is conducted differently in different states.\(^{234}\) The *Gat v LuK* case was not that complex as it did only concern two different national French patents. However, there is no suggestion in the judgment that the rules established in *Gat v Luk* would not apply to invalidity claims concerning European patents. An argument for this standpoint is that article 24(4) in the Brussels Regulation applies to European patents.\(^{235}\) Furthermore, although the European patent is a bundle of national patents which are governed by national law, no national authority has granted the patent. The contracting states to the EPC are only obliged to protect patents granted under the convention. Hence, the justification of the territorial link between a certain Member State and a European patent in regards of article 24(4) can be considered unconvincing.\(^{236}\) Furthermore, a typical infringement and invalidity dispute in Europe will consist of a European patent that is validated in several Member States. The effect of *Gat v Luk* will therefore be that such a dispute will require several actions; one for every Member State the patent is validated in. Moreover, the *Gat v Luk* decision enables the alleged infringer to use a torpedo and delay the infringement case as she has to sue in the Member State of registration and the infringement court has to stop the proceeding.\(^{237}\) The *Gat v LuK* as well as the *Roche* judgment has given different effects in different Member States.

The English High Court found in 2012 in the joint cases *Actavis v. Lilly* and *Medis v Lilly* that English courts had jurisdiction over a dispute on foreign designated patents despite the *Roche* and the *Gat v LuK* judgments.\(^{238}\) The plaintiff Actavis claimed a declaration of non-infringement on a patent held by Lilly USA and designated in the UK, France, Italy and Spain. Lilly USA challenged that an English court would have jurisdiction for the foreign designated patents. The dispute is even more complex as it was mainly between a company domiciled in a third state and a company domiciled within the EU, however, the company


\(^{235}\) Fawcett J. James and Torremans Paul, p. 353.

\(^{236}\) Ibid., p. 16.

\(^{237}\) Ibid., p. 348 and p. 350.

domiciled in a third state also has subsidiaries within the EU. To guarantee that the English court had jurisdiction Actavis started two claims. In the first claim the plaintiff was the parent company within the Actavis group. The first plaintiff wrote to Lilly’s lawyers stating that it was representing relevant national subsidiaries. In the second claim the plaintiff was a subsidiary within the Actavis group and apart from the identity of the plaintiff the second claim was identical to the first. As the defendant in both claims was Lilly USA, the English court had to apply national law. In the judgment it was held that Lilly USA had submitted to the jurisdiction and that it could not challenge the jurisdiction on the grounds that another court would be more suitable to rule in the case, so-called forum non conveniens. Mr Justice Arnold also found that Lilly USA had a place of business in the UK according to English jurisdiction rules as it had an European patent department situated in the territory and therefore jurisdiction could be conferred to the English court on that ground. Moreover, Mr Justice Arnold established that the validity of the foreign patents was not questioned and he referred to an earlier case where the Supreme Court had found that English courts had jurisdiction over an infringement claim of foreign copyright. He argued that there is no difference between copyrights and patents regarding the question of jurisdiction. Therefore, it was considered that English courts had jurisdiction over the foreign designated patents. Forum non conveniens did not apply because of several reasons. It was considered that there was no other court more suitable to rule over all different patents and further, no court had exclusive jurisdiction over all patents. Furthermore, Mr Justice Arnold argued that trying all patents in the same court would reduce the chance of inconsistent judgments. The argument is not coherent with the Roche judgment which established that foreign patents connected to the same bundle are to be treated separately as they are different rights. One can argue that Mr Justice Arnold took a necessary step towards a more unified cross-border litigation of patents. Conversely, one could also argue that each state must have the right and the ability to decide whether an alleged infringing product should be released in the domestic market or not.

In contrast, the same judge, Mr Justice Arnold, held in 2016 in Anan Kasei Co., Ltd & Rhodia Opérations S.A.S v. Molycorp Chemicals & Oxides (Europe) Ltd that English courts did not

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241 Ibid., paragraph 95-96.
242 Ibid., paragraph, 100.
243 Case C-539/03 Roche Nederland BV and Others, v Frederick Primus and Milton Goldenberg.
have jurisdiction over an infringement case concerning a German designated patent. Rhodia was the license holder of a European patent valid in the UK and in Germany. Rhodia claimed that Molycorp infringed the European patent both in the UK and Germany. At the same time Molycorp challenged the patents’ validity in a Germany court. The fact that German courts had exclusive jurisdiction in the validity dispute according to article 24(4) in the Brussels Regulation was common ground between the parties. The dispute between them was if the infringement claim was concerned with the validity of the German designated patent in accordance with article 24(4) in the Brussels Regulation or principally concerned with the validity case in accordance with article 27 in the Brussels Regulation. Article 27 implies that a court shall declare that it does not have jurisdiction if an action is brought to the court which is principally concerned with a case in a court in another Member State that has exclusive jurisdiction according to article 24 in the Brussels Regulation.

Mr Justice Arnold held that the infringement claim was at least in principal concerned with the revocation case in Germany. Reaching this conclusion he referred to earlier case law from the CJEU such as the Roche and GAT v LuK judgments. The later judgment from Mr Justice Arnold is difficult to reconcile with article 4 in the Brussels Regulation stating that a defendant shall be sued where she is domiciled. Molycorp was domiciled in the UK but Mr Justice Arnold declined jurisdiction over the infringement action against the company. This might be because he considered the territorial link between the patent and where it is protected more important. However, at the same time the decision did not follow the principle from the Wintersteiger case implying that the territorial link between an intellectual property right and where it has been granted is not crucial when deciding jurisdiction. Other factors than the territorial link can create important connections to the dispute. By comparing Anan Kasei Co., Ltd & Rhodia Opérations S.A.S v. Molycorp Chemicals & Oxides (Europe) Ltd with the judgment in Actavis v. Lilly and Medis v Lilly one may reach the conclusion that for an English court to have jurisdiction in an infringement case or a case on non-infringement according to English case law no other court within the EU shall have an on-going validity case, if so an English court may decline jurisdiction.

245 Mr Justice Arnold referred to Case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG and Case C-616/10 Solvay v Honeywell.
246 Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH.
The question is if the AUPC will open up for more consolidated validity and infringement disputes. To begin with a revocation claim that is not connected to an infringement case shall be brought before the central division in accordance with article 33(4). For example an independent action of a revocation of a pharmaceutical patent shall be brought at the central division in London. As earlier mentioned the advantage with hearing litigations at the central division is that the central division is specialised. Moreover, it can be considered preferable that the central division is the division that has the competence to decide whether a European patent with unitary effect should be invalidated in the entire area of all contracting states. Hence, the proceedings in accordance with article 33(4) regarding revocation will be similar to the earlier opposing procedure before the EPO. In contrast to the Brussels Regulation that does not give an opportunity to central oppose patents. Furthermore, the provisions in article 33(4) AUPC is subject to unlimited full jurisdiction, hence, the scope of the decision will cover all contracting Member State where the European patent has effect.

As regarding a counterclaim for revocation article 33(3) in the AUPC provides that the action shall be brought before the local or regional division that deals with the infringement case. The concerned division shall after having heard the parties decide whether to proceed with both action in the concerned division or refer the revocation case to the central division and at the same time stay the infringement proceeding. Furthermore, the concerned division can, if the parties agree, refer the entire case to the central division. Conversely, if a revocation case is on going at the central division the patent holder is free to initiate an infringement claim before the central division or a local and regional division which is competent for the infringement action. The relevant local division shall then proceed as stated in article 33(3) AUPC.

By comparing article 33(3) AUPC with article 24(4) in the Brussels Regulation and the Gat v LuK judgment one reaches the conclusion that the AUPC creates an opportunity for joint adjudications in contrast to article 24(4) which split adjudications. Consolidation of infringement and revocation disputes creates a less fragmentised cross-border patent litigations and it is further preferable for the procedural economy. However, article 33(3)

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247 See Annex II to the AUPC.
248 See article 3(2) in the Patent Regulation.
249 Compare with article 99 in the EPC.
250 See article 33(3)(a) and (b) AUPC.
251 See article 33(3)(c) AUPC.
252 See article 33(4) AUPC.
AUPC has been criticized as it tries to combine two different systems. On the one hand, the provision establishes the bifurcation system that is used in Germany, giving the result that infringement and revocation actions is separated into two different proceedings. On the other hand, article 33(3) as already mentioned, gives an opportunity to consolidate infringement and revocation cases. Furthermore, the critic regards that it is the local and regional division that shall with their own discretion choose if the claims shall be joined or nor. This might give the effect that different divisions will choose differently depending on the current tradition in that state which in turn will create inconsistency and uncertainty.\textsuperscript{253} In conclusion one could argue that article 33(3) is preferable as it gives more alternatives for both parties.

Furthermore, the entire Unitary Patent Package decreases the territorial limit for European patents within Europe giving the result that the UPC can revoke all validation of a European patent similar to the opposing procedure in the EPO. A further result might be that when conferring jurisdiction to a certain division in the UPC system the territorial link between the patent and its protection becomes less important. This in turn will decrease the fragmentation of cross-border revocation and infringement cases.

5. Conclusion

The current system for jurisdiction rules regarding patent litigations in the Brussels Regulation gives a plaintiff the possibility to sue the defendant in an infringement case where the defendant is domiciled, has its establishment or where the harmful event occurred. These rules also apply in cases concerning declaratory claims. However, several alleged patent infringers cannot be sued within the same jurisdiction unless they have acted in the same state. In revocation cases the plaintiff has to sue the right holder in the Member State where the patent is protected. It affects an infringement suit regarding the same patent in different Member States, which will have to be stayed. As a result the current system is fragmented and disputes regarding the same patent between more than two parties or disputes regarding infringement actions in different states have to be litigated in more than one state. Moreover, the Brussels Regulation gives an opportunity to delay infringement cases by suing the patent holder for revocation or declaratory of non-infringement in a state that is known for ineffective proceedings, giving the result that the competent court in the infringement case has to stop the proceeding and await the other state’s court. This can take years. Consequently, the EPC system generates high legal costs and uncertainty due to various jurisdictions and

\textsuperscript{253} Callens Peter and Granata Sam, p. 92.
diverging court outcomes. Furthermore, the judgement from the CJEU may be in favour of those who do not want national courts to decide over foreign rights or for those who have a lot of resources. It may not be beneficial in practice as it will lead to more litigations, which in turn leads to increased costs. Furthermore, the risk of diverging judgements increases as well with the current system.

The current system is perhaps beneficial in that as claims and disputes are consolidated to one court the possibilities are greater that the plaintiff will lose all claims together. From that perspective a plaintiff with considerable resources might want to retain the current system. With the current system she might succeed with some of the claims in some jurisdictions. Furthermore, a larger plaintiff with financial resources will have the possibility within the current system to exhaust a smaller defendant, as the smaller defendant may not have resources to litigate in several jurisdictions. From the perspective of procedural economy, fairness and the aim for consistent judgements the current system is not favourable.

The application of the *forum delicti rule* in the Brussels Regulation in a patent litigation is ambiguous. By studying case law and legal doctrine one can reach the conclusion that the place of effect is to be considered the place where the patent is protected. However, it is more uncertain where the place of action shall be considered to be. The place of action might be different in different infringement cases. As an example in a case where the infringement has occurred online by marketing a patented product, the place of action may be considered to be the place of the establishment of the alleged infringer. In disputes where the alleged infringer has manufactured, sold or disposed the patented product the place of action can be considered to be all those places. As a result the *forum delicti rule* creates opportunity for *forum shopping*. Moreover, one could claim that legal uncertainty affects the alleged infringer, as she cannot predict where she might be sued.

The provisions on local jurisdiction in AUPC are similar to the provisions in the Brussels Regulation. Similar to the defendant’s domicile rule in article 4 in the Brussels Regulation defendants can be sued at their residence or principal place of business according to article 33(1)(b) in the AUPC. Similar to the establishment rule in article 7(5) in the Brussels Regulation a defendant can be sued at its place of business according to article 33(1)(b)

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255 Kur Anette, p. 177.
Moreover, article 33(1)(a) in the AUPC gives an opportunity to sue the alleged infringer at the place where the infringement occurred or may occur which is similar to the forum delicti rule in the Brussels Regulation. Furthermore, both declaratory and revocation actions shall be brought at the central division for the UPC according to the AUPC. However, according to article 33(3) and 33(4) in the AUPC there is also a possibility to bring a counterclaim of revocation or declaration of non-infringement to the UPC division that has jurisdiction in an on-going infringement case.

Both provisions in Article 33(1)(a) in the AUPC and article 7(2) in the Brussels Regulation result in legal uncertainty. This is because one cannot easily determine where the place of infringement is situated. As the AUPC aspires to improve the enforcement of patents within the EU one can reach the conclusion that the new system will at least give the same possibilities as the old. This might give the result that the plaintiff can sue the infringer at both the place of action and effect. However, some connecting factors may be needed as a place of effect can be considered the place of protection, which in the case of a Unitary patent will be the entire area.

One of the main differences between the Brussels Regulation and the AUPC is that the UPC opens up for the possibility to consolidate cases to a further extent than the Brussels Regulation does. This applies regarding counterclaims for revocation and declaration of non-infringement but also when disputes concern the same patent but with more than two companies or several infringement actions in different Member States. The reason may be that the territorial limit for the new UPC system will be the territory of all participating Member States in contrast to the current system that limits European patent disputes to the territory of each designated patent. One could argue that the AUPC’s application of the territorial principle is more suitable for European patents as different designated patents are connected to the same application granted by the EPO. The contracting states have never granted the patents, they only protect them in accordance with the EPC. By viewing patents as granted for the territory of the EU it may create a further possibility to enforce patents across state borders. However, article 33(3) AUPC which regulates the jurisdiction for counterclaims regarding revocation has been criticised as it leaves it to the relevant local or regional division to decide if the infringement and the revocation case shall be consolidated or nor. This decision may be dependent on the legal tradition in the Member State, which will vary. This will in turn create legal uncertainty.
Independent revocation claims shall be brought at the central division of the UPC according to the AUPC and the court has unlimited full jurisdiction. There is a possibility to centrally oppose patents within the UPC. In the current system there is only the EPO that can centrally revoke a European patent for nine months post-grant. Revocation actions brought in national courts can only lead to the patent being revoked in the relevant state. From the view of procedural economy the UPC system is more favourable. However, from the patent holders point of view an opportunity to centrally revoke patents can be a disadvantage, as it may result in revocation in the entire area. Nevertheless, the central division is supposed to be more specialised than a local division and national courts, which may give the effect that legal and technical assessment of patents maintain a high standard which in turn will stop unfounded claims of revocation.

This thesis has aimed to answer the questions of what difficulties the current system of enforcement of European patents consists of, how the rules of local jurisdiction in the AUPC differ from the current system and lastly, which difficulties in the current system the AUPC will solve and which new problems that may arise with the new unitary system. In conclusion, the difficulties in the application of the Brussels Regulation to European patent litigations are a consequence of the territoriality principle of European patents and that the Brussels Regulation is not primarily designed for intellectual property disputes. This gives the effect that disputes across borders regarding the same patent cannot be litigated together due to European patents territorial limitation. The Unitary Patent Package will limit patent litigations to the territory of all participating Member States and moreover, the AUPC is specially created to improve patent litigations in the EU. It is therefore likely that the AUPC system will expand the opportunities to consolidate cases within the EU and create a more specialised court for trying patent disputes. However, consolidation of cases might not be favourable for a plaintiff with a high amount of resources as she might lose all claims in one judgment and furthermore loses the opportunity to exhaust a smaller defendant. Conversely, less fragmentised litigations are favourable for procedural economy and fairness. Moreover, different divisions application of the AUPC may be dependent on the state’s legal tradition, which might create inconsistency. Finally, the UPC system may also maintain some legal uncertainty in questions of jurisdiction. This can be considered an inevitable effect of the complexity of European cross-border patent disputes.
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